

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79377; File No. SR-NASDAQ-2016-134)

November 22, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Certain Exchange-Traded Managed Funds

I. Introduction

On September 28, 2016, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade the common shares (“Shares”) of the following Exchange-Traded Managed Funds: Gabelli ESG NextShares; Gabelli All Cap NextShares; Gabelli Equity Income NextShares; Gabelli Small and Mid Cap Value NextShares; and Gabelli Media Mogul NextShares (individually, “Fund,” and collectively, “Funds”). The proposed rule change was published for comment in the Federal Register on October 17, 2016.<sup>3</sup> On October 18, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</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. 79082 (Oct. 11, 2016), 81 FR 71549 (“Notice”).

<sup>4</sup> In Amendment No. 1 to the proposed rule change, the Exchange: (a) identified the public websites on which certain information about the Funds would be available; (b) discussed the obligations of the Adviser and its related personnel under the Advisers Act (as defined herein); (c) noted that the Bank of New York Mellon would act as custodian and transfer agent for the Funds; (d) clarified certain investment strategies of the Funds; and (e) made other technical, non-substantive corrections in the proposed rule change. Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2016-134/nasdaq2016134-1.pdf>. Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change, as modified by Amendment No. 1.

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

The Exchange proposes to list and trade the Shares of each Fund under Nasdaq Rule 5745, which governs the listing and trading of Exchange-Traded Managed Fund Shares, which are defined in Nasdaq Rule 5745(c)(1). Each Fund is a series of Gabelli NextShares Trust ("Trust").<sup>5</sup> The Exchange represents that the Trust is registered with the Commission as an open-end investment company and has filed a registration statement on Form N-1A ("Registration Statement") with the Commission.<sup>6</sup>

Gabelli Funds, LLC ("Adviser") will be the adviser to the Funds. G.distributors, LLC will be the principal underwriter and distributor of each Fund's Shares. The Bank of New York Mellon will act as custodian and transfer agent. BNY Mellon Investment Servicing (US) Inc. will act as the sub-administrator to the Funds.

The Exchange has made the following representations and statements in describing the Funds.<sup>7</sup>

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<sup>5</sup> According to the Exchange, the Trust and certain affiliates of the Trusts have obtained exemptive relief under the Investment Company Act of 1940 ("1940 Act"). See Investment Company Act Release No. 31608 (May 19, 2015) (File No. 812-14438). The Exchange represents that, in compliance with Nasdaq Rule 5745(b)(5), which applies to Shares based on an international or global portfolio, the Trust's application for exemptive relief under the 1940 Act states that each Fund will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933, as amended.

<sup>6</sup> See Registration Statement on Form N-1A for the Trust dated June 6, 2016 (File Nos. 333-211881 and 811-23160).

<sup>7</sup> The Commission notes that additional information regarding the Trust, the Funds, and the Shares, including investment strategies, risks, creation and redemption procedures, calculation of net asset value ("NAV"), fees, distributions, and taxes, among other things,

A. Principal Investment Strategies of the Funds

According to the Exchange, each Fund will be actively managed and will pursue the various principal investment strategies described below.<sup>8</sup>

1. Gabelli ESG NextShares (“Gabelli ESG Fund”)

The Gabelli ESG Fund seeks to provide capital appreciation. The Gabelli ESG Fund will seek to achieve its objective by investing substantially all, and in any case no less than 80%, of its net assets (plus borrowings for investment purposes) in common and preferred stocks of companies that meet the Gabelli ESG Fund’s guidelines for social responsibility at the time of investment. Pursuant to its social responsibility guidelines, the Gabelli ESG Fund will not invest in publicly traded fossil fuel (coal, oil, and gas) companies, the top 50 defense/weapons contractors, or in companies that derive more than 5% of their revenues from the following areas: tobacco, alcohol, gaming, defense/weapons production, and companies involved in the manufacture of abortion-related products.

2. Gabelli All Cap NextShares (“Gabelli All Cap Fund”)

The Gabelli All Cap Fund primarily seeks to provide capital appreciation. Under normal market conditions, the Gabelli All Cap Fund will invest at least 80% of its net assets plus borrowings for investment purposes in common stocks and preferred stocks of companies of all capitalization ranges that are listed on a recognized securities exchange or similar market. The Gabelli All Cap Fund may also invest in common and preferred securities of foreign issuers.

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can be found in the Notice, Amendment No. 1, and Registration Statement, as applicable. See supra notes 3, 4, and 6, respectively, and accompanying text.

<sup>8</sup> According to the Exchange, additional information regarding the Funds also will be available on one of two public websites for the Funds.

3. Gabelli Equity Income NextShares (“Gabelli Equity Income Fund”)

The Gabelli Equity Income Fund seeks a high level of total return on its assets with an emphasis on income. The Gabelli Equity Income Fund will seek to achieve its investment objective through a combination of capital appreciation and current income by investing, under normal market conditions, at least 80% of its net assets plus borrowings for investment purposes in income-producing equity securities. Income-producing equity securities include, for example, common stock and preferred stock.

4. Gabelli Small and Mid Cap Value NextShares (“Gabelli Small and Mid Cap Value Fund”)

The Gabelli Small and Mid Cap Value Fund seeks long-term capital growth. Under normal market conditions, the Gabelli Small and Mid Cap Value Fund will invest at least 80% of its net assets plus borrowings for investment purposes in equity securities (such as common stock and preferred stock) of companies with small or medium-sized market capitalizations (“small cap” and “mid cap” companies, respectively). The Gabelli Small and Mid Cap Value Fund defines “small cap companies” as those with a market capitalization generally less than \$3 billion at the time of investment and “mid cap companies” as those with a market capitalization between \$3 billion and \$12 billion at the time of investment. The Gabelli Small and Mid Cap Value Fund may invest in the equity securities of companies of any market capitalization, subject to its policy of investing at least 80% of its net assets in the equity securities of small-cap and mid-cap companies at the time of investment. In addition, the Gabelli Small and Mid Cap Value Fund may invest up to 25% of its total assets in securities of issuers in a single industry

5. Gabelli Media Mogul NextShares (“Gabelli Media Mogul Fund”)

The Gabelli Media Mogul Fund seeks to provide capital appreciation. Under normal market conditions, the Fund will invest at least 80% of net assets plus borrowings for investment

purposes in (a) companies that were spun-off from Liberty Media Corporation as constituted in 2001, (b) companies that resulted from subsequent mergers of any of those spin-offs, (c) stocks that track performance of those spin-offs or companies that resulted from subsequent mergers of any of those spin-offs, and (d) public companies in which Liberty Media Corporation and its successor companies invest. The current set of companies in which the Fund may invest includes U.S. and non-U.S. listed companies in the telecommunications, media, publishing, and entertainment industries.

B. Portfolio Disclosure and Composition File

Consistent with the disclosure requirements that apply to traditional open-end investment companies, a complete list of current Fund portfolio positions will be made available at least once each calendar quarter, with a reporting lag of not more than 60 days. Funds may provide more frequent disclosures of portfolio positions at their discretion.

As defined in Nasdaq Rule 5745(c)(3), the “Composition File” is the specified portfolio of securities, cash, or both that a Fund will accept as a deposit in issuing a Creation Unit of Shares, and the specified portfolio of securities, cash, or both that a Fund will deliver in a redemption of a Creation Unit of Shares. The Composition File will be disseminated through the National Securities Clearing Corporation once each business day before the open of trading in Shares on that day and also will be made available to the public each day on a free website.<sup>9</sup>

Because the Funds seek to preserve the confidentiality of their current portfolio trading program, a Fund’s Composition File generally will not be a pro rata reflection of the Fund’s investment positions. Each security included in the Composition File will be a current holding of a Fund, but the Composition File generally will not include all of the securities in the Fund’s

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<sup>9</sup> The free website containing the Composition File will be [www.nextshares.com](http://www.nextshares.com).

portfolio or match the weightings of the included securities in the portfolio. Securities that the Adviser is in the process of acquiring for a Fund generally will not be represented in the Fund's Composition File until their purchase has been completed. Similarly, securities that are held in a Fund's portfolio but in the process of being sold may not be removed from its Composition File until the sale program is substantially completed. Funds creating and redeeming Shares in kind will use cash amounts to supplement the in-kind transactions to the extent necessary to ensure that Creation Units are purchased and redeemed at NAV. The Composition File also may consist entirely of cash, in which case it will not include any of the securities in the Fund's portfolio.<sup>10</sup>

C. Intraday Indicative Value

For each Fund, an estimated value of an individual Share, defined in Nasdaq Rule 5745(c)(2) as the "Intraday Indicative Value," will be calculated and disseminated at intervals of not more than 15 minutes throughout the Regular Market Session<sup>11</sup> when Shares trade on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the Intraday Indicative Value will be calculated on an intraday basis and provided to Nasdaq for dissemination via the Nasdaq Global Index Service. The Intraday Indicative Value will be based on current information regarding the value of the securities and other assets held by a Fund.<sup>12</sup>

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<sup>10</sup> In determining whether a Fund will issue or redeem Creation Units entirely on a cash basis, the key consideration will be the benefit that would accrue to the Fund and its investors. For instance, in bond transactions, the Adviser may be able to obtain better execution for a Fund than Authorized Participants because of the Adviser's size, experience and potentially stronger relationships in the fixed-income markets.

<sup>11</sup> See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4:00 a.m. to 9:30 a.m. Eastern Time or "E.T."; (2) Regular Market Session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m. E.T.; and (3) Post-Market Session from 4:00 p.m. or 4:15 p.m. to 8:00 p.m. E.T.).

<sup>12</sup> The Intraday Indicative Values disseminated throughout each trading day would be based on the same portfolio as used to calculate that day's NAV. Funds will reflect purchases and sales of portfolio positions in their NAV the next business day after trades are executed.

The purpose of the Intraday Indicative Value is to enable investors to estimate the next-determined NAV so they can determine the number of Shares to buy or sell if they want to transact in an approximate dollar amount (e.g., if an investor wants to acquire approximately \$5,000 of a Fund, how many Shares should the investor buy?).<sup>13</sup>

D. NAV-Based Trading

Shares of a Fund will be purchased and sold in the secondary market at prices directly linked to the Fund's next-determined NAV using a trading protocol called "NAV-Based Trading." All bids, offers, and execution prices of Shares will be expressed as a premium or discount (which may be zero) to a Fund's next-determined NAV (e.g., NAV-\$0.01, NAV+\$0.01).<sup>14</sup> Each Fund's NAV will be determined each business day, normally as of 4:00 p.m. E.T.

Trade executions will be binding at the time orders are matched on Nasdaq's facilities, with the transaction prices contingent upon the determination of NAV. Nasdaq represents that all Shares listed on the Exchange will have a unique identifier associated with their ticker symbols, which will indicate that the Shares are traded using NAV-Based Trading.

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<sup>13</sup> Because, in NAV-Based Trading, prices of executed trades are not determined until the reference NAV is calculated, buyers and sellers of Shares during the trading day will not know the final value of their purchases and sales until the end of the trading day. A Fund's Registration Statement, website, and any advertising or marketing materials will include prominent disclosure of this fact. Although Intraday Indicative Values may provide useful estimates of the value of intraday trades, they cannot be used to calculate with precision the dollar value of the Shares to be bought or sold.

<sup>14</sup> According to the Exchange, the premium or discount to NAV at which Share prices are quoted and transactions are executed will vary depending on market factors, including the balance of supply and demand for Shares among investors, transaction fees, and other costs in connection with creating and redeeming creation units of Shares, the cost and availability of borrowing Shares, competition among market makers, the Share inventory positions and inventory strategies of market makers, the profitability requirements and business objectives of market makers, and the volume of Share trading.

According to the Exchange, member firms will utilize certain existing order types and interfaces to transmit Share bids and offers to Nasdaq, which will process Share trades like trades in shares of other listed securities.<sup>15</sup> In the systems used to transmit and process transactions in Shares, a Fund's next-determined NAV will be represented by a proxy price (e.g., 100.00) and a premium or discount of a stated amount to the next-determined NAV to be represented by the same increment or decrement from the proxy price used to denote NAV (e.g., NAV-\$0.01 would be represented as 99.99; NAV+\$0.01 as 100.01).

To avoid potential investor confusion, Nasdaq represents that it will work with member firms and providers of market data services to seek to ensure that representations of intraday bids, offers, and execution prices of Shares that are made available to the investing public follow the "NAV-\$0.01/NAV+\$0.01" (or similar) display format. Specifically, the Exchange will use the NASDAQ Basic and NASDAQ Last Sale data feeds to disseminate intraday price and quote data for Shares in real time in the "NAV-\$0.01/NAV+\$0.01" (or similar) display format. Member firms may use the NASDAQ Basic and NASDAQ Last Sale data feeds to source intraday Share prices for presentation to the investing public in the "NAV-\$0.01/NAV+\$0.01" (or similar) display format. Alternatively, member firms may source intraday Share prices in proxy price format from the Consolidated Tape and other Nasdaq data feeds (e.g., Nasdaq TotalView and Nasdaq Level 2) and use a simple algorithm to convert prices into the "NAV-\$0.01/NAV+\$0.01" (or similar) display format. Prior to the commencement of trading in a Fund,

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<sup>15</sup> According to the Exchange, all orders to buy or sell Shares that are not executed on the day the order is submitted will be automatically canceled as of the close of trading on that day. Prior to the commencement of trading in a Fund, the Exchange will inform its members in an Information Circular of the effect of this characteristic on existing order types.

the Exchange will inform its members in an Information Circular of the identities of the specific Nasdaq data feeds from which intraday Share prices in proxy price format may be obtained.

### 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 Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>16</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>17</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Shares will be subject to Rule 5745, which sets forth the initial and continued listing criteria applicable to Exchange-Traded Managed Fund Shares. A minimum of 50,000 Shares and no less than two creation units of each Fund will be outstanding at the commencement of trading on the Exchange.

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Every order to trade Shares of the Funds is subject to the proxy price protection threshold of plus/minus \$1.00, which determines the lower and upper threshold for the life of the order and provides that the order will be canceled at any point if it exceeds \$101.00 or falls below \$99.00, the established

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<sup>16</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>17</sup> 15 U.S.C. 78f(b)(5).

thresholds.<sup>18</sup> With certain exceptions, each order also must contain the applicable order attributes, including routing instructions and time-in-force information, as described in Nasdaq Rule 4703.<sup>19</sup>

Nasdaq also represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and the Financial Industry Regulatory Authority (“FINRA”) on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>20</sup> The Exchange represents that its surveillance procedures are adequate to properly monitor trading of Shares on the Exchange and to deter and detect violations of Exchange rules and applicable federal securities laws. FINRA, on behalf of the Exchange, will communicate as needed with other markets and other entities that are members of the Intermarket Surveillance Group (“ISG”)<sup>21</sup> regarding trading in the Shares, and in exchange-traded securities and instruments held by the Funds (to the extent those exchange-traded securities and instruments are known through the publication of the Composition File and periodic public disclosures of a Fund’s portfolio holdings), and FINRA may obtain trading information from other markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, and in exchange-traded securities and instruments held by the Funds (to the extent those exchange-traded securities and instruments are known through the publication of the Composition File and periodic public disclosures of a Fund’s

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<sup>18</sup> See Nasdaq Rule 5745(h).

<sup>19</sup> See Nasdaq Rule 5745(b)(6).

<sup>20</sup> The Exchange states that FINRA provides surveillance of 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.

<sup>21</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 a Fund’s portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

portfolio holdings), 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.

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) the dissemination of information regarding the Intraday Indicative Value and Composition File; (d) the requirement that members deliver a prospectus to investors purchasing Shares prior to or concurrently with the confirmation of a transaction; and (e) information regarding NAV-Based Trading protocols.

The Information Circular also will identify the specific Nasdaq data feeds from which intraday Share prices in proxy price format may be obtained. As noted above, all orders to buy or sell Shares that are not executed on the day the order is submitted will be automatically canceled as of the close of trading on that day. The Information Circular will discuss the effect of this characteristic on existing order types. In addition, Nasdaq intends to provide its members with a detailed explanation of NAV-Based Trading through a Trading Alert issued prior to the commencement of trading in Shares on the Exchange.

Nasdaq states that the Adviser is not a registered broker-dealer, although it is affiliated with a broker-dealer.<sup>22</sup> The Exchange represents that the Adviser has implemented a fire wall with respect to its affiliated broker-dealer regarding access to information concerning the

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<sup>22</sup> See Notice, *supra* note 3, 81 FR at 71550.

composition of, and changes to, each Fund’s portfolio.<sup>23</sup> The Reporting Authority<sup>24</sup> will ensure that the Composition File will implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding each Fund’s portfolio positions and changes in the positions. In the event that (a) the Adviser registers as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or a sub-adviser to a Fund is a registered broker-dealer or becomes affiliated with a broker-dealer, the applicable entity will implement a fire wall with respect to its relevant personnel and broker-dealer affiliate, as the case may be, regarding access to information concerning the composition of, and changes to, the relevant Fund’s portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.

The Commission also finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>25</sup> which sets forth Congress’ finding that it is in the public interest and appropriate for the protection of investors and the maintenance of

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<sup>23</sup> See *id.* The Exchange further represents that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (“Advisers Act”). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

<sup>24</sup> See Nasdaq Rule 5745(c)(4).

<sup>25</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Information regarding NAV-based trading prices, best bids and offers for Shares, and volume of Shares traded will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. All bids and offers for Shares and all Share trade executions will be reported intraday in real time by the Exchange to the Consolidated Tape and separately disseminated to member firms and market data services through the Exchange data feeds.

Once a Fund's daily NAV has been calculated and disseminated, Nasdaq will price each Share trade entered into during the day at the Fund's NAV plus or minus the trade's executed premium or discount. Using the final trade price, each executed Share trade will then be disseminated to member firms and market data services via an FTP file<sup>26</sup> that will be created for exchange-traded managed funds and that will be confirmed to the member firms participating in the trade to supplement the previously provided information with final pricing.

The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily (on each business day that the New York Stock Exchange is open for trading) and provided to Nasdaq via the Mutual Fund Quotation Service ("MFQS") by the fund accounting agent. As soon as the NAV is entered into MFQS, Nasdaq will disseminate the value to market participants and market data vendors via the Mutual Fund Dissemination Service so that all firms will receive the NAV per share at the same time.

The Exchange further represents that it may consider all relevant factors in exercising its discretion to halt or suspend trading in Shares. Nasdaq will halt trading in Shares under the

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<sup>26</sup> According to Nasdaq, File Transfer Protocol ("FTP") is a standard network protocol used to transfer computer files on the Internet. Nasdaq will arrange for the daily dissemination of an FTP file with executed Share trades to member firms and market data services.

conditions specified in Nasdaq Rule 4120 and in Nasdaq Rule 5745(d)(2)(C). Additionally, Nasdaq may cease trading Shares if other unusual conditions or circumstances exist that, in the opinion of Nasdaq, make further dealings on Nasdaq detrimental to the maintenance of a fair and orderly market. To manage the risk of a non-regulatory Share trading halt, Nasdaq has in place back-up processes and procedures to ensure orderly trading.

Prior to the commencement of market trading in Shares, each Fund will be required to establish and maintain a public website through which its current prospectus may be downloaded. In addition, a separate website ([www.nextshares.com](http://www.nextshares.com)) will include the prior business day's NAV, and the following trading information for that business day expressed as premiums or discounts to NAV: (a) intraday high, low, average, and closing prices of Shares in Exchange trading; (b) the midpoint of the highest bid and lowest offer prices as of the close of Exchange trading, expressed as a premium or discount to NAV ("Closing Bid/Ask Midpoint"); and (c) the spread between highest bid and lowest offer prices as of the close of Exchange trading ("Closing Bid/Ask Spread."). The website at [www.nextshares.com](http://www.nextshares.com) will also contain charts showing the frequency distribution and range of values of trading prices, Closing Bid/Ask Midpoints, and Closing Bid/Ask Spreads over time.

The Exchange represents that all statements and representations made in this filing regarding (a) the description of the Funds' portfolios, (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 of the Funds on the Exchange. The issuer has represented to the Exchange that it will advise the Exchange of any failure by any Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing

requirements.<sup>27</sup> If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Nasdaq Rules 5800, et seq.

This approval order is based on all of the Exchange's representations, including those set forth above, in the Notice and Amendment No. 1,<sup>28</sup> and the Exchange's description of the Funds. The Commission notes that the Funds and the Shares must comply with the requirements of Nasdaq Rule 5745 and the conditions set forth in this proposed rule change to be listed and traded on the Exchange on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act<sup>29</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>27</sup> The Commission notes that certain other proposals for the listing and trading of Managed Fund Shares include a representation that the exchange will “surveil” for compliance with the continued listing requirements. See, e.g., Securities Exchange Act Release No. 78005 (Jun. 7, 2016), 81 FR 38247 (Jun. 13, 2016) (SR-BATS-2015-100). In the context of this representation, it is the Commission’s view that “monitor” and “surveil” both mean ongoing oversight of a fund’s compliance with the continued listing requirements. Therefore, the Commission does not view “monitor” as a more or less stringent obligation than “surveil” with respect to the continued listing requirements.

<sup>28</sup> See supra notes 3 and 4, respectively.

<sup>29</sup> 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>30</sup> that the proposed rule change (SR-NASDAQ-2016-134), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>31</sup>

Robert W. Errett  
Deputy Secretary

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<sup>30</sup> 15 U.S.C. 78s(b)(2).

<sup>31</sup> 17 CFR 200.30-3(a)(12).