

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-78626; File No. SR-NASDAQ-2016-072)

August 22, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of the Shares of the Amplify Dow Theory Forecasts Buy List ETF of Amplify ETF Trust

I. Introduction

On May 10, 2016, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) 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”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the Amplify Dow Theory Forecasts Buy List ETF (“Fund”) of Amplify ETF Trust (“Trust”). On May 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1 thereto, was published for comment in the Federal Register on May 31, 2016.<sup>3</sup> On July 5, 2016, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> 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.<sup>5</sup> The Commission received no comment letters on the proposed rule change. This order grants approval of the proposed rule change, as modified by Amendment No. 1 thereto.

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 77890 (May 24, 2016), 81 FR 34419 (“Notice”).

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 78225, 81 FR 44902 (July 11, 2016).

## 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 Shares will be offered by the Trust, which was established as a Massachusetts business trust on January 6, 2015.<sup>6</sup> According to the Exchange, 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.<sup>7</sup> The Fund, which will be an actively-managed exchange-traded fund ("ETF"), will be a series of the Trust.

Amplify Investments LLC will be the investment adviser ("Adviser") to the Fund. The following entities will serve as investment sub-advisers (collectively, "Sub-Adviser") to the Fund: Horizon Investment Services, LLC ("Horizon") and Penserra Capital Management LLC ("Penserra"). Quasar Distributors LLC will be the principal underwriter and distributor of the Fund's Shares. U.S. Bancorp Fund Services LLC will act as the administrator, accounting agent, custodian, and transfer agent to the Fund. The Exchange represents that neither the Adviser nor any Sub-Adviser is a broker-dealer, although Penserra is affiliated with a broker-dealer.<sup>8</sup>

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<sup>6</sup> The Exchange represents that the Trust has obtained certain exemptive relief under the Investment Company Act of 1940 ("1940 Act"). See Investment Company Act Release No. 31582 (April 28, 2015) (File No. 812-14423).

<sup>7</sup> See Post-Effective Amendment No. 2 to Registration Statement on Form N-1A for the Trust, dated May 5, 2016 (File Nos. 333 207937 and 811 23108).

<sup>8</sup> The Exchange further represents that Adviser and Horizon are not currently affiliated with a broker-dealer. In addition, the Exchange states that personnel who make decisions on the Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the Fund's portfolio. In the event (a) the Adviser or a Sub-Adviser registers as a broker-dealer, or becomes affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with another broker-dealer, it will implement and will maintain a fire wall with respect to its relevant personnel or broker-dealer affiliate, as applicable, regarding access to information concerning the composition of, and changes

Penserra has implemented and will maintain a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of, and changes to, the portfolio.

The Exchange has made the following representations and statements in describing the Fund and its investment strategies, including the Fund's portfolio holdings and investment restrictions.<sup>9</sup>

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

The investment objective of the Fund will be to seek long-term capital appreciation. Under normal market conditions,<sup>10</sup> the Fund will seek to achieve its investment objective by investing at least 90% of its net assets (including investment borrowings) in companies included in the buy list (updated on a semi-weekly basis) ("Buy List") of the Dow Theory Forecasts, an investment newsletter of Horizon Publishing Company, LLC, an affiliate of Horizon. In general,

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to, the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the portfolio.

<sup>9</sup> The Commission notes that additional information regarding the Trust, the Fund, and the Shares, including investment strategies, risks, net asset value ("NAV") calculation, creation and redemption procedures, fees, Fund holdings disclosure policies, distributions, and taxes, among other information, is included in the Notice, as modified by Amendment No. 1 thereto, and the Registration Statement, as applicable. See Notice and Registration Statement, supra notes 3 and 7, respectively, and accompanying text.

<sup>10</sup> The term "under normal market conditions" as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the securities markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. 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. During such periods, the Fund may not be able to achieve its investment objective. The Fund may adopt a defensive strategy when the Adviser or a Sub-Adviser believes securities in which the Fund normally invests have elevated risks due to political or economic factors and in other extraordinary circumstances.

the Buy List includes 25 to 40 U.S. exchange-traded stocks. All of such stocks are large-cap or mid-cap and are selected based on a proprietary quantitative ranking system known as Quadrix<sup>®</sup>. Quadrix<sup>®</sup> ranks approximately 5,000 stocks and scores target stocks based on their operating momentum; valuation; long-term track record and financial strength; earnings-estimate trends; and share-price performance.

The Fund will seek diversification among the ten economic sectors of the U.S. stock market, and it is not anticipated that more than 45% of the portfolio will be invested in a single sector. Horizon will select the Fund's portfolio securities from the Buy List. Penserra will be responsible for implementing the Fund's investment program by, among other things, trading portfolio securities and performing related services, rebalancing the Fund's portfolio, and providing cash management services in accordance with the investment advice formulated by, and model portfolios delivered by, the Adviser and Horizon.

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

The Fund may invest the remaining 10% of its net assets 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:<sup>11</sup> (1) 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; (2) certificates of deposit issued against funds deposited in a bank or savings and loan

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<sup>11</sup> 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.

association; (3) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (4) repurchase agreements,<sup>12</sup> which involve purchases of debt securities; (5) 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 (6) commercial paper, which is short-term unsecured promissory notes.<sup>13</sup>

The Fund may invest in the securities of other ETFs and non-exchange listed open-end investment companies (referred to as "mutual funds"), including money market funds,<sup>14</sup> that, in each case, will be investment companies registered under the 1940 Act.

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

According to the Exchange, 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

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<sup>12</sup> 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. The Adviser will review and monitor the creditworthiness of such institutions. 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.

<sup>13</sup> 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.

<sup>14</sup> It is expected that any such mutual fund or ETF will invest primarily in short-term fixed income securities. 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. 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). While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) ETFs.

illiquid by the Adviser or a Sub-Adviser.<sup>15</sup> 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 or group of industries (other than securities issued or guaranteed by the U.S. government, its agencies or instrumentalities, or securities of other investment companies), except that the Fund may invest 25% or more of the value of its total assets in securities of issuers in a group of industries to approximately the same extent that the Buy List includes the securities of a particular group of industries.<sup>16</sup>

All of the Fund's net assets that are invested in exchange-traded equity securities (including common stocks and ETFs) will be invested in securities that are listed on a U.S. exchange.<sup>17</sup> In addition, the Fund will not invest in derivative instruments, and the Fund's

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<sup>15</sup> In reaching liquidity decisions, the Adviser and a Sub-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).

<sup>16</sup> The Exchange further represents that the Fund intends to qualify each year as a regulated investment company under Subchapter M of the Internal Revenue Code of 1986, as amended.

<sup>17</sup> The Fund will not invest in OTC secondary market securities.

investments will be consistent with its investment objective and will not be used to enhance leverage.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>18</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1 thereto, is consistent with Section 6(b)(5) of the Exchange Act,<sup>19</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission 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,<sup>20</sup> 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. According to the Exchange, 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. On each

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<sup>18</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

business day, before commencement of trading in Shares in the Regular Market Session<sup>21</sup> on the Exchange, the Fund will disclose on its website the “Disclosed Portfolio,” as defined in Nasdaq Rule 5735(c)(2), that will form the basis for the Fund’s calculation of NAV at the end of the business day.<sup>22</sup> In addition, an estimated value, defined in 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, which will be made available on the NASDAQ OMX Information LLC proprietary index data service,<sup>23</sup> 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. The Fund’s NAV will be determined as of the close of regular trading on the New York Stock Exchange (“NYSE”) on each day the NYSE is open

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<sup>21</sup> 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., Eastern Time; (2) Regular Market Session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m., Eastern Time; and (3) Post-Market Session from 4:00 p.m. or 4:15 p.m. to 8:00 p.m., Eastern Time).

<sup>22</sup> 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. 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); the identity of the security or other asset or instrument underlying the holding, if any; 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.

<sup>23</sup> According to the Exchange, the NASDAQ OMX Global Index Data Service (“GIDS”) currently 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. 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.



for trading. If the NYSE closes early on a valuation day, the NAV will be determined as of that time.<sup>24</sup>

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.

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<sup>24</sup> According to the Exchange, equity securities (including other ETFs) listed on a securities exchange, market or automated quotation system for which quotations are readily available (except for securities traded on NASDAQ) 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., Eastern Time 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 NASDAQ, the 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. Open-end investment companies other than ETFs will be valued at NAV. Except as provided below, short-term U.S. government securities, commercial paper, and bankers' acceptances, all as set forth under "Other Investments" (collectively, "Short-Term Debt Instruments") will typically be valued using information provided by a pricing service. Pricing services typically value non-exchange-traded instruments utilizing a range of market-based inputs and assumptions, including readily available market quotations obtained from broker-dealers making markets in such instruments, cash flows, and transactions for comparable instruments. In pricing certain instruments, the pricing services may consider information about an instrument's issuer or market activity provided by the Adviser. Short-Term Debt Instruments having a remaining maturity of 60 days or less when purchased will typically be valued at cost adjusted for amortization of premiums and accretion of discounts, provided the pricing committee of the Adviser has determined that the use of amortized cost is an appropriate reflection of value given market and issuer-specific conditions existing at the time of the determination. Certificates of deposit and bank time deposits will typically be valued at cost. Overnight repurchase agreements will be valued at 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.

Quotation and last-sale information for U.S. exchange-traded equity securities (including common stocks and ETFs) will be available from the exchanges on which they are traded as well as in accordance with any applicable CTA plans. Open-end investment companies (other than ETFs) 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. Pricing information for Short-Term Debt Instruments, repurchase agreements, certificates of deposit, and bank time deposits will be available from major broker-dealer firms, major market data vendors, and pricing services. Moreover, 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, as well as the Shares' ticker, CUSIP, and exchange information along with additional quantitative information updated on a daily basis, including, for the Fund: (1) daily trading volume, the prior business day's reported NAV and closing price, mid-point of the bid/ask spread at the time of calculation of such NAV ("Bid/Ask Price"),<sup>25</sup> and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

The Commission 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 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

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<sup>25</sup> The Bid/Ask Price of the Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

all market participants at the same time. 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.<sup>26</sup> Trading in the Shares also will be subject to Rule 5735(d)(2)(D), which sets forth circumstances under which trading in the Shares of the Fund may be halted. The Exchange represents that it has a general policy prohibiting the distribution of material, non-public information by its employees. Further, the Commission notes that the Reporting Authority<sup>27</sup> 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.<sup>28</sup> In addition, Nasdaq Rule 5735(g) further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the open-end fund's portfolio. The Exchange states that Penserra is affiliated with a broker-dealer, and 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.<sup>29</sup>

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<sup>26</sup> These may include: (1) the extent to which trading is not occurring in the securities and 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.

<sup>27</sup> Nasdaq Rule 5730(c)(4) defines "Reporting Authority."

<sup>28</sup> See Nasdaq Rule 5735(d)(2)(B)(ii).

<sup>29</sup> See supra note 8 and accompanying text. 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, each 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

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including the following:

(1) The Shares will be subject to 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 also the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, 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.<sup>30</sup>

(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 common stocks and ETFs) with other markets and other entities that are members of

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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.

<sup>30</sup> The Exchange represents that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement and that the Exchange is responsible for FINRA's performance under this regulatory services agreement.

the Intermarket Surveillance Group (“ISG”),<sup>31</sup> 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 held by the Fund from markets and other entities that are members of ISG, which includes securities exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement.

(4) All of the Fund’s net assets that are invested in exchange-traded equity securities (including common stocks and ETFs) 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. In addition, the Fund will not invest in OTC secondary market securities.

(5) The Fund will not invest in derivative instruments, and the Fund’s investments will be consistent with its investment objective and will not be used to enhance leverage.

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

(7) 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 the information

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<sup>31</sup> For a list of the current members of ISG, see [www.isgportal.org](http://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.

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.

(8) For initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Exchange Act.<sup>32</sup>

(9) 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 or a Sub-Adviser.<sup>33</sup>

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

(11) 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. The Adviser will review and monitor the creditworthiness of such institutions and 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.

(12) 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.

(13) While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) ETFs.

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<sup>32</sup> See 17 CFR 240.10A-3.

<sup>33</sup> See supra note 15 and accompanying text.

The Commission notes that the Fund and the Shares must comply with the initial and continued listing criteria in Nasdaq Rule 5735 for the Shares to be listed and traded on the Exchange. In addition, 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.<sup>34</sup> 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, as modified by Amendment No. 1 to the proposed rule change.

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 Act,<sup>35</sup> Section 11A(a)(1)(C)(iii) of the Act,<sup>36</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>34</sup> 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. 78005 (Jun. 7, 2016), 81 FR 38247 (Jun. 13, 2016) (SR-BATS-2015-100). In the context of this representation, it is the Commission’s view that “monitor” and “surveil” both mean ongoing oversight of a 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.

<sup>35</sup> 15 U.S.C. 78f(b)(5).

<sup>36</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>37</sup> that the proposed rule change (SR-NASDAQ-2016-072), 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.<sup>38</sup>

Robert W. Errett  
Deputy Secretary

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<sup>37</sup> 15 U.S.C. 78s(b)(2).

<sup>38</sup> 17 CFR 200.30-3(a)(12).