

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77688; File No. SR-NASDAQ-2016-030)

April 22, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of the Shares of the Elkhorn Dorsey Wright Commodity Rotation Portfolio of Elkhorn ETF Trust

I. Introduction

On February 26, 2016, The NASDAQ Stock Market LLC (“Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Elkhorn Dorsey Wright Commodity Rotation Portfolio (“Fund”). The proposed rule change was published for comment in the Federal Register on March 16, 2016.³ The Commission received one comment on the proposal.⁴ On April 15, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.⁵ This order grants approval of the proposed rule change, as modified by Amendment No. 1 thereto.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 77338 (March 10, 2016), 81 FR 14142 (“Notice”).

⁴ See Letter from Anonymous to the Commission, dated April 8, 2016 (“Anonymous Letter”), available at: <http://www.sec.gov/comments/sr-nasdaq-2016-030/nasdaq2016030-1.htm> (commenting in favor of the Exchange’s proposal).

⁵ In Amendment No. 1, which amended and replaced the proposed rule change in its entirety, the Exchange made the following clarifications: (1) the Fund may invest in commercial paper only if it has received the highest rating from at least one nationally recognized statistical rating organization or, if unrated, has been judged by the Adviser (as defined herein) and/or a Sub-Adviser (as defined herein) to be of comparable quality; (2) the Fund and the Subsidiary (as defined herein) will not invest in leveraged or inverse

II. Exchange's Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by the Elkhorn ETF Trust ("Trust"), which was established as a Massachusetts business trust on December 12, 2013.⁶ Elkhorn Investments, LLC will be the investment adviser ("Adviser") to the Fund. It is currently anticipated that day-to-day portfolio management for the

leveraged securities of investment companies; (3) the commodity-linked instruments in which the Fund invests will be listed and traded in the U.S. on registered exchanges; (4) with respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value of the Subsidiary's futures and options contracts) of the futures and options contracts held by the Subsidiary in the aggregate shall consist of instruments whose principal trading market (a) is not a member of the Intermarket Surveillance Group ("ISG") or (b) is a market with which the Exchange does not have a comprehensive surveillance sharing agreement, provided that, so long as the Exchange may obtain market surveillance information with respect to transactions occurring on the Commodity Exchange pursuant to the ISG memberships of the Chicago Mercantile Exchange, the Chicago Board of Trade and the New York Mercantile Exchange, futures and options contracts whose principal trading market is the Commodity Exchange shall not be subject to the prohibition in (a); (5) all statements and representations made in the proposal regarding the description of the portfolio, limitations on portfolio holdings or reference assets, or the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange; (6) the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements; (7) pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements; and (8) if the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. Amendment No. 1 also corrects a typographical error and makes other edits of a technical nature. Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment (Amendment No. 1 to the proposed rule change is available at: <http://www.sec.gov/comments/sr-nasdaq-2016-030/nasdaq2016030-2.pdf>).

⁶ The Exchange represents that the Trust is registered under the Investment Company Act of 1940 ("1940 Act"). See Registration Statement on Form N-1A for the Trust dated February 18, 2016 (File Nos. 333-201473 and 811-22926) ("Registration Statement"). The Exchange further states that the Trust has obtained certain exemptive relief under the 1940 Act (File No. 812-14262).

Fund will be provided by the Adviser. However, the Fund and the Adviser may contract with an investment sub-adviser (“Sub-Adviser”) to provide day-to-day portfolio management for the Fund. ALPS Distributors, Inc. (“Distributor”) will be the principal underwriter and distributor of the Fund’s Shares. The Fund will contract with unaffiliated third parties to provide administrative, custodial and transfer agency services to the Fund. The Exchange represents that the Adviser is not a broker-dealer, although it is affiliated with a broker-dealer, and it has implemented a firewall with respect to its broker-dealer affiliate regarding access to information concerning the composition of, and changes to, the portfolio.⁷

The Exchange has made the following representations and statements describing the Fund and the Fund’s investment strategies, including the Fund’s portfolio holdings and investment restrictions.⁸

A. Exchange’s Description of the Fund’s Investments

According to the Exchange, the Fund’s investment objective will be to provide total return which exceeds that of the DWA Commodity Rotation Index (“Benchmark”).⁹ The Fund

⁷ See Nasdaq Rule 5735(g). The Exchange further represents that, in the event (a) the Adviser or a Sub-Adviser becomes, or becomes newly 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 firewall with respect to its relevant personnel or broker-dealer affiliate, as applicable, regarding access to information concerning the composition of, and changes to, the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the portfolio.

⁸ The Commission notes that additional information regarding the Fund, the Trust, the Subsidiary (as defined herein), and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, calculation of net asset value (“NAV”), distributions, and taxes, among other things, can be found in the Notice and the Registration Statement, as applicable. See Notice and Registration Statement, supra notes 3 and 6, respectively.

⁹ The Benchmark is developed, maintained, and sponsored by Dorsey, Wright & Associates, LLC.

will seek excess return above the Benchmark solely through the active management of a short duration portfolio of highly liquid, high quality bonds.

The Fund will be an actively-managed exchange-traded fund (“ETF”) that seeks to achieve its investment objective by, under normal market conditions,¹⁰ investing in exchange-traded commodity futures contracts, exchange-cleared and non-exchange-cleared swaps,¹¹ exchange-traded options on futures contracts, and exchange-traded commodity-linked instruments¹² (collectively, “Commodities”) through a wholly-owned subsidiary controlled by the Fund and organized under the laws of the Cayman Islands (“Subsidiary”), thereby obtaining exposure to the commodities markets.

The Fund’s Commodities investments, in part, will be comprised of exchange-traded futures contracts on commodities that comprise the Benchmark. Although the Fund, through the

¹⁰ The term “under normal market conditions” includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets, futures 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.

¹¹ Investments in non-exchange-cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund’s net assets. When investing in non-exchange-cleared swaps, the Subsidiary (as defined herein) will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser and/or a Sub-Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser’s and/or a Sub-Adviser’s analysis will evaluate each approved counterparty using various methods of analysis, and may consider such factors as the counterparty’s liquidity, its reputation, the Adviser’s and/or Sub-Adviser’s past experience with the counterparty, its known disciplinary history, and its share of market participation.

¹² Exchange-traded commodity-linked instruments include: (1) ETFs that provide exposure to commodities, as would be listed under Nasdaq Rules 5705 and 5735; and (2) pooled investment vehicles that invest primarily in commodities and commodity-linked instruments, as would be listed under Nasdaq Rules 5710 and 5711(b), (d), (f), (g), (h), (i) and (j).

Subsidiary, will generally hold many of the futures contracts included in the Benchmark, the Fund and the Subsidiary will be actively managed and will not be obligated to invest in all the futures contracts on commodities that comprise the Benchmark. In addition, with respect to investments in exchange-traded futures contracts, the Fund and the Subsidiary will not be obligated to invest in the same amount or proportion as the Benchmark, or be obligated to track the performance of the Benchmark. In addition to exchange-traded futures contracts, the Fund's Commodities investments will also be comprised of exchange-cleared and non-exchange-cleared swaps on commodities, exchange-traded options on futures contracts that provide exposure to the investment returns of the commodities markets, and exchange-traded commodity-linked instruments, without investing directly in physical commodities. The Fund will invest in Commodities through investments in the Subsidiary and will not invest directly in physical commodities. The Fund's investment in the Subsidiary may not exceed 25% of the Fund's total assets.

In addition to Commodities, the Fund may invest its assets in (1) the following short-term debt instruments:¹³ fixed rate and floating rate U.S. government securities, including bills, notes and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by U.S. government agencies or instrumentalities;¹⁴ certificates of deposit issued against funds deposited in a bank or savings and loan association; bankers' acceptances,

¹³ Short-term debt instruments are issued by issuers having a long-term debt rating of at least A by Standard & Poor's Ratings Services, Moody's Investors Service, Inc., or Fitch Ratings, and have a maturity of one year or less.

¹⁴ Such securities will include securities that are issued or guaranteed by the U.S. Treasury, by various agencies of the U.S. government, or by various instrumentalities, which have been established or sponsored by the U.S. government. U.S. Treasury obligations are backed by the "full faith and credit" of the U.S. government. Securities issued or guaranteed by federal agencies and U.S. government-sponsored instrumentalities may or may not be backed by the full faith and credit of the U.S. government.

which are short-term credit instruments used to finance commercial transactions; repurchase agreements,¹⁵ which involve purchases of debt securities; bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; and commercial paper, which are short-term unsecured promissory notes (collectively, “Short-Term Debt Instruments”);¹⁶ (2) corporate debt obligations;¹⁷ (3) money market instruments;¹⁸ (4) investment companies (other than those that are commodity-linked instruments),¹⁹ including both exchange-traded and non-exchange-traded investment companies,

¹⁵ According to the Exchange, the Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser and/or a Sub-Adviser to present minimal credit risks in accordance with criteria approved by the Board of Trustees of the Trust (“Board”). The Adviser and/or a Sub-Adviser will review and monitor the creditworthiness of such institutions. The Adviser and/or a Sub-Adviser will monitor the value of the collateral at the time the transaction is entered into and at all times during the term of the repurchase agreement.

¹⁶ The Fund may invest in commercial paper only if it has received the highest rating from at least one nationally recognized statistical rating organization or, if unrated, has been judged by the Adviser and/or a Sub-Adviser to be of comparable quality.

¹⁷ At least 75% of corporate debt obligations will have a minimum principal amount outstanding of \$100 million or more.

¹⁸ For the Fund’s purposes, money market instruments will include only the following instruments: short-term, high-quality securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; non-convertible corporate debt securities with remaining maturities of not more than 397 days that satisfy ratings requirements under Rule 2a-7 under the 1940 Act; and money market mutual funds.

¹⁹ According to the Exchange, the Fund may invest in the securities of certain other investment companies in excess of the limits imposed under the 1940 Act pursuant to an exemptive order obtained by the Trust and the Adviser from the Commission. The exchange-traded investment companies in which the Fund may invest include Index Fund Shares (as described in Nasdaq Rule 5705), Portfolio Depository Receipts (as described in Nasdaq Rule 5705), and Managed Fund Shares (as described in Nasdaq Rule 5735). The non-exchange-traded investment companies in which the Fund may invest include all non-exchange-traded investment companies that are not money market instruments, as described above. While the Fund and the Subsidiary may invest in inverse commodity-linked instruments or securities of investment companies, the Fund and the Subsidiary will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) commodity-linked instruments or securities of investment companies.

that provide exposure to (a) commodities, (b) equity securities, and (c) fixed income securities, to the extent permitted under the 1940 Act and any applicable exemptive relief;²⁰ and (5) cash and other cash equivalents (collectively, “Other Investments”). The Fund will use the Other Investments as investments, to provide liquidity, and to collateralize the Subsidiary’s commodity exposure on a day-to-day basis.

The Fund’s investment in the Subsidiary will be designed to help the Fund achieve exposure to commodity returns in a manner consistent with the federal tax requirements applicable to the Fund and other regulated investment companies. The Fund intends to qualify for and to elect to be treated as a separate regulated investment company under Subchapter M of the Internal Revenue Code.

B. Exchange’s Description of the Subsidiary’s Investments

The Subsidiary will generally seek to make investments in Commodities, and its portfolio will be managed by the Adviser or a Sub-Adviser.²¹ The Adviser or a Sub-Adviser will use its discretion to determine the percentage of the Fund’s assets allocated to the Commodities held by the Subsidiary that will be invested in exchange-traded commodity futures contracts, exchange-cleared and non-exchange-cleared swaps, exchange-traded options on futures contracts, and

²⁰ The exchange-traded investment companies and commodity-linked instruments in which the Fund invests will be listed and traded in the U.S. on registered exchanges.

²¹ The Exchange states that the Subsidiary will not be registered under the 1940 Act and will not be directly subject to its investor protections, except as noted in the Registration Statement. However, the Subsidiary will be wholly-owned and controlled by the Fund. Therefore, the Fund’s ownership and control of the Subsidiary will prevent the Subsidiary from taking action contrary to the interests of the Fund or its shareholders. The Board will have oversight responsibility for the investment activities of the Fund, including its expected investment in the Subsidiary, and the Fund’s role as the sole shareholder of the Subsidiary. The Subsidiary will also enter into separate contracts for the provision of custody, transfer agency, and accounting agent services with the same or with affiliates of the same service providers that provide those services to the Fund.

exchange-traded commodity-linked instruments. The Subsidiary will have the same investment objective as the Fund, but unlike the Fund, it may invest without limitation in Commodities.

In addition to investing in Commodities, the Subsidiary, like the Fund, may invest in Other Investments (e.g., as investments or to serve as margin or collateral or otherwise support the Subsidiary's positions in Commodities). The Subsidiary's investments will provide the Fund with exposure to domestic and international markets.²²

C. Exchange's Description of Investment Restrictions

While the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will be consistent with the Fund's investment objective and will not be used to seek performance that is the multiple or inverse multiple (i.e., 2X and -3X) of an index. In addition, 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 will not apply to obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities, or securities of other investment companies.

²² See Notice, supra note 3, 81 FR at 14144-45 (listing the futures contracts in which the Subsidiary will initially consider investing and providing instrument's trading hours, exchange, and ticker symbol). The Exchange states that, as: (1) the U.S. and foreign exchanges list additional contracts; (2) currently listed contracts on those exchanges gain sufficient liquidity; or (3) other exchanges list sufficiently liquid contracts, the Adviser and/or any Sub-Adviser will include those contracts in the list of possible investments of the Subsidiary. The Exchange further represents that the Commodity Futures Trading Commission ("CFTC") has adopted substantial amendments to CFTC Rule 4.5 relating to the permissible exemptions and conditions for reliance on exemptions from registration as a commodity pool operator. As a result of the instruments that will be indirectly held by the Fund, the Adviser will register as a commodity pool operator and will also be a member of the National Futures Association ("NFA"). Any Sub-Adviser will register as a commodity pool operator or commodity trading adviser, as required by CFTC regulations. The Fund and the Subsidiary will be subject to regulation by the CFTC and NFA and additional disclosure, reporting, and recordkeeping rules imposed upon commodity pools.

The Subsidiary's shares will be offered only to the Fund and the Fund will not sell shares of the Subsidiary to other investors. The Fund and the Subsidiary will not invest in any non-U.S. equity securities (other than shares of the Subsidiary). The Fund will not purchase securities of open-end or closed-end investment companies except in compliance with the 1940 Act or any applicable exemptive relief. In addition, the Exchange represents that, with respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value of the Subsidiary's futures and options contracts) of the futures and options contracts held by the Subsidiary in the aggregate shall consist of instruments whose principal trading market (a) is not a member of ISG or (b) is a market with which the Exchange does not have a comprehensive surveillance sharing agreement; provided that, so long as the Exchange may obtain market surveillance information with respect to transactions occurring on the Commodity Exchange pursuant to the ISG memberships of the Chicago Mercantile Exchange, the Chicago Board of Trade, and the New York Mercantile Exchange, futures and options contracts whose principal trading market is the Commodity Exchange will not be subject to the limitation in (a) above. Investments in non-exchange-cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund's net assets.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including securities deemed illiquid by the Adviser.²³ The

²³ In reaching liquidity decisions, the Adviser may consider the following factors: the frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace trades (e.g., the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act²⁴ and the rules and regulations thereunder applicable to a national securities exchange.²⁵ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁶ 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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 also finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,²⁷ which sets forth the finding of Congress

²⁴ 15 U.S.C. 78f.

²⁵ 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).

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ 15 U.S.C. 78k-1(a)(1)(C)(iii).

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 services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans for the Shares. An estimated value, defined in Nasdaq Rule 5735(c)(3) as the “Intraday Indicative Value,” that reflects an estimated intraday value of the Fund’s portfolio (including the Subsidiary’s portfolio), will be disseminated. The Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service²⁸ will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session.²⁹ On each business day, before commencement of trading in Shares in the Regular Market Session on the Exchange, the Fund will disclose on its website the identities and quantities of the portfolio of securities, Commodities, and other assets (“Disclosed Portfolio,” as defined in Nasdaq Rule 5735(c)(2))

²⁸ Currently, the NASDAQ OMX Global Index Data Service (“GIDS”) is the NASDAQ OMX global index data feed service, offering real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs. According to the Exchange, GIDS provides investment professionals with the daily information needed to track or trade Nasdaq indexes, listed ETFs, or third-party partner indexes and ETFs.

²⁹ See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4:00 a.m. to 9:30 a.m., E.T.; (2) Regular Market Session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m., E.T.; and (3) Post-Market Session from 4:00 p.m. or 4:15 p.m. to 8:00 p.m., E.T.).

held by the Fund and the Subsidiary that will form the basis for the Fund's calculation of NAV at the end of the business day.³⁰

The Fund's NAV will be determined as of the close of trading (normally 4:00 p.m., E.T.) on each day the New York Stock Exchange is open for business.³¹ Additionally, information

³⁰ The Fund's disclosure of derivative positions in the Disclosed Portfolio will include information that market participants can use to value these positions intraday. On a daily basis, the Fund will disclose on the Fund's website the following information regarding each portfolio holding, as applicable to the type of holding: ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding such as the type of swap), the identity of the security, commodity or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and percentage weighting of the holding in the Fund's portfolio. The website and information will be publicly available at no charge.

³¹ In determining the value of the assets held by the Fund and the Subsidiary, the Fund's and the Subsidiary's investments will be generally valued using market valuations. A market valuation generally means a valuation (i) obtained from an exchange, a pricing service, or a major market maker (or dealer), (ii) based on a price quotation or other equivalent indication of value supplied by an exchange, a pricing service, or a major market maker (or dealer), or (iii) based on amortized cost. The Fund and the Subsidiary may use various pricing services or discontinue the use of any pricing service. A price obtained from a pricing service based on such pricing service's valuation matrix may be considered a market valuation. If available, Short-Term Debt Instruments (other than certificates of deposits, bank time deposits, and repurchase agreements), corporate debt obligations, other cash equivalents, and money market instruments (other than money market mutual funds) with maturities of more than 60 days will typically be priced based on valuations provided by independent, third-party pricing agents. Such values will generally reflect the last reported sales price if the instrument is actively traded. The third-party pricing agents may also value debt instruments at an evaluated bid price by employing methodologies that utilize actual market transactions, broker-supplied valuations, or other methodologies designed to identify the market value for such instruments. Short-Term Debt Instruments (other than certificates of deposit, bank time deposits, and repurchase agreements), corporate debt obligations, other cash equivalents, and money market instruments (other than money market mutual funds) with remaining maturities of 60 days or less may be valued on the basis of amortized cost, which approximates market value. If such prices are not available, the instrument will be valued based on values supplied by independent brokers or by fair value pricing. Certificates of deposit and bank time deposits will typically be valued at cost. Repurchase agreements will typically be valued as follows: Overnight repurchase agreements will be valued at

regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

The previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Intra-day executable price quotations on the securities and other assets held by the Fund and the Subsidiary will be available from major broker-dealer firms or on the exchange on which they are traded, as applicable. Intra-day price

amortized cost when it represents the best estimate of value. Term repurchase agreements (i.e., those whose maturity exceeds seven days) will be valued at the average of the bid quotations obtained daily from at least two recognized dealers. Futures contracts will be valued at the settlement price established each day by the board or exchange on which they are traded. Exchange-traded options will be valued at the closing price in the market where such contracts are principally traded. Swaps will be valued based on valuations provided by independent, third-party pricing agents. Securities of non-exchange-traded investment companies will be valued at the investment company's applicable NAV. Equity securities (including exchange-traded commodity-linked instruments and exchange-traded investment companies, other than exchange-traded commodity-linked instruments) listed on a securities exchange, market, or automated quotation system for which quotations are readily available (except for securities traded on the Exchange) will be valued at the last reported sale price on the primary exchange or market on which they are traded on the valuation date (or at approximately 4:00 p.m., E.T. if a security's primary exchange is normally open at that time). For a security that trades on multiple exchanges, the primary exchange will generally be considered to be the exchange on which the security generally has the highest volume of trading activity. If it is not possible to determine the last reported sale price on the relevant exchange or market on the valuation date, the value of the security will be taken to be the most recent mean between the bid and asked prices on such exchange or market on the valuation date. Absent both bid and asked prices on such exchange, the bid price may be used. For securities traded on the Exchange, the Exchange official closing price will be used. If such prices are not available, the security will be valued based on values supplied by independent brokers or by fair value pricing. The prices for foreign instruments will be reported in local currency and converted to U.S. dollars using currency exchange rates. Exchange rates will be provided daily by recognized independent pricing agents. In the event that current market valuations are not readily available or such valuations do not reflect current market values, the affected investments will be valued using fair value pricing pursuant to the pricing policy and procedures approved by the Board in accordance with the 1940 Act. The frequency with which the Fund's and the Subsidiary's investments are valued using fair value pricing will be primarily a function of the types of securities and other assets in which they invest pursuant to their respective investment objectives, strategies, and limitations.

information on the securities and other assets held by the Fund and the Subsidiary will also be available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by authorized participants and other investors.³² The Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further 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. The Commission notes that 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. Trading in the Shares also will be subject to Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (12). Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the securities, Commodities, and other assets constituting the Disclosed Portfolio of the Fund and the Subsidiary; or (2) whether other

³² More specifically, pricing information for exchange-traded commodity futures contracts, exchange-traded options on futures contracts, exchange-traded commodity-linked instruments, and exchange-traded investment companies (other than exchange-traded commodity-linked instruments) will be available on the exchanges on which they are traded and through subscription services. Pricing information for non-exchange-traded U.S. registered open-end investment companies will be available through the applicable fund's website or major market data vendors. Pricing information for swaps, corporate debt obligations, money market instruments (other than money market mutual funds), other cash equivalents, and Short-Term Debt Instruments will be available through subscription services and/or broker-dealer firms and/or pricing services. Additionally, the Trade Reporting and Compliance Engine ("TRACE") of the Financial Industry Regulatory Authority ("FINRA") will be a source of price information for certain fixed income securities held by the Fund.

unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. 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. The Exchange also represents that the Adviser is affiliated with a broker-dealer, and the Adviser has implemented a firewall with respect to its broker-dealer affiliate regarding access to information concerning the composition of, and changes to, the portfolio.³³ Moreover, the Exchange represents that FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and in the exchange-traded Commodities and exchange-traded investment companies not included within the definition of “Commodities” (such investment companies, together with exchange-traded Commodities, are referred to as “Exchange-Traded Instruments”) held by the Fund and the Subsidiary with other markets and other entities that are

³³ See supra note 7 and accompanying text. An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (“Advisers Act”). As a result, the Adviser and any Sub-Adviser and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

members of the ISG,³⁴ and FINRA may obtain trading information regarding trading in the Shares and in the Exchange-Traded Instruments held by the Fund and the Subsidiary from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and in the Exchange-Traded Instruments held by the Fund and the Subsidiary from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, FINRA, on behalf of the Exchange,³⁵ will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.

The Exchange 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 has made representations, including:

- (1) The Shares will be subject to Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.
- (3) The Exchange represents that its surveillance 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.

³⁴ For a list of the current members of ISG, see www.isgportal.org. The Exchange notes that not all components of the Disclosed Portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

³⁵ According to the Exchange, FINRA surveils trading on the Exchange pursuant to a regulatory services agreement, and the Exchange is responsible for FINRA's performance under this regulatory services agreement.

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.

- (4) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and in the Exchange-Traded Instruments held by the Fund and the Subsidiary with other markets and other entities that are members of the ISG and FINRA may obtain trading information regarding trading in the Shares and in the Exchange-Traded Instruments held by the Fund and the Subsidiary from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and in the Exchange-Traded Instruments held by the Fund and the Subsidiary from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.
- (5) With respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value of the Subsidiary's futures and options contracts) of the futures and options contracts held by the Subsidiary in the aggregate shall consist of instruments whose principal trading market (a) is not a member of ISG or (b) is a market with

which the Exchange does not have a comprehensive surveillance sharing agreement, provided, that so long as the Exchange may obtain market surveillance information with respect to transactions occurring on the Commodity Exchange pursuant to the ISG memberships of the Chicago Mercantile Exchange, the Chicago Board of Trade and the New York Mercantile Exchange, futures and options contracts whose principal trading market is the Commodity Exchange shall not be subject to the prohibition in (a) above.

- (6) 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 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how and by whom information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (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; and (f) trading information.

- (7) For initial and/or continued listing, the Fund and the Subsidiary must be in compliance with Rule 10A-3 under the Act.³⁶
- (8) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including securities deemed illiquid by the Adviser.
- (9) The Fund and the Subsidiary will not invest in any non-U.S. equity securities (other than shares of the Subsidiary).
- (10) The Fund will invest in Commodities through investments in the Subsidiary and will not invest directly in physical commodities. The Fund's investment in the Subsidiary may not exceed 25% of the Fund's total assets.
- (11) Investments in non-exchange-cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund's net assets.
- (12) The exchange-traded investment companies and commodity-linked instruments in which the Fund invests will be listed and traded in the U.S. on registered exchanges.
- (13) The Fund and the Subsidiary will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) commodity-linked instruments or securities of investment companies.
- (14) At least 75% of corporate debt obligations will have a minimum principal amount outstanding of \$100 million or more.
- (15) While the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will be consistent with the Fund's investment objective and

³⁶ See 17 CFR 240.10A-3.

will not be used to seek performance that is the multiple or inverse multiple (i.e., 2X and -3X) of an index.

- (16) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

The Exchange represents that all statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements.³⁷ If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.

This approval order is based on all of the Exchange's representations, including those set forth above, in the Notice, and in Amendment No. 1 to the proposed rule change. The

³⁷ The Commission notes that certain other proposals for the listing and trading of Managed Fund Shares include a representation that the exchange will “surveil” for compliance with the continued listing requirements. See, e.g., Securities Exchange Act Release No. 77499 (April 1, 2016), 81 FR 20428 (April 7, 2016) (Notice of Filing of Amendment No. 2, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the SPDR DoubleLine Short Duration Total Return Tactical ETF of the SSgA Active Trust), available at: <http://www.sec.gov/rules/sro/bats/2016/34-77499.pdf>. In the context of this representation, it is the Commission's view that “monitor” and “surveil” both mean ongoing oversight of the Fund's compliance with the continued listing requirements. Therefore, the Commission does not view “monitor” as a more or less stringent obligation than “surveil” with respect to the continued listing requirements.

Commission notes that a commenter has expressed support for the proposal.³⁸ The Commission further notes that the Fund and the Shares must comply with the requirements of Nasdaq Rule 5735, including those set forth in this proposed rule change, as modified by Amendment No. 1 thereto, to be listed and traded on the Exchange on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1 thereto, is consistent with Section 6(b)(5) of the Act³⁹ and the rules and regulations thereunder applicable to a national securities exchange.

³⁸ See Anonymous Letter, supra note 4.

³⁹ 15 U.S.C. 78f(b)(5).

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁴⁰ that the proposed rule change (SR-NASDAQ-2016-030), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴¹

Brent J. Fields
Secretary

⁴⁰ 15 U.S.C. 78s(b)(2).

⁴¹ 17 CFR 200.30-3(a)(12).