

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-74728; File No. SR-NASDAQ-2015-013)

April 15, 2015

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change to List and Trade Shares of the AlphaMark Actively Managed Small Cap ETF of ETF Series Solutions

I. Introduction

On February 17, 2015, The NASDAQ Stock Market LLC (the “Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> a proposed rule change to list and trade the shares (“Shares”) of the AlphaMark Actively Managed Small Cap ETF (the “Fund”) of ETF Series Solutions (the “Trust”) under Nasdaq Rule 5735. The proposed rule change was published for comment in the Federal Register on March 3, 2015.<sup>4</sup> The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to list and trade the Shares under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. The Fund will be an actively-managed exchange-traded fund (“ETF”). The Shares will be offered by the Trust.<sup>5</sup> The

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See Securities Exchange Act Release No. 74377 (February 25, 2015), 80 FR 11502 (“Notice”).

<sup>5</sup> The Trust has obtained an order from the Commission granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 31469 (February 24, 2015) (File No. 812-14402).

Trust is registered with the Commission as an investment company and has filed a registration statement on Form N-1A (“Registration Statement”) with the Commission.<sup>6</sup> The Fund is a series of the Trust.

AlphaMark Advisors, LLC will be the investment adviser (“Adviser”) to the Fund. Quasar Distributors, LLC (the “Distributor”) will be the principal underwriter and distributor of the Fund’s Shares. U.S. Bancorp Fund Services, LLC will act as the administrator, accounting agent, and transfer agent to the Fund. U.S. Bank National Association will act as the custodian to the Fund. The Exchange states that the Adviser is not a broker-dealer, and is not affiliated with any broker-dealer.<sup>7</sup> The Exchange has made the following representations and statements regarding the Fund.<sup>8</sup>

#### Principal Investments

The Fund’s primary investment objective is to seek long-term growth of capital. The Fund will pursue its objectives by investing primarily -- i.e., at least 80% of its assets under

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<sup>6</sup> See Post- Effective Amendment No. 43 to the Registration Statement on Form N-1A for the Trust, dated February 4, 2015 (File Nos. 333-179562 and 811-22668).

<sup>7</sup> See Notice, supra note 4, 80 FR at 11503. In addition, the Exchange states that, in the event (a) the Adviser becomes affiliated with a broker-dealer or registers as a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding such portfolio. According to the Exchange, the Adviser has no present intent or arrangement to become affiliated with any broker-dealer, and the Fund does not currently intend to use a sub-adviser. Id.

<sup>8</sup> Additional information regarding, among other things, the Fund, the Shares, the Fund’s investment objectives, the Fund’s strategies, the Fund’s holdings, risks, fees and expenses associated with the Shares, creations and redemptions of Shares, availability of information, trading rules and halts, and surveillance procedures can be found in the Notice and the Registration Statement. See Notice, supra note 4, and Registration Statement, supra note 6, respectively.

normal market conditions<sup>9</sup> -- in a portfolio of equity securities of small cap companies listed on a U.S. exchange.

The Fund defines “equity securities” to include common and preferred stock, American Depositary Receipts (“ADRs”), real estate investment trusts, and ETFs that under normal circumstances invest at least 80% of their net assets in equity securities of small cap companies (“Small Cap ETFs”). The Fund may invest up to 30% of its net assets in foreign equity securities of small cap companies traded on a U.S. exchange as ADRs, which may include companies in emerging markets. The Adviser expects that there will generally be between 25 and 40 stocks in the Fund’s portfolio.

The Fund is non-diversified, and therefore may invest a larger percentage of its assets in the securities of a single company than diversified funds. The Fund’s investment in various sectors may change significantly over time. The Fund’s investment in foreign equity securities will be in the form of ADRs and may include ADRs representing companies in emerging markets. With respect to its investments as part of its principal investment strategies in exchange-listed securities, the Fund will invest in such securities that trade in markets that are members of the Intermarket Surveillance Group (“ISG”).<sup>10</sup>

#### Other Investments

Although the Fund under normal circumstances will invest at least 80% of its assets in U.S. exchange-listed equity securities, the Fund may invest the remaining assets in: equity

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<sup>9</sup> The term “under normal market conditions” as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the securities markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

<sup>10</sup> See Notice, supra note 4, 80 FR at 11504.

securities traded over-the-counter;<sup>11</sup> money market instruments; securities of open-end mutual funds, money market mutual funds, and ETFs other than Small Cap ETFs; and non-exchange-listed ADRs.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,<sup>13</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,<sup>14</sup> which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers and investors of information with respect to quotations for and transactions in securities. Quotation and last-sale information for the Shares will be available via Nasdaq proprietary quote and trade

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<sup>11</sup> The Exchange states that not more than 10% of the net assets of the Fund, in the aggregate, will be invested in unlisted equity securities or equity securities not listed on an exchange that is a member of the ISG or a party to a comprehensive surveillance sharing agreement with the Exchange. See id. at 11504, n.12.

<sup>12</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

services and via the Consolidated Tape Association (“CTA”) plans for the Shares. Information regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers’ computer screens and other electronic services.

Information regarding the previous day’s closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information for any underlying exchange-traded products will also be available via the quote and trade services of their respective primary exchanges, as well as in accordance with the Unlisted Trading Privileges and the CTA plans, as applicable.

Intraday, executable price quotations on the securities and other assets held by the Fund (other than investment company securities that are not exchange-listed) will be available from major broker-dealer firms and through subscription or free services that can be accessed by authorized participants and other investors. Intraday price information for exchange-traded securities will be publicly available from the websites of the exchanges on which they trade, on public financial websites, and through subscription services. Intraday price information regarding over-the-counter equities (including certain investment company securities) and money market instruments, will be available through subscription services.

The Commission also believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. On each business day, before commencement of trading in Shares in the Regular Market Session<sup>15</sup> on the Exchange, the Fund will disclose on its website the identities and quantities of

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<sup>15</sup> See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m. Eastern time; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m. Eastern time; and (3) Post-Market Session from 4

the portfolio of securities and other assets (the “Disclosed Portfolio”) held by the Fund that will form the basis for the Fund’s calculation of NAV at the end of the business day. The website information will be publicly available at no charge. The NAV of the Fund’s Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4:00 p.m., Eastern Time. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.<sup>16</sup> The intraday indicative value, available on the NASDAQ OMX Information LLC proprietary index data service,<sup>17</sup> will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated and broadly displayed at least every 15 seconds during the Regular Market Session.<sup>18</sup> The website for the Fund will include the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.<sup>19</sup>

The Exchange represents that it may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Nasdaq will halt or pause trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (12). Trading also may be halted because of

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p.m. or 4:15 p.m. to 8 p.m. Eastern time).

<sup>16</sup> See Notice, supra note 4, 80 FR at 11507.

<sup>17</sup> Currently, the NASDAQ OMX Global Index Data Service (“GIDS”) is the NASDAQ OMX global index data feed service. The Exchange represents that GIDS offers real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs, and that GIDS provides investment professionals with the daily information needed to track or trade NASDAQ OMX indexes, listed ETFs, or third-party partner indexes and ETFs.

<sup>18</sup> See id. at 11506.

<sup>19</sup> See id. at 11509.

market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.<sup>20</sup> Trading in the Shares also will be subject to Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.<sup>21</sup> The Exchange states that the Adviser is not a broker-dealer, and is not affiliated with any broker-dealer. In addition, the Exchange states that in the event (a) the Adviser becomes affiliated with a broker-dealer or registers as a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding such portfolio.<sup>22</sup>

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and other exchange-traded securities with other markets and other entities that are ISG members, and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares and other exchange-traded securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and other

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<sup>20</sup> These may include: (1) the extent to which trading is not occurring in the securities and/or the financial instruments constituting the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. See id. at 11507.

<sup>21</sup> See id. at 11508.

<sup>22</sup> See supra note 7.

exchange-traded securities from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.<sup>23</sup>

The Commission notes that the Fund and the Shares must comply with the requirements of Nasdaq Rule 5735 to be listed and traded on the Exchange. Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities. In support of this proposal, the Exchange represented that:

- (1) The Shares will be subject to Nasdaq Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.
- (2) Trading in the Shares will be subject to the existing trading surveillances administered by both Nasdaq and FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws, and these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.
- (3) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.
- (4) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule

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<sup>23</sup> For a list of the current members of ISG, see [www.isgportal.org](http://www.isgportal.org).



2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) the dissemination of information regarding the Intraday Indicative Value through major index service providers such as NASDAQ OMX proprietary index data services or other major market proprietary index services; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (f) trading information; and (g) the dissemination of the Disclosed Portfolio through the Fund's website.

- (5) For initial and/or continued listing, the Fund must be in compliance with Rule 10A-3<sup>24</sup> under the Act.
- (6) The Fund may invest up to 30% of its net assets in foreign equity securities of small cap companies traded on a U.S. exchange as ADRs, which may include companies in emerging markets.
- (7) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities or other illiquid assets (calculated at the time of investment).
- (8) The Fund may not invest more than 25% of the value of its total assets in securities of issuers in any one industry or group of industries. This restriction does not apply to obligations issued or guaranteed by the U.S. government, its

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<sup>24</sup> See 17 CFR 240.10A-3.

agencies or instrumentalities, or securities of other registered investment companies.

- (9) Not more than 10% of the net assets of the Fund, in the aggregate, will be invested in unlisted equity securities or equity securities not listed on an exchange that is a member of the ISG or a party to a comprehensive surveillance sharing agreement with the Exchange.
- (10) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice. For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>25</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>25</sup> 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>26</sup> that the proposed rule change (SR-NASDAQ-2015-013) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

Brent J. Fields  
Secretary

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<sup>26</sup> 15 U.S.C. 78s(b)(2).

<sup>27</sup> 17 CFR 200.30-3(a)(12).