

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75031; File No. SR-NASDAQ-2015-023)

May 21, 2015

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade the Shares of the Tuttle Tactical Management Multi-Strategy Income ETF of ETFis Series Trust I

I. Introduction

On March 25, 2015, The NASDAQ Stock Market LLC (“Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)² and Rule 19b-4 thereunder,³ a proposed rule change to list and trade shares (“Shares”) of the Tuttle Tactical Management Multi-Strategy Income ETF (“Fund”), a series of ETFis Series Trust I (“Trust”) under NASDAQ Rule 5735. The proposed rule change was published for comment in the Federal Register on April 10, 2015.⁴ On May 20, 2015, the Exchange filed Amendment No. 1 to the proposed rule change.⁵ The Commission received no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 74653 (April 6, 2015), 80 FR 19371 (“Notice”).

⁵ In Amendment No. 1, the Exchange clarified that under normal market conditions, the Fund will invest only in those assets listed under the “Principal Investments” section of the Notice. Amendment No. 1 is not subject to notice and comment because it is a technical amendment that does not materially alter the substance of the proposed rule change or raise any novel regulatory issues.

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.⁶ The 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.⁷ The Fund is a series of the Trust.

Etfis Capital LLC will be the investment adviser (“Adviser”) to the Fund. Tuttle Tactical Management, LLC will be the investment sub-adviser (“Sub-Adviser”) to the Fund. ETF Distributors LLC will be the principal underwriter and distributor of the Fund’s Shares. The Bank of New York Mellon will act as the administrator, accounting agent, custodian, and transfer agent to the Fund. The Exchange states that the Adviser and Sub-Adviser are not registered as broker-dealers but that the Adviser is affiliated with a broker-dealer.⁸ In addition, the Exchange states that the Adviser has implemented a fire wall with respect to its broker-dealer affiliate 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 non-public information regarding the Fund’s portfolio.⁹ In the event (a) the Adviser or the Sub-Adviser 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 fire wall with respect to its relevant personnel and/or such

⁶ The Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 30607 (July 23, 2013).

⁷ See Registration Statement on Form N-1A for the Trust filed on January 30, 2015 (File Nos. 333-187668 and 811-22819).

⁸ See Notice, supra note 4, 80 FR at 19372.

⁹ See id.

broker-dealer affiliate, if 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 non-public information regarding such portfolio.¹⁰

The Exchange has made the following representations and statements regarding the Fund.¹¹

Investments for the Fund

The Fund's investment objective will be to seek current income while maintaining a secondary emphasis on long-term capital appreciation and low volatility. The Fund will seek to achieve its investment objective by utilizing a long-only, multi-strategy, tactically-managed exposure to the U.S. equity market. To obtain such exposure, the Sub-Adviser will invest, under normal market conditions,¹² the Fund's assets in ETFs, exchange-traded notes ("ETNs")¹³, exchange-traded trusts that hold commodities ("ETTs") (collectively, ETFs, ETNs and ETTs are referred to hereinafter as "exchange-traded products" or "ETPs"), individually selected U.S. exchange-traded common stocks (when the Sub-Adviser determines that is more efficient or otherwise advantageous to do so), money market funds, U.S. treasuries or money market

¹⁰ See id.

¹¹ Additional information regarding, among other things, the Fund, the Shares, the Fund's investment objectives, the Fund's strategies, methodology and restrictions, risks; fees and expenses associated with the Shares, creations and redemptions of Shares, availability of price 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 7, respectively.

¹² The term "under normal market conditions" includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the fixed income 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.

¹³ The Exchange states that ETNs are limited to those described in Nasdaq Rule 5710.

instruments. The Exchange states that, to the extent that the Fund invests in ETFs or money market funds to gain domestic exposure, the Fund is considered, in part, a “fund of funds.”

Investment Restrictions

- The Fund will not use derivative instruments, including options, swaps, forwards and futures contracts.
- The Fund will not invest in leveraged, inverse, or leveraged inverse ETPs.
- The Fund’s net assets that are invested in exchange-traded equities, including ETPs and common stock, will be invested in instruments that trade in markets that are members of the Intermarket Surveillance Group (“ISG”) or are parties to a comprehensive surveillance sharing agreement with the Exchange.¹⁴
- The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities and other illiquid assets (calculated at the time of investment).¹⁵
- The Fund does not presently intend to engage in any form of borrowing for investment purposes, and will not be operated as a “leveraged ETF”, i.e., it will not be operated in a manner designed to seek a multiple of the performance of an underlying reference index.

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

¹⁴ See Notice, supra note 4, 80 FR at 19375.

¹⁵ The 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 securities or other illiquid assets. Illiquid securities and other 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.

applicable to a national securities exchange.¹⁶ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹⁷ which requires, among other things, that the Exchange's rules be designed 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,¹⁸ 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 and any underlying exchange-traded products 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.

Price information regarding the ETPs, equity securities, U.S. treasuries, money market instruments and money market Funds held by the Fund will be available through the U.S. exchanges trading such assets, in the case of exchange-traded securities, as well as automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. Intra-day price information for all assets held by the Fund will also be available through subscription services, such as Bloomberg, Markit and Thomson Reuters, which can be accessed by authorized participants and other investors. Information regarding market

¹⁶ 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).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ 15 U.S.C. 78k-1(a)(1)(C)(iii).

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. The previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.

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 Session¹⁹ on the Exchange, the Fund will disclose on its website the identities and quantities of the portfolio of securities and other assets ("Disclosed Portfolio," as defined in Nasdaq Rule 5735(c)(2)) held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the business day.²⁰ The website information will be publicly available at no charge. The 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. 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.²¹ The

¹⁹ 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 ("E.T."); (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m. E.T.; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m. E.T.).

²⁰ Under accounting procedures to be followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on such business day. Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

²¹ See Notice, supra note 4, 80 FR at 19375.

Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,²² 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.²³ 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.²⁴

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 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 market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.²⁵ 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.²⁶ The Exchange states that the Adviser and Sub-

²² 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.

²³ See id. at 19374.

²⁴ See id.

²⁵ These may include: (1) the extent to which trading is not occurring in the securities and/or the other assets 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 19375.

²⁶ See id.

Adviser are not registered as broker-dealers, but that the Adviser is affiliated with a broker-dealer. In addition, the Exchange states that the Adviser has implemented a fire wall with respect to its broker-dealer affiliate 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 non-public information regarding the Fund's portfolio.²⁷ In the event (a) the Adviser or the Sub-Adviser 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 fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, if 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 non-public information regarding such portfolio.²⁸

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and other exchange-traded securities and instruments held by the Fund with other markets and other entities that are members of ISG,²⁹ and FINRA may obtain trading information regarding trading in the Shares and other exchange-traded securities and instruments held by the Fund from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the exchange-traded securities and instruments held by the Fund from markets and other entities that are members of ISG, or with which the Exchange has in place a comprehensive surveillance sharing agreement.

²⁷ See id. at 19372.

²⁸ See supra text accompanying note 10.

²⁹ 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.

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 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Intraday Indicative Value and 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.
- (5) For initial and/or continued listing, the Fund must be in compliance with Rule 10A-3³⁰ under the Act.
- (6) The Fund will not use derivative instruments, including options, swaps, forwards and futures contracts, both listed and OTC.
- (7) The Fund's net assets that are invested in exchange-traded equities, including ETPs and common stock, will be invested in instruments that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.
- (8) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities and other illiquid assets (calculated at the time of investment).
- (9) 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, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act³¹ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

³⁰ See 17 CFR 240.10A-3.

³¹ 15 U.S.C. 78f(b)(5).

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,³² that the proposed rule change (SR-NASDAQ-2015-023), as modified by Amendment No. 1, is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Robert W. Errett
Deputy Secretary

³² 15 U.S.C. 78s(b)(2).

³³ 17 CFR 200.30-3(a)(12).