

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-78913; File No. SR-Nasdaq-2016-002)

September 23, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 3, and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 3, to List and Trade Shares of the First Trust Municipal High Income ETF of First Trust Exchange-Traded Fund III

I. Introduction

On January 6, 2016, The NASDAQ Stock Market LLC (“Nasdaq” or the “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 First Trust Municipal High Income ETF (“Fund”) under Nasdaq Rule 5735. The proposed rule change was published for comment in the Federal Register on January 27, 2016.<sup>3</sup> On February 16, 2016, the Exchange filed Amendment No. 1.<sup>4</sup> On March 8, 2016, pursuant to Section 19(b)(2) of the Act,<sup>5</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>6</sup>

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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. 76944 (Jan. 21, 2016), 81 FR 4712.

<sup>4</sup> Amendment No. 1 is available on the Commission’s website at: <http://www.sec.gov/comments/sr-bats-2015-100/bats2015100.shtml>.

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> See Securities Exchange Act Release No. 34-77320, 81 FR 13429 (Mar. 14, 2016). The Commission designated April 26, 2016, as the date by which the Commission would either approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

On April 26, 2016, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act<sup>7</sup> to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.<sup>8</sup> In the Order Instituting Proceedings, the Commission solicited comments on specified matters related to the proposal.<sup>9</sup>

On June 24, 2016, the Exchange filed Amendment No. 2, which replaced the originally filed proposed rule change in its entirety.<sup>10</sup>

On July 21, 2016, the Commission designated a longer period for Commission action on the proposed rule change.<sup>11</sup> On August 30, 2016, the Exchange filed Amendment No. 3, which replaced the originally filed proposed rule change (as previously modified by Amendments No. 1 and No. 2) in its entirety.<sup>12</sup>

The Commission has not received any comments on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 3 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

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<sup>7</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>8</sup> See Securities Exchange Act Release No. 77871, 81 FR 26265 (May 2, 2016) (“Order Instituting Proceedings”).

<sup>9</sup> Specifically, the Commission instituted proceedings to allow for additional analysis of the proposed rule change’s consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,” and “to protect investors and the public interest.” See *id.*, 81 FR at 26268.

<sup>10</sup> Amendment No. 2 is available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2016-002/nasdaq2016002-2.pdf>.

<sup>11</sup> See Securities Exchange Act Release No. 78384, 81 FR 49286 (July 27, 2016) (designating September 23, 2016, as the date by which the Commission must either approve or disapprove the proposed rule change).

<sup>12</sup> Amendment No. 3 is available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2016-002/nasdaq2016002-3.pdf>.

## II. The Exchange's Description of the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The Exchange proposes to list and trade the Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares<sup>13</sup> on the Exchange. The Fund will be an actively-managed exchange-traded fund ("ETF"). The Shares will be offered by the Trust, which was established as a Massachusetts business trust on January 9, 2008.<sup>14</sup> The Trust is

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<sup>13</sup> A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) (the "1940 Act") organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Index Fund Shares, listed and traded on the Exchange under Nasdaq Rule 5705, seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

<sup>14</sup> The Commission has issued an order, upon which the Trust may rely, granting certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 30029 (April 10, 2012) (File No. 812-13795) (the "Exemptive Relief"). In addition, on December 6, 2012, the staff of the Commission's Division of Investment Management ("Division") issued a no-action letter ("No-Action Letter") relating to the use of derivatives by actively-managed ETFs. See No-Action Letter dated December 6, 2012 from Elizabeth G. Osterman, Associate Director, Office of Exemptive Applications, Division of Investment Management. The No-Action Letter stated that the Division would not recommend enforcement action to the Commission under applicable provisions of and rules under the 1940 Act if actively-managed ETFs operating in reliance on specified orders (which include the Exemptive Relief) invest in options contracts, futures contracts or swap agreements provided that they comply with certain representations stated in the No-Action Letter.

registered with the Commission as an investment company and has filed a registration statement on Form N-1A (“Registration Statement”) with the Commission.<sup>15</sup> The Fund will be a series of the Trust. The Fund intends to qualify each year as a regulated investment company (“RIC”) under Subchapter M of the Internal Revenue Code of 1986, as amended.

First Trust Advisors L.P. will be the investment adviser (“Adviser”) to the Fund. First Trust Portfolios L.P. (the “Distributor”) will be the principal underwriter and distributor of the Fund’s Shares. Brown Brothers Harriman & Co. (“BBH”) will act as the administrator, accounting agent, custodian, and transfer agent to the Fund.

Paragraph (g) of Rule 5735 provides that if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.<sup>16</sup> In addition, paragraph (g) further requires that personnel who make

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<sup>15</sup> See Post-Effective Amendment No. 27 to Registration Statement on Form N-1A for the Trust, dated August 31, 2015 (File Nos. 333-176976 and 811-22245). The descriptions of the Fund and the Shares contained herein are based, in part, on information in the Registration Statement.

<sup>16</sup> An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the “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)

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.

Rule 5735(g) is similar to Nasdaq Rule 5705(b)(5)(A)(i); however, paragraph (g) in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser is not a broker-dealer, but it is affiliated with the Distributor, a broker-dealer, and 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.

In addition, 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 any sub-adviser registers as a broker-dealer or becomes newly 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 a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. The Fund currently does not intend to use a sub-adviser.

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responsible for administering the policies and procedures adopted under subparagraph (i) above.

## First Trust Municipal High Income ETF

### Principal Investments

The primary investment objective of the Fund will be to generate current income that is exempt from regular federal income taxes and its secondary objective will be long-term capital appreciation. Under normal market conditions<sup>17</sup>, the Fund will seek to achieve its investment objectives by investing at least 80% of its net assets (including investment borrowings) in municipal debt securities that pay interest that is exempt from regular federal income taxes which are “exempted securities” under Section 3(a)(12) of the Act (collectively, “Municipal Securities”).<sup>18</sup> Municipal Securities are generally issued by or on behalf of states, territories or possessions of the U.S. and the District of Columbia and their political subdivisions, agencies, authorities and other instrumentalities. The types of Municipal Securities in which the Fund may invest include municipal lease obligations (and certificates of participation in such obligations), municipal general obligation bonds, municipal revenue bonds, municipal notes, municipal cash

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<sup>17</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 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. On a temporary basis, including for defensive purposes, during the initial invest-up period (i.e., the six-week period following the commencement of trading of Shares on the Exchange) and during periods of high cash inflows or outflows (i.e., rolling periods of seven calendar days during which inflows or outflows of cash, in the aggregate, exceed 10% of the Fund’s net assets as of the opening of business on the first day of such periods), 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 objectives. 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.

<sup>18</sup> Assuming compliance with the investment requirements and limitations described herein, the Fund may invest up to 100% of its net assets in Municipal Securities that pay interest that generates income subject to the federal alternative minimum tax.

equivalents, private activity bonds (including without limitation industrial development bonds), and pre-refunded<sup>19</sup> and escrowed to maturity bonds. In addition, Municipal Securities include securities issued by entities whose underlying assets are municipal bonds (i.e., tender option bond (TOB) trusts and custodial receipts trusts).

The Fund may invest in Municipal Securities of any maturity. However, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,<sup>20</sup> the weighted average maturity of the Fund will be less than or equal to 14 years.

Under normal market conditions, the Fund will invest at least 65% of its net assets in Municipal Securities that are, at the time of investment, rated below investment grade (i.e., not rated Baa3/BBB- or above) by at least one nationally recognized statistical rating organization (“NRSRO”) rating such securities (or Municipal Securities that are unrated and determined by the Adviser to be of comparable quality)<sup>21</sup> (commonly referred to as “high yield” or “junk”

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<sup>19</sup> A pre-refunded municipal bond is a municipal bond that has been refunded to a call date on or before the final maturity of principal and remains outstanding in the municipal market. The payment of principal and interest of the pre-refunded municipal bonds held by the Fund will be funded from securities in a designated escrow account that holds U.S. Treasury securities or other obligations of the U.S. government (including its agencies and instrumentalities). As the payment of principal and interest is generated from securities held in a designated escrow account, the pledge of the municipality has been fulfilled and the original pledge of revenue by the municipality is no longer in place. The escrow account securities pledged to pay the principal and interest of the pre-refunded municipal bond do not guarantee the price movement of the bond before maturity. Investment in pre-refunded municipal bonds held by the Fund may subject the Fund to interest rate risk, market risk and credit risk. In addition, while a secondary market exists for pre-refunded municipal bonds, if the Fund sells pre-refunded municipal bonds prior to maturity, the price received may be more or less than the original cost, depending on market conditions at the time of sale.

<sup>20</sup> See supra note 17 regarding the meaning of the terms “initial invest-up period” and “periods of high cash inflows or outflows.”

<sup>21</sup> Comparable quality of unrated Municipal Securities will be determined by the Adviser based on fundamental credit analysis of the unrated security and comparable rated securities. On a best efforts basis, the Adviser will attempt to make a rating determination based on publicly available data. In making a “comparable quality” determination, the

bonds);<sup>22</sup> however, the Fund will consider pre-refunded or escrowed to maturity bonds, regardless of rating, to be investment grade securities.

The Fund may invest up to 35% of its net assets in “investment grade” Municipal Securities, which are Municipal Securities that are, at the time of investment, rated investment grade (i.e., rated Baa3/BBB- or above) by each NRSRO rating such securities (or Municipal Securities that are unrated and determined by the Adviser to be of comparable quality). If, subsequent to purchase by the Fund, a Municipal Security held by the Fund experiences an improvement in credit quality and becomes investment grade, the Fund may continue to hold the Municipal Security and it will not cause the Fund to violate the 35% investment limitation; however, the Municipal Security will be taken into account for purposes of determining whether purchases of additional Municipal Securities will cause the Fund to violate such limitation.

The Fund will be actively managed and will not be tied to an index. However, under normal market conditions, on a continuous basis determined at the time of purchase, its portfolio of Municipal Securities<sup>23</sup> will generally meet, as applicable, all except for two of the criteria for

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Adviser may consider, for example, whether the issuer of the security has issued other rated securities, the nature and provisions of the relevant security, whether the obligations under the relevant security are guaranteed by another entity and the rating of such guarantor (if any), relevant cash flows, macroeconomic analysis, and/or sector or industry analysis.

<sup>22</sup> The Municipal Securities in which the Fund will invest to satisfy this 65% investment requirement may include Municipal Securities that are currently in default and not expected to pay the current coupon (“Distressed Municipal Securities”). The Fund may invest up to 10% of its net assets in Distressed Municipal Securities. If, subsequent to purchase by the Fund, a Municipal Security held by the Fund becomes a Distressed Municipal Security, the Fund may continue to hold the Distressed Municipal Security and it will not cause the Fund to violate the 10% limitation; however, the Distressed Municipal Security will be taken into account for purposes of determining whether purchases of additional Municipal Securities will cause the Fund to violate such limitation.

<sup>23</sup> For purposes of this statement and the discussion of the requirements of Nasdaq Rule 5705(b)(4)(A) below, with respect to Municipal Securities that are issued by entities



non-actively managed, index-based, fixed income ETFs contained in Nasdaq Rule 5705(b)(4)(A), as described below.

Nasdaq Rule 5705(b)(4)(A)(i) requires that the index or portfolio consist of “Fixed Income Securities.” Fixed Income Securities include, among other things, Municipal Securities.<sup>24</sup> Therefore, the Fund’s portfolio of Municipal Securities will satisfy this requirement under normal market conditions.

Nasdaq Rule 5705(b)(4)(A)(iii) applies to convertible securities and, therefore, since Municipal Securities do not include convertible securities, this requirement is not applicable.

Nasdaq Rule 5705(b)(4)(A)(iv) requires that no component fixed income security (excluding Treasury securities) will represent more than 30% of the weight of the index or portfolio, and that the five highest weighted component fixed income securities will not in the aggregate account for more than 65% of the weight of the index or portfolio. The Fund’s portfolio of Municipal Securities<sup>25</sup> will satisfy this requirement under normal market conditions.

Nasdaq Rule 5705(b)(4)(A)(v) requires that an underlying index or portfolio (excluding one consisting entirely of exempted securities) include securities from a minimum of 13 non-affiliated issuers. Under normal market conditions, the Fund’s portfolio of Municipal Securities<sup>26</sup> will include securities from a minimum of 13 non-affiliated issuers.<sup>27</sup> Therefore, the Fund’s portfolio of Municipal Securities will satisfy this requirement under normal market conditions.

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whose underlying assets are municipal bonds, the underlying municipal bonds, rather than the securities issued by such entities, will be taken into account.

<sup>24</sup> See supra note 23.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> For purposes of this restriction, “non-affiliated issuers” are issuers that are not “affiliated persons” within the meaning of Section 2(a)(3) of the 1940 Act. Additionally, for purposes of this restriction, each state and each separate political subdivision, agency,

The Fund's portfolio of Municipal Securities may not satisfy Rule 5705(b)(4)(A)(vi), which requires that component securities that in the aggregate account for at least 90% of the weight of the index or portfolio be either exempted securities or from a specified type of issuer. However, as noted above, under normal market conditions, at least 80% of the Fund's net assets (including investment borrowings) will be invested in Municipal Securities, which are "exempted securities" as defined in Section 3(a)(12) of the Act.<sup>28</sup>

The Fund's portfolio of Municipal Securities will not generally satisfy Rule 5705(b)(4)(A)(ii), which requires that components that in the aggregate account for at least 75% of the weight of the index or portfolio have a minimum original principal amount outstanding of \$100 million or more. However, under normal market conditions, at least 40% (based on dollar amount invested) of the Municipal Securities in which the Fund invests<sup>29</sup> will be issued by issuers with total outstanding debt issuances that, in the aggregate, have a minimum amount of municipal debt outstanding at the time of purchase of \$75 million or more. The Commission has previously issued orders approving proposed rule changes relating to the listing and trading under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02 (which governs the listing and trading of fixed-income index ETFs on NYSE Arca, Inc.), to various ETFs that track indexes comprised of municipal securities (including high-yield municipal index ETFs) that did not meet the analogous requirement included in Commentary .02(a)(2) to NYSE Arca Equities Rule 5.2(j)(3),<sup>30</sup> but demonstrated that the portfolio of municipal securities in which the ETFs would

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authority, or instrumentality of such state, each multi-state agency or authority, and each guarantor, if any, will be treated as separate issuers of Municipal Securities.

<sup>28</sup> See supra note 23.

<sup>29</sup> Id.

<sup>30</sup> See, e.g., Securities Exchange Act Release Nos. 75376 (July 7, 2015), 80 FR 40113 (July 13, 2015) (SR-NYSEArca-2015-18) (order approving listing and trading of

invest would be sufficiently liquid. Similarly, under normal market conditions, the Fund's portfolio of Municipal Securities (although not necessarily the Fund's entire portfolio as a whole) will satisfy all except for two of the applicable requirements of Nasdaq Rule 5705(b)(4)(A), and a significant portion (at least 40% (based on dollar amount invested)) of the Municipal Securities in which the Fund invests<sup>31</sup> will be issued by issuers with total outstanding debt issuances that, in the aggregate, have a minimum amount of municipal debt outstanding at the time of purchase of \$75 million or more, which should provide support regarding the anticipated liquidity of the Fund's Municipal Securities portfolio.

#### Other Investments

With respect to up to 20% (in the aggregate) of its net assets, the Fund may invest in and hold the securities and other instruments (including cash) described below.

The Fund may invest up to 20% of its net assets in short-term debt instruments (described below), money market funds and other cash equivalents, taxable municipal securities or tax-exempt municipal securities that are not exempted securities under Section 3(a)(12) under the Act, 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.

Short-term debt instruments, which do not include Municipal Securities, are issued by issuers having a long-term debt rating of at least A-/A3 (as applicable) by Standard & Poor's Ratings Services ("S&P Ratings"), Moody's Investors Service, Inc. ("Moody's") or Fitch Ratings ("Fitch") and have a maturity of one year or less.

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Vanguard Tax-Exempt Bond Index Fund); 71232 (January 3, 2014), 79 FR 1662 (January 9, 2014) (SR-NYSEArca-2013-118) (order approving listing and trading of Market Vectors Short High-Yield Municipal Index ETF); and 63881 (February 9, 2011), 76 FR 9065 (February 16, 2011) (SR-NYSEArca-2010-120) (order approving listing and trading of SPDR Nuveen S&P High Yield Municipal Bond ETF).

<sup>31</sup> See supra note 23.

The Fund may invest in the following short-term debt instruments: (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 association; (3) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (4) repurchase agreements,<sup>32</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>33</sup>

With respect to up to 20% of its net assets, the Fund may (i) invest in the securities of other investment companies registered under the 1940 Act, including money market funds, other ETFs,<sup>34</sup> open-end funds (other than money market funds and other ETFs), and closed-end funds and (ii) acquire short positions in the securities of the foregoing investment companies.

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<sup>32</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 ("Trust Board"). 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>33</sup> The Fund may only invest in commercial paper rated A-3 or higher by S&P Ratings, Prime-3 or higher by Moody's or F3 or higher by Fitch.

<sup>34</sup> 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

With respect to up to 20% of its net assets, the Fund may (i) invest in exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts and (ii) acquire short positions in the foregoing derivatives. Transactions in the foregoing derivatives 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 Fund's investments in derivative instruments will be consistent with the Fund's investment objectives and the 1940 Act and will not be used to seek to achieve a multiple or inverse multiple of an index.

#### Investment Restrictions

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.<sup>35</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

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

<sup>35</sup> 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).

resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.<sup>36</sup>

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 (a) Municipal Securities issued by governments or political subdivisions of governments, (b) obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities, or (c) securities of other investment companies.<sup>37</sup> In addition, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,<sup>38</sup> the Fund's investments in Municipal Securities will provide exposure (based on dollar amount invested) to (a) at least 10 different industries<sup>39</sup> (with no more than 25% of the value of the Fund's net assets comprised of Municipal Securities

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<sup>36</sup> The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. See Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. See also Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding "Restricted Securities"); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N-1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. See Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a-7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

<sup>37</sup> See Form N-1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. See, e.g., Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

<sup>38</sup> See supra note 17 regarding the meaning of the terms "initial invest-up period" and "periods of high cash inflows or outflows."

<sup>39</sup> The municipal industry classification system used by the Fund will divide the municipal securities universe into distinct categories that are intended to reflect either the use of proceeds generated by particular subsets of municipal securities or the collateral/sources of repayment securing/backing such municipal securities. For example, municipal bonds associated with the airport industry are issued to construct or expand an airport and/or related facilities and are secured by revenues generated from the use of the airport.

that provide exposure to any single industry) and (b) at least 15 different states (with no more than 30% of the value of the Fund's net assets comprised of Municipal Securities that provide exposure to any single state).<sup>40</sup>

Under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,<sup>41</sup> (a) with respect to 75% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 3% of the value of the Fund's net assets and (b) with respect to 15% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 5% of the value of the Fund's net assets.<sup>42</sup>

Under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,<sup>43</sup> (a) with respect to the Municipal Securities in which the Fund invests that are rated investment grade by each NRSRO rating such securities, at the time of purchase, the applicable borrower will be obligated to pay debt service on issues of municipal obligations that have an aggregate principal amount outstanding of \$100 million or more and (b) with respect to all other Municipal Securities in which the Fund invests ("Clause B

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<sup>40</sup> For the avoidance of doubt, in the case of Municipal Securities that are issued by entities whose underlying assets are municipal bonds, the underlying municipal bonds will be taken into account.

<sup>41</sup> See supra note 17 regarding the meaning of the terms "initial invest-up period" and "periods of high cash inflows or outflows."

<sup>42</sup> For this purpose, (a) in the case of a municipal conduit financing (in general terms, the issuance of municipal securities by an issuer to finance a project to be used primarily by a third party (the "conduit borrower")), the term "borrower" will refer to the conduit borrower (i.e., the party on which a bondholder must rely for repayment) and (b) in the case of other municipal financings, the term "borrower" will refer to the issuer of the municipal securities. In addition, for the avoidance of doubt, in the case of Municipal Securities that are issued by entities whose underlying assets are municipal bonds, the underlying municipal bonds will be taken into account.

<sup>43</sup> See note 17 regarding the meaning of the terms "initial invest-up period" and "periods of high cash inflows or outflows."

Munis”),<sup>44</sup> at the time of purchase of a Clause B Muni, the borrowers of all Clause B Munis held by the Fund, in the aggregate, will have a weighted average of principal municipal debt outstanding of \$50 million or more.<sup>45</sup> In complying with this requirement, the Fund will calculate the weighted average of all principal municipal debt outstanding of all Clause B Muni borrowers at the time of purchase of a new Clause B Muni based on (i) the most recent information available on debt outstanding of the new Clause B Muni purchase and (ii) the debt outstanding information available at the previous time of original purchase of all other existing Clause B Muni borrowers already held in the Fund.<sup>46</sup> Purchases that add to an existing borrower position will result in updated debt calculations for that borrower using the most recent information available. Notwithstanding the foregoing, in the case of a Municipal Security that is a pre-refunded or escrowed to maturity bond, such Municipal Security will be included in clause (a) of the first sentence of this paragraph only if it was rated investment grade by each NRSRO rating such security immediately prior to being pre-refunded or escrowed to maturity, as applicable, and will otherwise be a Clause B Muni.

#### Creation and Redemption of Shares

The Fund will issue and redeem Shares on a continuous basis at net asset value (“NAV”)<sup>47</sup> only in large blocks of Shares (“Creation Units”) in transactions with authorized

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<sup>44</sup> For the avoidance of doubt, unrated Municipal Securities, regardless of credit quality, will be Clause B Munis.

<sup>45</sup> For purposes of this paragraph, see supra note 42 for the meaning of the term “borrower”. In addition, for the avoidance of doubt, in the case of Municipal Securities that are issued by entities whose underlying assets are municipal bonds, the underlying municipal bonds will be taken into account.

<sup>46</sup> The Fund will not be required to update information regarding debt outstanding for borrowers of Clause B Munis already held in the Fund.

<sup>47</sup> The NAV of the Fund’s Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange (“NYSE”),



participants, generally including broker-dealers and large institutional investors (“Authorized Participants”). Creation Units generally will consist of 50,000 Shares, although this may change from time to time. Creation Units, however, are not expected to consist of less than 50,000 Shares. As described in the Registration Statement and consistent with the Exemptive Relief, the Fund will issue and redeem Creation Units in exchange for an in-kind portfolio of instruments and/or cash in lieu of such instruments (the “Creation Basket”).<sup>48</sup> In addition, if there is a difference between the NAV attributable to a Creation Unit and the market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments (which may include cash-in-lieu amounts) with the lower value will pay to the other an amount in cash equal to the difference (referred to as the “Cash Component”).

Creations and redemptions must be made by or through an Authorized Participant that has executed an agreement that has been agreed to by the Distributor and BBH with respect to creations and redemptions of Creation Units. All standard orders to create Creation Units must be received by the transfer agent no later than the closing time of the regular trading session on the NYSE (ordinarily 4:00 p.m., Eastern Time) (the “Closing Time”), in each case on the date such order is placed in order for the creation of Creation Units to be effected based on the NAV of Shares as next determined on such date after receipt of the order in proper form. Shares may be redeemed only in Creation Units at their NAV next determined after receipt, not later than the Closing Time, of a redemption request in proper form by the Fund through the transfer agent and only on a business day.

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generally 4:00 p.m., Eastern Time (the “NAV Calculation Time”). NAV per Share will be calculated by dividing the Fund’s net assets by the number of Fund Shares outstanding.

<sup>48</sup> Subject to, and in accordance with, the provisions of the Exemptive Relief, it is expected that the Fund will typically issue and redeem Creation Units on a cash basis; however, at times, it may issue and redeem Creation Units on an in-kind (or partially in-kind) basis.

The Fund’s custodian, through the National Securities Clearing Corporation, will make available on each business day, prior to the opening of business of the Exchange, the list of the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Component (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following business day prior to commencement of trading in the Shares.

#### Net Asset Value

The Fund’s NAV will be determined as of the close of regular trading on the NYSE on each day the NYSE is open for trading. If the NYSE closes early on a valuation day, the NAV will be determined as of that time. 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. The result, rounded to the nearest cent, will be the NAV per Share. All valuations will be subject to review by the Trust Board or its delegate.

The Fund’s investments will be valued daily. As described more specifically below, investments traded on an exchange (i.e., a regulated market), will generally be valued at market value prices that represent last sale or official closing prices. In addition, as described more specifically below, non-exchange traded investments (including Municipal Securities) will generally be valued using prices obtained from third-party pricing services (each, a “Pricing Service”).<sup>49</sup> If, however, valuations for any of the Fund’s investments cannot be readily obtained as provided in the preceding manner, or the Pricing Committee of the Adviser (the “Pricing

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<sup>49</sup> The Adviser may use various Pricing Services or discontinue the use of any Pricing Services, as approved by the Trust Board from time to time.

Committee”)<sup>50</sup> questions the accuracy or reliability of valuations that are so obtained, such investments will be valued at fair value, as determined by the Pricing Committee, in accordance with valuation procedures (which may be revised from time to time) adopted by the Trust Board (the “Valuation Procedures”), and in accordance with provisions of the 1940 Act. The Pricing Committee’s fair value determinations may require subjective judgments about the value of an asset. The fair valuations attempt to estimate the value at which an asset could be sold at the time of pricing, although actual sales could result in price differences, which could be material.

Certain securities, including in particular Municipal Securities, in which the Fund may invest will not be listed on any securities exchange or board of trade. Such securities will typically be bought and sold by institutional investors in individually negotiated private transactions that function in many respects like an over-the-counter secondary market, although typically no formal market makers will exist. Certain securities, particularly debt securities, will have few or no trades, or trade infrequently, and information regarding a specific security may not be widely available or may be incomplete. Accordingly, determinations of the value of debt securities may be based on infrequent and dated information. Because there is less reliable, objective data available, elements of judgment may play a greater role in valuation of debt securities than for other types of securities.

The information summarized below is based on the Valuation Procedures as currently in effect; however, as noted above, the Valuation Procedures are amended from time to time and, therefore, such information is subject to change.

The following investments will typically be valued using information provided by a Pricing Service: (a) except as provided below, Municipal Securities; (b) except as provided

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<sup>50</sup> The Pricing Committee will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund’s portfolio.

below, short-term U.S. government securities, commercial paper, and bankers' acceptances, all as set forth under "Other Investments" (collectively, "Short-Term Debt Instruments"); and (c) except as provided below, taxable and other municipal securities that are not Municipal Securities. Debt instruments may be valued at evaluated mean prices, as provided by Pricing Services. 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.

Municipal Securities, Short-Term Debt Instruments and taxable and other municipal securities 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 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.

Repurchase agreements will typically be valued as follows:

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.

Equity securities (including ETFs and closed-end funds) listed on any exchange other than the Exchange will typically be valued at the last sale price on the exchange on which they are principally traded on the business day as of which such value is being determined. Such equity securities (including ETFs and closed-end funds) listed on the Exchange will typically be

valued at the official closing price on the business day as of which such value is being determined. If there has been no sale on such day, or no official closing price in the case of securities traded on the Exchange, such equity securities will typically be valued using fair value pricing. Such equity securities traded on more than one securities exchange will be valued at the last sale price or official closing price, as applicable, on the business day as of which such value is being determined at the close of the exchange representing the principal market for such securities.

Money market funds and other registered open-end management investment companies (other than ETFs, which will be valued as described above) will typically be valued at their net asset values as reported by such registered open-end management investment companies to Pricing Services.

Exchange-listed derivatives (including options on U.S. Treasury securities, options on U.S. Treasury futures contracts, and U.S. Treasury futures contracts) will typically be valued at the closing price in the market where such instruments are principally traded.

#### Availability of Information

The Fund's website ([www.ftportfolios.com](http://www.ftportfolios.com)), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The website will include 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 (the "Bid/Ask Price"),<sup>51</sup> and a

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<sup>51</sup> The Bid/Ask Price of the Fund will be determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV.

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. On each business day, before commencement of trading in Shares in the Regular Market Session<sup>52</sup> on the Exchange, the Fund will disclose on its website the identities and quantities of the portfolio of securities and other assets (the “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.<sup>53</sup> 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), 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.

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The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

<sup>52</sup> See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m., Eastern Time; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m., Eastern Time; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m., Eastern Time).

<sup>53</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.

In addition, for the Fund, 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. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,<sup>54</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 Intraday Indicative Value will be based on quotes and closing prices provided by a dealer who makes a market in those instruments. Premiums and discounts between the Intraday Indicative Value and the market price may occur. 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.

The dissemination of the Intraday Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and will provide a close estimate of that value throughout the trading day.

Investors will also be able to obtain the Fund’s Statement of Additional Information (“SAI”), the Fund’s annual and semi-annual reports (together, “Shareholder Reports”), and its Form N-CSR and Form N-SAR, filed twice a year. The Fund’s SAI and Shareholder Reports will be available free upon request from the Fund, and those documents and the Form N-CSR and Form N-SAR may be viewed on-screen or downloaded from the Commission’s website at [www.sec.gov](http://www.sec.gov). Information regarding market price and trading volume of the Shares will be

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<sup>54</sup> 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. GIDS provides investment professionals with the daily information needed to track or trade Nasdaq indexes, listed ETFs, or third party partner indexes and ETFs.

continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for 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 exchange-listed equity securities (including other ETFs and closed-end funds) 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-listed options will be available via the Options Price Reporting Authority.

One source of price information for Municipal Securities and taxable and other municipal securities will be the Electronic Municipal Market Access ("EMMA") of the Municipal Securities Rulemaking Board ("MSRB").<sup>55</sup> Additionally, the MSRB offers trade data subscription services that permit subscribers to obtain same-day pricing information about municipal securities transactions. Moreover, pricing information for Municipal Securities, as well as for taxable and other municipal securities, Short-Term Debt Instruments (including short-term U.S. government securities, commercial paper, and bankers' acceptances), and repurchase agreements will be available from major broker-dealer firms and/or major market data vendors and/or Pricing Services.

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<sup>55</sup> Information available on EMMA includes next-day information regarding municipal securities transactions and par amounts traded. In addition, a source of price information for certain taxable municipal securities is the Trade Reporting and Compliance Engine ("TRACE") of the Financial Industry Regulatory Authority ("FINRA").



Pricing information for exchange-listed derivatives (including options on U.S. Treasury securities, options on U.S. Treasury futures contracts, and U.S. Treasury futures contracts), ETFs and closed-end funds will be available from the applicable listing exchange and from major market data vendors.

Money market funds and other open-end funds (excluding 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.

Additional information regarding the Fund and the Shares, including investment strategies, risks, creation and redemption procedures, fees, Fund holdings disclosure policies, distributions and taxes will be included in the Registration Statement.

#### Initial and Continued Listing

The Shares will be subject to Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and continued listing, the Fund must be in compliance with Rule 10A-3<sup>56</sup> under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

#### Trading Halts

With respect to trading halts, 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

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<sup>56</sup> See 17 CFR 240.10A-3.

pauses under Nasdaq Rules 4120(a)(11) and (12). Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the securities 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. 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.

#### Trading Rules

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. Nasdaq will allow trading in the Shares from 4:00 a.m. until 8:00 p.m., Eastern Time. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in Nasdaq Rule 5735(b)(3), the minimum price variation for quoting and entry of orders in Managed Fund Shares traded on the Exchange is \$0.01.

#### Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>57</sup> The Exchange represents that 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.

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<sup>57</sup> 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.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund (including closed-end funds, ETFs, exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures, and exchange-listed U.S. Treasury futures contracts) with other markets and other entities that are members of the Intermarket Surveillance Group (“ISG”),<sup>58</sup> and FINRA may obtain trading information regarding trading in the Shares and such exchange-listed 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-listed securities and instruments 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. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA’s TRACE.<sup>59</sup>

At least 90% of the Fund’s net assets that are invested in exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts (in the aggregate) will be invested in instruments

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<sup>58</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.

<sup>59</sup> For Municipal Securities, trade information can generally be found on the MSRB’s EMMA.

that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange. All of the Fund's net assets that are invested in exchange-listed equity securities (including closed-end funds 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 Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

#### Information Circular

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: (1) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (4) 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; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

Additionally, the Information Circular will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Information Circular will also

disclose the trading hours of the Shares of the Fund and the applicable NAV Calculation Time for the Shares. The Information Circular will disclose that information about the Shares of the Fund will be publicly available on the Fund's website.

#### Continued Listing Representations

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. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.

#### 2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act in general and Section 6(b)(5) of the Act in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in Nasdaq Rule 5735. The Exchange

represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.

The Adviser is not a broker-dealer, but it is affiliated with a broker-dealer and is required to implement a “fire wall” with respect to such broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund’s portfolio. In addition, paragraph (g) of Nasdaq Rule 5735 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.

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund (including closed-end funds, ETFs, exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts) with other markets and other entities that are members of ISG, and FINRA may obtain trading information regarding trading in the Shares and such exchange-listed 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-listed securities and instruments 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. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA’s TRACE. At least 90% of the Fund’s net assets that are invested in exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts,

and exchange-listed U.S. Treasury futures contracts (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. All of the Fund's net assets that are invested in exchange-listed equity securities (including closed-end funds 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.

The primary investment objective of the Fund will be to generate current income that is exempt from regular federal income taxes and its secondary objective will be long-term capital appreciation. Under normal market conditions, the Fund will seek to achieve its investment objectives by investing at least 80% of its net assets (including investment borrowings) in Municipal Securities. The Fund may invest up to 20% of its net assets in taxable municipal securities and in tax-exempt municipal securities that are not Municipal Securities. In addition, the Fund may invest up to 10% of its net assets in Distressed Municipal Securities. With respect to up to 20% of its net assets, the Fund may (i) invest in exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts and (ii) acquire short positions in the foregoing derivatives. The Fund's investments in derivative instruments will be consistent with the Fund's investment objectives and the 1940 Act and will not be used to seek to achieve a multiple or inverse multiple of an index. Also, 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. 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.

Under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,<sup>60</sup> the Fund's investments in Municipal Securities will provide exposure (based on dollar amount invested) to (a) at least 10 different industries (with no more than 25% of the value of the Fund's net assets comprised of Municipal Securities that provide exposure to any single industry) and (b) at least 15 different states (with no more than 30% of the value of the Fund's net assets comprised of Municipal Securities that provide exposure to any single state). In addition, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,<sup>61</sup> (a) with respect to 75% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 3% of the value of the Fund's net assets and (b) with respect to 15% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 5% of the value of the Fund's net assets. The Exchange believes that the foregoing restrictions should mitigate the risks associated with manipulation in that they limit exposure to specific industries, states and borrowers.

Further, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,<sup>62</sup> (a) with respect to the Municipal Securities in which

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<sup>60</sup> See note 17 regarding the meaning of the terms "initial invest-up period" and "periods of high cash inflows or outflows."

<sup>61</sup> Id.

<sup>62</sup> Id.



the Fund invests that are rated investment grade by each NRSRO rating such securities, at the time of purchase, the applicable borrower will be obligated to pay debt service on issues of municipal obligations that have an aggregate principal amount outstanding of \$100 million or more and (b) with respect to Clause B Munis, at the time of purchase of a Clause B Muni, the borrowers of all Clause B Munis held by the Fund, in the aggregate, will have a weighted average of principal municipal debt outstanding of \$50 million or more. In complying with this requirement, the Fund will calculate the weighted average of all principal municipal debt outstanding of all Clause B Muni borrowers at the time of purchase of a new Clause B Muni based on (i) the most recent information available on debt outstanding of the new Clause B Muni purchase and (ii) the debt outstanding information available at the previous time of original purchase of all other existing Clause B Muni borrowers already held in the Fund.<sup>63</sup> Purchases that add to an existing borrower position will result in updated debt calculations for that borrower using the most recent information available. Notwithstanding the foregoing, in the case of a Municipal Security that is a pre-refunded or escrowed to maturity bond, such Municipal Security will be included in clause (a) of the first sentence of this paragraph only if it was rated investment grade by each NRSRO rating such security immediately prior to being pre-refunded or escrowed to maturity, as applicable, and will otherwise be a Clause B Muni. The Exchange believes that the foregoing restrictions should mitigate the risks associated with manipulation in that they impose requirements relating to the outstanding municipal debt of borrowers of Municipal Securities.

The Fund's investments will be valued daily. Investments traded on an exchange (i.e., a regulated market), will generally be valued at market value prices that represent last sale or

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<sup>63</sup> The Fund will not be required to update information regarding debt outstanding for borrowers of Clause B Munis already held in the Fund.

official closing prices. Non-exchange traded investments (including Municipal Securities) will generally be valued using prices obtained from a Pricing Service. If, however, valuations for any of the Fund's investments cannot be readily obtained as provided in the preceding two sentences, or the Pricing Committee questions the accuracy or reliability of valuations that are so obtained, such investments will be valued at fair value, as determined by the Pricing Committee, in accordance with the Valuation Procedures and in accordance with provisions of the 1940 Act.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service, will be widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session. On each business day, before commencement of trading in Shares in the Regular Market Session on the Exchange, the Fund will disclose on its website the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. 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, and 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 CTA plans for the Shares. One source of price information for Municipal Securities and taxable and other municipal securities will be the MSRB's EMMA.

Additionally, the MSRB offers trade data subscription services that permit subscribers to obtain same-day pricing information about municipal securities transactions. Moreover, pricing information for Municipal Securities, as well as for taxable and other municipal securities, Short-Term Debt Instruments (including short-term U.S. government securities, commercial paper, and bankers' acceptances), and repurchase agreements will be available from major broker-dealer firms and/or major market data vendors and/or Pricing Services.

Pricing information for exchange-listed derivatives (including options on U.S. Treasury securities, options on U.S. Treasury futures contracts, and U.S. Treasury futures contracts), ETFs and closed-end funds will be available from the applicable listing exchange and from major market data vendors.

Money market funds and other open-end funds (excluding 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.

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. Trading in Shares of the Fund will be halted under the conditions specified in Nasdaq Rules 4120 and 4121 or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and

trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund (including closed-end funds, ETFs, exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts) with other markets and other entities that are members of ISG, and FINRA may obtain trading information regarding trading in the Shares and such exchange-listed 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-listed securities and instruments 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. Furthermore, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

For the above reasons, Nasdaq believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of actively-managed exchange-traded fund that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

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>64</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,<sup>65</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, 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>66</sup> which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotation and last sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and CTA plans for the Shares.

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<sup>64</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>65</sup> 15 U.S.C. 78f(b)(5).

<sup>66</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

In addition, for the Fund, 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. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,<sup>67</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.<sup>68</sup>

On each business day, before commencement of trading in Shares in the Regular Market Session<sup>69</sup> on the Exchange, the Fund will disclose on its website the identities and quantities of the portfolio of securities and other assets (the “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.<sup>70</sup> The Fund’s custodian, through the National Securities Clearing Corporation, will make available on each business day, prior to the opening of business of the

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<sup>67</sup> See supra note 54.

<sup>68</sup> The Exchange states that several major market data vendors display or make widely available Portfolio Indicative Values taken from the CTA or other data feeds.

<sup>69</sup> See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m., Eastern Time; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m., Eastern Time; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m., Eastern Time).

<sup>70</sup> The Fund’s disclosure of derivative positions in the Disclosed Portfolio will include information designed to allow 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), 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.

Exchange, the list of the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Component (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following business day prior to commencement of trading in the Shares.

The NAV of the Fund's Shares will normally be determined as of the close of the regular trading session on the Exchange (ordinarily 4:00 p.m. Eastern time) on each business day. 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.

One source of price information for Municipal Securities and taxable municipal securities will be the EMMA of the MSRB.<sup>71</sup> Additionally, the MSRB offers trade data subscription services that permit subscribers to obtain same-day pricing information about municipal securities transactions. Moreover, pricing information for Municipal Securities, as well as for taxable and other municipal securities, Short-Term Debt Instruments (including short-term U.S. government securities, commercial paper, and bankers' acceptances), and repurchase agreements will be available from major broker-dealer firms or from major market data vendors or Pricing Services.

Pricing information for exchange-listed derivatives (including options on U.S. Treasury securities, options on U.S. Treasury futures contracts, and U.S. Treasury futures contracts), ETFs, and closed-end funds will be available from the applicable listing exchange and from major market data vendors. Money market funds and other open-end funds (excluding ETFs) are

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<sup>71</sup> See supra note 55.

typically priced once each business day, and their prices will be available through the applicable fund's website or from major market data vendors. Quotation and last sale information for exchange-listed equity securities (including other ETFs and closed-end funds) 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-listed options will be available via the Options Price Reporting Authority. The Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Trading in Shares of the Fund will be halted under the conditions specified in Nasdaq Rules 4120 and 4121<sup>72</sup> or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which 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. In addition, paragraph (g) of Nasdaq Rule 5735 further requires that personnel who make decisions on the open-end fund's portfolio

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<sup>72</sup> These reasons may include: (1) the extent to which trading is not occurring in the securities and financial instruments comprising 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. With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.



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 represents that the Adviser is not a broker-dealer, but it is affiliated with the Distributor, 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/or changes to the portfolio.<sup>73</sup>

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. The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>74</sup> The Commission believes that the Exchange's procedures, combined with the Fund's general adherence to the generic fixed income listing requirements in Nasdaq Rule 5705(b)(4)(A) on a continuous basis measured at the time of purchase are designed to mitigate the potential for price manipulation of the shares. Furthermore, the Commission believes that the investment restrictions discussed above appear reasonably designed to minimize the Fund's susceptibility to manipulation.

The Exchange represents that it deems the Shares to be equity securities, thus rendering the trading of the Shares subject to the Exchange's existing rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following additional representations:

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<sup>73</sup> See supra notes 16 and 23.

<sup>74</sup> The Exchange states 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. See supra note 57.

- (1) The Shares will conform to the initial and continued listing criteria under Nasdaq Rule 5735.<sup>75</sup>
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.<sup>76</sup>
- (3) Trading in the Shares will be subject to the existing trading surveillances, administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws, and that 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 federal securities laws applicable to trading on the Exchange.<sup>77</sup>
- (4) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund (including closed-end funds, ETFs, exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures, and exchange-listed U.S. Treasury futures contracts) with other markets and other entities that are members of the ISG, and FINRA may obtain trading information regarding trading in the Shares and in the exchange-listed securities and instruments held by the Fund from these markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund from markets and other entities that are members of ISG, which includes securities and futures

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<sup>75</sup> See Amendment No. 3, *supra* note 12, at 33.

<sup>76</sup> See *id.* at 29.

<sup>77</sup> See *id.* at 30.

exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.<sup>78</sup>

- (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. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.<sup>79</sup>
- (6) For initial and continued listing, the Fund must be in compliance with Rule 10A-3<sup>80</sup> under the Act.<sup>81</sup>

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<sup>78</sup> See id. at 30-31.

<sup>79</sup> See id. at 31-32.

<sup>80</sup> See 17 CFR 240.10A-3.

- (7) The Fund may invest up to 10% of its net assets in Distressed Municipal Securities.<sup>82</sup>
- (8) Under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows, (1) with respect to 75% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 3% of the value of the Fund's net assets; and (2) with respect to 15% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 5% of the value of the Fund's net assets.<sup>83</sup>
- (9) Except for the initial invest-up period and periods of high cash inflows or outflows, the Fund's investments in Municipal Securities will provide exposure to at least 15 different states, with no more than 30% of the value of the Fund's net assets comprising Municipal Securities that provide exposure to any single state.<sup>84</sup>
- (10) Except for the initial invest-up period and periods of high cash inflows or outflows, the Fund's investments in Municipal Securities will provide exposure to at least 10 different industries with no more than 25% of the value of the Fund's net assets comprising Municipal Securities that provide exposure to any single industry.<sup>85</sup>

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<sup>81</sup> See Amendment No. 3, supra note 12, at 28.

<sup>82</sup> See id. at 35.

<sup>83</sup> See id. at 17.

<sup>84</sup> See id. at 16-17.

<sup>85</sup> See id.

The Exchange also represents that all statements and representations made in the proposed rule change, as modified by Amendment No. 3 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 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. 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, and the Exchange's description of the Fund. 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.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>86</sup> and the rules and regulations thereunder applicable to a national securities exchange.

#### IV. Solicitation of Comments on Amendment No. 3

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 3 is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

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<sup>86</sup> 15 U.S.C. 78f(b)(5).

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Nasdaq-2016-002 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Nasdaq-2016-002. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Nasdaq-2016-002 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 3 in the Federal Register. Amendment No. 3 supplements the proposed rule change by clarifying the Fund's general adherence to the quantitative standards set forth in NASDAQ 5705(b)(4)(A).<sup>87</sup> In addition, the Exchange represents that it would adhere to certain investment restrictions, including but not limited to, the following:

(1) with respect to 75% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 3% of the value of the Fund's net assets;

(2) with respect to 15% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 5% of the value of the Fund's net assets;

(3) the Fund's investments in Municipal Securities will provide exposure to at least 15 different states, with no more than 30% of the value of the Fund's net assets comprising Municipal Securities that provide exposure to any single state; and

(4) the Fund's investments in Municipal Securities will provide exposure to at least 10 different industries with no more than 25% of the value of the Fund's net assets comprising Municipal Securities that provide exposure to any single industry.<sup>88</sup>

The addition of these investment restrictions helped the Commission find that the proposed listing and trading of the Shares is consistent with the portion of Section 6(b)(5) of the

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<sup>87</sup> See Amendment No. 3, supra note 12, at 10-13.

<sup>88</sup> The Fund represents that it would adhere to these investment restrictions under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows. See id. at 16-17.

Exchange Act,<sup>89</sup> which requires that the rules of a national securities exchange must be designed to, among other things, prevent fraudulent and manipulative acts and practices and, in general, to protect investors and the public interest. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>90</sup> to approve the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>91</sup> that the proposed rule change (SR-Nasdaq-2016-002), as modified by Amendment No. 3 be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>92</sup>

Brent J. Fields  
Secretary

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<sup>89</sup> 15 U.S.C. 78f(b)(5).

<sup>90</sup> 15 U.S.C. 78s(b)(2).

<sup>91</sup> Id.

<sup>92</sup> 17 CFR 200.30-3(a)(12).