

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78443; File No. SR-NASDAQ-2016-064)

July 29, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change Relating to the Listing and Trading of the Shares of the First Trust Strategic Mortgage REIT ETF of First Trust Exchange-Traded Fund VIII

I. Introduction

On May 3, 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” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the First Trust Strategic Mortgage REIT ETF (“Fund”) of First Trust Exchange-Traded Fund VIII (“Trust”) under NASDAQ Rule 5735. The proposed rule change was published for comment in the Federal Register on May 12, 2016.³ On June 15, 2016, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change.

II. Exchange’s 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 77781 (May 6, 2016), 81 FR 29590 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 78078 (Jun. 21, 2016), 81 FR 40377.

actively-managed exchange-traded fund (“ETF”). The Shares will be offered by the Trust, which was established as a Massachusetts business trust on February 22, 2016.⁶ The Fund will be a series of the Trust.

First Trust Advisors L.P. will be the investment adviser (“Adviser”) to the Fund. First Trust Portfolios L.P. (“Distributor”) will be the principal underwriter and distributor of the Fund’s Shares. The Bank of New York Mellon Corporation will act as the administrator, accounting agent, custodian, and transfer agent to the Fund. The Exchange states that the Adviser is not a broker-dealer, but it is affiliated with the Distributor, a broker-dealer.⁷ The Exchange represents that the Adviser has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of, and changes to, the portfolio.⁸ According to the Exchange, the Fund currently does not intend to use a sub-advisor.⁹

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 March 14, 2016 (File Nos. 333-210186 and 811-23147) (“Registration Statement”). The Exchange further states that the Trust has obtained certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 28468 (October 27, 2008) (File No. 812-13477).

⁷ See Notice, supra note 3, 81 FR at 29591.

⁸ See id. The Exchange further represents that, in the event (a) the Adviser or any sub-adviser registers as a broker-dealer, or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser registers is a registered broker-dealer or becomes affiliated with another broker-dealer, it will implement a fire wall with respect to its relevant personnel and such 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 such portfolio.

⁹ See id.

The Exchange has made the following representations and statements in describing the Fund and its investment strategy, including the Fund’s portfolio holdings and investment restrictions.¹⁰

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

The investment objective of the Fund will be to generate high current income. Under normal market conditions,¹¹ the Fund will seek to achieve its investment objective by investing at least 80% of its net assets (including investment borrowings) in the exchange-traded common shares of U.S. exchange-traded mortgage real estate investment trusts (“mortgage REITs”). In general terms, a mortgage REIT makes loans to developers and owners of property and invests primarily in mortgages and similar real estate interests, and includes companies or trusts that are primarily engaged in the purchasing or servicing of commercial or residential mortgage loans or mortgage-related securities, which may include mortgage-backed securities issued by private

¹⁰ The Commission notes that additional information regarding the Fund, the Trust, 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.

¹¹ 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. On a temporary basis, including for defensive purposes, during the initial invest-up period and during periods of high cash inflows or outflows, the Fund may depart from its principal investment strategies; for example, it may hold a higher than normal proportion of its assets in cash. According to the Exchange, during such periods, the Fund may not be able to achieve its investment objective. The Fund may adopt a defensive strategy when the Adviser believes securities in which the Fund normally invests have elevated risks due to political or economic factors and in other extraordinary circumstances. See Notice, supra note 3, 81 FR at 29591 n.8.

issuers and those issued or guaranteed by U.S. Government agencies, instrumentalities, or sponsored entities.

The Fund intends to qualify each year as a regulated investment company under Subchapter M of the Internal Revenue Code of 1986, as amended.

B. Exchange's Description of the Fund's Other Investments

The Fund may invest (in the aggregate) up to 20% of its net assets in the following securities and instruments:

(1) The Fund may invest in the exchange-traded preferred shares of U.S. exchange-traded mortgage REITs.

(2) The Fund may invest in (a) U.S. exchange-traded equity and preferred securities and (b) domestic over-the-counter ("OTC") preferred securities, in each case, of companies engaged in the U.S. real estate industry (other than mortgage REITs) (collectively, "Real Estate Companies").

(3) The Fund may invest in mortgage-backed securities,¹² and such investments may, from time to time, include investments in to-be-announced

¹² Mortgage-backed securities, which are securities that directly or indirectly represent a participation in, or are secured by and payable from, mortgage loans on real property, will consist of: (1) residential mortgage-backed securities; (2) commercial mortgage-backed securities; (3) stripped mortgage-backed securities, which are mortgage-backed securities where mortgage payments are divided between paying the loan's principal and paying the loan's interest; (4) collateralized mortgage obligations and real estate mortgage investment conduits, which are mortgage-backed securities that are divided into multiple classes, with each class being entitled to a different share of the principal and interest payments received from the pool of underlying assets.

transactions¹³ and mortgage dollar rolls¹⁴ (collectively, “Mortgage-Related Instruments”).

(4) The Fund may invest in (a) exchange-traded and OTC options on mortgage REITs and Real Estate Companies; (b) OTC options on mortgage TBA transactions; (c) exchange-traded U.S. Treasury and Eurodollar futures contracts; (d) exchange-traded and OTC interest rate swap agreements; (e) exchange-traded options on U.S. Treasury and Eurodollar futures contracts; and (f) exchange-traded and OTC options on interest rate swap agreements. The use of these derivative transactions may allow the Fund to obtain net long or short exposures to selected interest rates. These derivatives may also be used to hedge risks, including interest rate risks and credit risks, associated with the Fund’s portfolio investments. The Exchange represents that the Fund’s investments in derivative instruments will be consistent with the Fund’s investment objective and the 1940 Act and will not be used to seek to achieve a multiple or inverse multiple of an index. The Fund will only enter into transactions in OTC derivatives (including OTC options on mortgage REITs, Real Estate Companies, and mortgage TBA transactions; OTC interest rate swap agreements; and OTC options on interest rate swap

¹³ A to-be-announced (“TBA”) transaction is a method of trading mortgage-backed securities. In a TBA transaction, the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount, and price. The actual pools delivered generally are determined two days prior to the settlement date.

¹⁴ In a mortgage dollar roll, the Fund will sell (or buy) mortgage-backed securities for delivery on a specified date and simultaneously contract to repurchase (or sell) substantially similar (same type, coupon and maturity) securities on a future date. During the period between a sale and repurchase, the Fund will forgo principal and interest paid on the mortgage-backed securities. The Fund will earn or lose money on a mortgage dollar roll from any difference between the sale price and the future purchase price. In a sale and repurchase, the Fund will also earn money on the interest earned on the cash proceeds of the initial sale. According to the Exchange, the Fund intends to enter into mortgage dollar rolls only with high quality securities dealers and banks, as determined by the Adviser. See Notice, *supra* note 3, 81 FR at 29591 n.11.

agreements) with counterparties that the Adviser reasonably believes are capable of performing under the applicable contract or agreement.¹⁵

(5) The Fund may invest in short-term debt securities and other short-term debt instruments (described below), as well as cash equivalents, or it may hold cash. The percentage of the Fund invested in such holdings or held in cash will vary and will depend on several factors, including market conditions. The Fund may invest in the following short-term debt instruments:¹⁶ (a) 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; (b) certificates of deposit issued against funds deposited in a bank or savings and loan association; (c) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (d) repurchase agreements,¹⁷ which involve purchases of debt securities; (e) bank time deposits, which are monies kept

¹⁵ According to the Exchange, the Fund 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 will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser's analysis will evaluate each approved counterparty using various methods of analysis and may consider the Adviser's past experience with the counterparty, its known disciplinary history and its share of market participation. See id. at 29591 n.12.

¹⁶ Short-term debt instruments are issued by issuers having a long-term debt rating of at least A by Standard & Poor's Ratings Services, a Division of The McGraw-Hill Companies, Inc. ("S&P Ratings"), Moody's Investors Service, Inc. ("Moody's") or Fitch Ratings ("Fitch") and have a maturity of one year or less.

¹⁷ The Exchange represents that the Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser to present minimal credit risks in accordance with criteria approved by the Board of Trustees of the Trust ("Trust Board"). According to the Exchange, the Adviser will review and monitor the creditworthiness of such institutions, and the 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. See id. at 29592 n.14.

on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; and (f) commercial paper, which is short-term unsecured promissory notes.¹⁸

(6) The Fund may invest (but only, in the aggregate, up to 10% of its net assets) in the securities of money market funds and other ETFs that, in each case, will be investment companies registered under the 1940 Act.¹⁹

C. Exchange's Description of the Fund's Investment Restrictions

The Fund may enter into short sales as part of its overall portfolio management strategies or to offset a potential decline in the value of a security; however, the Fund will not engage in short sales with respect to more than 30% of the value of its net assets. To the extent required under applicable federal securities laws, rules, and interpretations thereof, the Fund will “set aside” liquid assets or engage in other measures to “cover” open positions and short positions held in connection with the foregoing types of transactions.

¹⁸ The Exchange states that the Fund may only invest in commercial paper rated A-1 or higher by S&P Ratings, Prime-1 or higher by Moody's or F1 or higher by Fitch. See id. at 29592 n.15.

¹⁹ An ETF is an investment company registered under the 1940 Act that holds a portfolio of securities. Many ETFs are designed to track the performance of a securities index, including industry, sector, country and region indexes. ETFs included in the Fund will be listed and traded in the U.S. on registered exchanges. The Fund may invest in the securities of ETFs in excess of the limits imposed under the 1940 Act pursuant to exemptive orders obtained by other ETFs and their sponsors from the Commission. In addition, 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 that the Trust has obtained from the Commission. See Investment Company Act Release No. 30377 (February 5, 2013) (File No. 812-13895). The ETFs 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 Exchange represents that while the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) ETFs. See id. at 29592 n.16.

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 Rule 144A securities deemed illiquid by the Adviser.²⁰ 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 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.

The Fund may not invest 25% or more of the value of its total assets in securities of issuers in any one industry. This restriction does not apply to securities of issuers in the real estate sector, including real estate investment trusts; obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities; or securities of other investment companies. The Fund will be concentrated in the real estate sector.

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.²¹ In particular, the Commission finds that the

²⁰ 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 in which it trades (e.g., the time needed to dispose of the security, the method of soliciting offers and the mechanics of transfer).

²¹ 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).

proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,²² 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 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 Exchange Act,²³ which sets forth the finding of Congress 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 (“CTA”) plans for the Shares. Quotation and last-sale information for U.S. exchange-traded equity securities (including mortgage REITs, ETFs, and exchange-traded Real Estate Companies) will be available from the exchanges on which they are traded as well as in accordance with any applicable CTA plans. Quotation and last-sale information for U.S. exchange-traded options will be available via the Options Price Reporting Authority. On each business day, before commencement of trading in Shares in the Regular Market Session²⁴ 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

²² 15 U.S.C. 78f(b)(5).

²³ 15 U.S.C. 78k-1(a)(1)(C)(iii).

²⁴ 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 p.m. or 4:15 p.m. to 8 p.m., Eastern Time).

the Fund that will form the basis for the Fund's calculation of NAV at the end of the business day.²⁵ 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 Disclosed Portfolio, will be disseminated. The Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,²⁶ 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.²⁷

²⁵ 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"). 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. The Fund's disclosure of derivative positions in the Disclosed Portfolio will include sufficient information for market participants to 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 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 information will be publicly available at no charge.

²⁶ Currently, the NASDAQ OMX Global Index Data Service ("GIDS") is the Nasdaq 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.

²⁷ According to the Exchange, the Intraday Indicative Value will be based on quotes and closing prices from the securities' local market and may not reflect events that occur subsequent to the local market's close. The Exchange states that premiums and discounts between the Intraday Indicative Value and the market price may occur. The Exchange states that this should not be viewed as a "real time" update of the NAV per Share of the Fund, which is calculated only once a day. See Notice, supra note 3, 81 FR at 29594

The Fund's NAV will be determined as of the close of trading (normally 4:00 p.m. Eastern time) on each day the New York Stock Exchange LLC is open for business.²⁸ Additionally, information 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. 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. Pricing information for Mortgage-Related Instruments, OTC Real Estate Companies, Short-Term Debt Instruments, repurchase agreements, certificates of deposit, bank time deposits, OTC options on mortgage REITs, Real Estate Companies and mortgage TBA transactions, OTC interest rate swap agreements, and OTC options on interest rate swap agreements will be available from major broker-dealer firms, major market data vendors, and/or Pricing Services. Pricing information for mortgage REITs (both common and preferred shares), exchange-traded Real Estate Companies, ETFs, exchange-traded options on mortgage REITs and Real Estate Companies, exchange-traded U.S. Treasury and Eurodollar futures contracts, exchange-traded interest rate swap agreements, exchange-traded options on U.S. Treasury and Eurodollar futures contracts, and exchange-traded options on interest rate swap agreements will be available from the applicable listing exchange and from major market data vendors. Money market funds are typically priced once each business day, and their prices will be available through the applicable fund's website or from major market data vendors. The Fund's website, which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund

²⁸ NAV per Share will be calculated for the Fund by taking the value of the Fund's total assets, including interest or dividends accrued but not yet collected, less all liabilities, including accrued expenses and dividends declared but unpaid, and dividing such amount by the total number of Shares outstanding. See Notice, *supra* note 3, 81 FR at 29593-29594 (providing more detailed information on the NAV valuation methodology for each of the Fund's holdings).

and additional data relating to NAV and other applicable quantitative information that may be downloaded.

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. The Exchange states that it 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.²⁹ The Exchange also represents that the Exchange 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 may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.³⁰ Trading in the Shares also will be subject to Rule 5735(d)(2)(D), which sets forth circumstances under which trading of Shares of the Fund may be halted.³¹ The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.³² The Exchange also represents that the Adviser is not a broker-dealer, although it is affiliated with the Distributor, a broker-dealer, and 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

²⁹ See id. at 29595.

³⁰ 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.

³¹ See id.

³² See id.

portfolio.³³ Further, the Commission notes that the Reporting Authority³⁴ that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.³⁵ The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also the Financial Industry Regulatory Authority (“FINRA”) on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.³⁶

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:

³³ See *id.* at 29591. See also *supra* note 8. The Exchange further represents that 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 its 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.

³⁴ Nasdaq Rule 5730(c)(4) defines “Reporting Authority.”

³⁵ See Nasdaq Rule 5735(d)(2)(B)(ii).

³⁶ FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA’s performance under this regulatory services agreement.

- (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 detect and help deter violations of Exchange rules and applicable federal securities laws.
- (3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-traded securities and instruments held by the Fund (including mortgage REITs (both common and preferred shares); exchange-traded Real Estate Companies; ETFs; exchange-traded options on mortgage REITs and Real Estate Companies; exchange-traded U.S. Treasury and Eurodollar futures contracts; exchange-traded interest rate swap agreements; exchange-traded options on U.S. Treasury and Eurodollar futures contracts; and exchange-traded options on interest rate swap agreements) with other markets and other entities that are members of the Intermarket Surveillance Group (“ISG”),³⁷ and FINRA may obtain trading information regarding trading in the Shares and such 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

³⁷ 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.

held by the Fund 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. 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 Trade Reporting and Compliance Engine.

- (4) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.
- (5) 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 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.

- (6) For initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Act.³⁸
- (7) The Fund's investments in derivative instruments will be consistent with the Fund's investment objective and the 1940 Act and will not be used to seek to achieve a multiple or inverse multiple of an index, and the Fund will only enter into transactions in OTC derivatives (including OTC options on mortgage REITs, Real Estate Companies and mortgage TBA transactions; OTC interest rate swap agreements; and OTC options on interest rate swap agreements) with counterparties that the Adviser reasonably believes are capable of performing under the applicable contract or agreement.
- (8) The Fund may invest (but only, in the aggregate, up to 10% of its net assets) in the securities of money market funds and other ETFs that, in each case, will be investment companies registered under the 1940 Act, and ETFs included in the Fund will be listed and traded in the U.S. on registered exchanges.
- (9) The Fund will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) ETFs.
- (10) The Fund will not engage in short sales with respect to more than 30% of the value of its net assets. To the extent required under applicable federal securities laws, rules, and interpretations thereof, the Fund will "set aside" liquid assets or engage in other measures to "cover" open positions and short positions held in connection with the foregoing types of transactions.

³⁸ See 17 CFR 240.10A-3.

- (11) 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.
- (12) At least 90% of the Fund's net assets that are invested in exchange-traded derivatives (including exchange-traded options on mortgage REITs and Real Estate Companies; exchange-traded U.S. Treasury and Eurodollar futures contracts; exchange-traded interest rate swap agreements; exchange-traded options on U.S. Treasury and Eurodollar futures contracts; and exchange-traded options on interest rate swap agreements) (in the aggregate) 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.
- (13) All of the Fund's net assets that are invested in exchange-traded equity securities (including mortgage REITs (both common and preferred shares); ETFs; and exchange-traded Real Estate Companies) (in the aggregate) will be invested in securities that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.
- (14) 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.³⁹ 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 and in the Notice. 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 on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act⁴⁰ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,⁴¹ that the

³⁹ 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.

⁴⁰ 15 U.S.C. 78f(b)(5).

⁴¹ 15 U.S.C. 78s(b)(2).

proposed rule change (SR-NASDAQ-2016-064) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴²

Robert W. Errett
Deputy Secretary

⁴² 17 CFR 200.30-3(a)(12).