

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-83046; File No. SR-NASDAQ-2018-012)

April 13, 2018

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Granting Approval of a Proposed Rule Change to List and Trade, Under Nasdaq Rule 5705, the Shares of the Horizons Russell 2000 Covered Call ETF

I. Introduction

On February 9, 2018, 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 shares (“Shares”) of the Horizons Russell 2000 Covered Call ETF (“Fund”). The proposed rule change was published for comment in the Federal Register on February 28, 2018.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade Shares of the Fund under Rule 5705, which governs the listing and trading of Index Fund Shares on the Exchange. The Shares will be offered by the Fund, which will be a passively managed exchange-traded fund (“ETF”) that seeks to track the performance of the CBOE Russell 2000 30-Delta BuyWrite V2 Index

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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. 82761 (Feb. 22, 2018), 83 FR 8719 (“Notice”).

(“Benchmark Index”).<sup>4</sup> The Fund is a series of the Horizons ETF Trust I (“Trust”).<sup>5</sup> Horizons ETF Management (US), LLC will serve as the investment adviser (“Adviser”) to the Fund.<sup>6</sup> Foreside Fund Services, LLC will serve as the principal underwriter and distributor of the Fund’s Shares. U.S. Bank National Association will act as the custodian for the Fund. U.S. Bancorp Fund Services, LLC will serve as the administrator, transfer agent and fund accounting agent for the Fund. The Benchmark Index was developed by and is maintained by FTSE International Limited and Frank Russell Company (“Index Provider”).<sup>7</sup>

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<sup>4</sup> The Benchmark Index methodology is available at: <https://www.cboe.com/products/strategy-benchmark-indexes/buywrite-indexes/cboe-russell-2000-30-delta-buywrite-index-bxrd>. The Chicago Board Options Exchange, Incorporated (n/k/a Cboe Exchange, Inc.) (“CBOE”) is the index calculation agent for the Benchmark Index.

<sup>5</sup> The Trust is registered with the Commission as an open-end management investment company and has filed a post-effective amendment to its registration statement on Form N-1A (“Registration Statement”) on behalf of the Fund. See Registration Statement for the Trust, filed on June 22, 2017 (File No. 333-183155). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 31961 (Jan. 19, 2016) (File No. 812-14461) (“Exemptive Order”).

<sup>6</sup> The Exchange represents that the Adviser is not a broker-dealer; however, it is affiliated with two broker-dealers. A fire wall exists around the respective personnel at the Adviser and affiliated broker-dealers who have access to information concerning changes and adjustments to the composition and/or changes to the Fund’s portfolio. In addition, such personnel will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund’s portfolio. The Exchange represents that in the event (a) the Adviser, any sub-adviser, or the Index Provider (as discussed herein) becomes registered as a broker-dealer or is newly affiliated with a broker dealer, or (b) any new adviser, sub-adviser, or Index Provider is a registered broker-dealer or becomes affiliated with a broker dealer, then the Adviser, sub-adviser or Index Provider will implement a fire wall with respect to its relevant personnel or such broker dealer affiliate, as applicable, regarding access to information concerning the composition or changes to the portfolio or concerning changes and adjustments to the Benchmark Index and will be subject to procedures designed to prevent the use and dissemination of material, nonpublic information regarding the Fund’s portfolio. According to the Exchange, the Fund does not currently intend to use a sub-adviser.

<sup>7</sup> The Exchange represents that the Index Provider is not a broker-dealer and it is not affiliated with a broker-dealer. A fire wall exists around its personnel who have access to

The Exchange has made the following representations and statements in describing the Fund and its investment strategies, including other assets and investment restrictions.<sup>8</sup>

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

According to the Exchange, the Fund's investment objective is to seek to track the investment results that correspond (before fees and expenses) generally to the performance of the Benchmark Index provided by the Index Provider. The Fund will pursue its objective by investing at least 80% of its total assets in all of the equity securities in the Russell 2000 Index and a single written one-month out-of-the-money covered call option on the Russell 2000 Index. The market value of the option strategy may be up to 20% of the Fund's overall net asset value. The market value of the call options included in the Benchmark Index will not represent more than 10% of the total weight of the Benchmark Index. According to the Exchange, the component securities of the Benchmark Index meet all requirements of Nasdaq Rule 5705(b)(3)(A)(i) except that the Benchmark Index includes call options, which are not NMS Stocks as defined in Rule 600 of Regulation NMS.<sup>9</sup>

In pursuing its investment objective, under normal market conditions,<sup>10</sup> the Fund will seek investment results that, before fees and expenses, generally correspond to the performance

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information concerning changes and adjustments to the Benchmark Index. In addition, such personnel will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Benchmark Index.

<sup>8</sup> Additional information regarding the Trust, the Fund, and the Shares, including information relating to the underlying Index, investment strategies, risks, net asset value ("NAV") calculation, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes, among other information, is included in the Notice and the Registration Statement, as applicable. See Notice, supra note 3 and Registration Statement, supra note 5.

<sup>9</sup> See Notice, supra note 3, 83 FR at 8720.

<sup>10</sup> The term "under normal market conditions" as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme

of the Benchmark Index. The Fund seeks correlation of 0.90 or better between its performance and the performance of the Benchmark Index. A figure of 1.00 would represent perfect correlation. The call option written is at the strike nearest to the 30 Delta between 10:30 a.m. and 11:00 a.m. CT on the roll date (the third Friday of every month).

The Benchmark Index is a benchmark index that measures the performance of a theoretical portfolio that holds the stocks included in the Russell 2000 Index and writes (or sells) a single one-month out-of-the-money Russell 2000 Index covered call option. The call option written for the Benchmark Index is at the strike nearest to the 30 Delta between 10:30 a.m. and 11:00 a.m. CT on the roll date (the third Friday of every month). The Russell 2000 Index measures the performance of the small capitalization sector of the U.S. equity market, as defined by the Index Provider. The Russell 2000 Index is a subset of the Russell 3000 Index, which measures the performance of the broad U.S. equity market, as determined by the Index Provider. The Russell 2000 Index is a float-adjusted capitalization-weighted index of equity securities issued by the approximately 2000 smallest issuers in the Russell 3000 Index. Preferred and convertible preferred stock, redeemable shares, participating preferred stock, warrants, rights, installment receipts and trust receipts are not included in the Russell 2000 Index.

According to the Exchange, because a covered call strategy generates income in the form of premiums on the written call options, the Benchmark Index is generally expected to provide higher total returns with lower volatility than the Russell 2000 Index in most market

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volatility or trading halts in the securities markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. In periods of extreme market disturbance, the Fund may take temporary defensive positions, by overweighting its portfolio in cash/cash-like instruments; however, to the extent possible, the Adviser would continue to seek to achieve the Fund's investment objective.

environments, with the exception of when the equity market is rallying rapidly. The Exchange states that each single call option in the Benchmark Index will be traded on national securities exchanges, such as the CBOE. According to the Exchange, as of October 31, 2017, the Russell 2000 Index included common stocks of 1984 companies, with an average market capitalization of approximately \$2.3 billion.<sup>11</sup>

The Fund will generally use a replication methodology, meaning it will invest in all of the securities and the call option comprising the Benchmark Index in proportion to the weightings in the Benchmark Index. However, the Fund may, from time-to-time, utilize a sampling methodology under various circumstances where it may not be possible or practicable to purchase all of the equity securities comprising the Benchmark Index.

The Exchange represents that the equity securities in which the Fund will invest and the option that the Fund will write will be limited to U.S. exchange-traded securities and call options, respectively, and that such securities will trade in markets that are members of the Intermarket Surveillance Group (“ISG”) or which are parties to a comprehensive surveillance sharing agreement with the Exchange.<sup>12</sup>

The equity securities held by the Fund will be rebalanced quarterly. The call option portion of the portfolio will consist of a single U.S. exchange-traded one-month covered call on the Russell 2000 Index that is written by the Fund slightly out-of-the-money. A call option will give the holder the right to buy the securities underlying the call options written at a predetermined strike price from the Fund. The notional value of the covered call options written (including the financial instruments in the Exchange’s description of the Fund’s Other Investments below) will be generally 100% of the overall Fund.

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<sup>11</sup> See Notice, supra note 3, 83 FR at 8721.

<sup>12</sup> See id. A list of ISG members is available at [www.isgportal.org](http://www.isgportal.org).

The Fund will utilize options in accordance with Rule 4.5 of the Commodity Exchange Act (“CEA”). The Trust, on behalf of the Fund, has filed a notice of eligibility for exclusion from the definition of the term “commodity pool operator” in accordance with Rule 4.5 so that the Fund is not subject to registration or regulation as a commodity pool operator under the CEA.

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

According to the Exchange, the Fund may invest no more than 20% of its net assets in the instruments described below.

The Fund may invest in ETFs, which shall be registered as investment companies under the 1940 Act and trade on a U.S. national securities exchange. The Fund may also buy and sell individual large capitalization equity securities that do not comprise the Russell 2000 Index and are traded on a U.S. national securities exchange.

The Fund may invest in U.S. exchange-listed futures contracts based on (1) the Benchmark Index or Russell 2000 Index and (2) ETFs designed to track the Benchmark Index or Russell 2000 Index. In addition, the Fund may invest in forward contracts based on (1) the Benchmark Index or Russell 2000 Index and (2) ETFs designed to track the Benchmark Index or Russell 2000 Index. The Fund may also buy and sell OTC options on (1) the Benchmark Index or Russell 2000 Index and (2) ETFs designed to track the Benchmark Index or Russell 2000 Index. Moreover, the Fund may enter into dividend and total return swap transactions (including equity swap transactions) based on (1) the Benchmark Index or Russell 2000 Index and (2) ETFs designed to track the Benchmark Index or Russell 2000 Index.<sup>13</sup> The Fund also may engage in

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<sup>13</sup> The Exchange represents that the Fund will transact only with swap dealers that have in place an International Swaps and Derivatives Association (“ISDA”) agreement with the Fund. See id. at 8721 n.10. According to the Exchange, where practicable, the Fund intends to invest in swaps cleared through a central clearing house (“Cleared Swaps”). Currently, only certain of the interest rate swaps in which the Fund intends to invest are Cleared Swaps, while the dividend and total return swaps (including equity swaps) in

interest rate swap transactions. The Fund would use interest rate swap transactions to manage or hedge exposure to interest rate fluctuations.

The Exchange represents that the Fund's short positions and its investments in swaps, futures contracts, forward contracts and options based on the Benchmark Index and Russell 2000 Index and ETFs designed to track the Benchmark Index or Russell 2000 Index will be backed by investments in cash, high-quality short-term debt securities and money-market instruments in an amount equal to the Fund's maximum liability under the applicable position or contract, or will otherwise be offset in accordance with Section 18 of the 1940 Act.<sup>14</sup>

The Fund will attempt to limit counterparty risk in non-cleared swaps, forwards, and OTC option contracts by entering into such contracts only with counterparties the Adviser believes are creditworthy and by limiting the Fund's exposure to each counterparty. The Adviser will monitor the creditworthiness of each counterparty and the Fund's exposure to each counterparty on an ongoing basis.

The Fund may invest in short-term debt securities, money market instruments and shares of money market funds to the extent permitted under the 1940 Act. Short-term debt securities and money market instruments include shares of fixed income or money market mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. government securities (including securities issued or guaranteed by the U.S. government or its authorities, agencies, or

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which the Fund may invest are currently not Cleared Swaps. See id. at 8721 n.11.

<sup>14</sup> The Exchange represents that the Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser will evaluate each approved counterparty using various methods of analysis, such as, for example, the counterparty's liquidity in the event of default, the counterparty's reputation, the Adviser's past experience with the counterparty, and the counterparty's share of market participation. See id. at 8721 n.12.

instrumentalities) and, repurchase agreements.<sup>15</sup> Short-term debt securities include bonds that are rated BBB or higher.

The Exchange represents that the Fund's investments described above in this section will be consistent with the Fund's investment objective and with the requirements of the 1940 Act.<sup>16</sup>

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment). The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities. Illiquid securities 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.

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<sup>15</sup> The Fund may enter into repurchase agreements with banks and broker-dealers. A repurchase agreement is an agreement under which securities are acquired by a fund from a securities dealer or bank subject to resale at an agreed upon price on a later date. The acquiring fund bears a risk of loss in the event that the other party to a repurchase agreement defaults on its obligations and the fund is delayed or prevented from exercising its rights to dispose of the collateral securities.

<sup>16</sup> The Exchange represents that, to limit the potential risk associated with such transactions, the Fund will segregate or " earmark " assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations arising from such transactions. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged. To mitigate leveraging risk, the Adviser will segregate or " earmark " liquid assets or otherwise cover the transactions that may give rise to such risk the 1940 Act. The Exchange further represents that the Fund will not make investments in securities to seek to achieve a multiple or inverse multiple of an index and they will not be used to enhance leverage. See Notice, supra note 3, 83 FR at 8722 n.14.

The Exchange states that the Fund will not invest in assets that are not described in this proposed rule change.

The Fund seeks to track the Benchmark Index, which itself may have concentration in certain regions, economies, markets, industries or sectors. The Fund may concentrate its investments in a particular industry or group of industries to the extent that the Russell 2000 Index concentrates in an industry or group of industries.<sup>17</sup> According to the Exchange, by concentrating its investments in an industry or sector, the Fund faces more risks than if it were diversified broadly over numerous industries or sectors.

### III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act<sup>18</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>19</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>20</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission also finds that the proposal to list and trade

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<sup>17</sup> See Registration Statement, supra note 5, 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>18</sup> 15 U.S.C. 78f.

<sup>19</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>20</sup> 15 U.S.C. 78f(b)(5).

the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>21</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 the Consolidated Tape Association plans for the Shares. With respect to the securities and other assets held by the Fund, the intra-day, executable price quotations on such securities will be available from major broker-dealer firms or on the exchange on which they are traded, as applicable. Intra-day price information will also be available through subscription services, such as Bloomberg, Markit and Thomson Reuters, which can be accessed by Authorized Participants and other investors. Specifically, the intra-day, closing and settlement prices of the portfolio securities and other Fund investments, including exchange-listed equity securities, exchange-listed futures, and exchange-listed options, will be readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, and, with respect to OTC options, swaps, and forwards, from third party pricing sources, or on-line information services such as Bloomberg or Reuters. Price information regarding ETFs will be available from on-line information services and from the website for the applicable investment company security. The intra-day, closing and settlement prices of short-term debt securities and money market instruments will be readily available from published and other public sources or on-line information services. Money market funds are

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<sup>21</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

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 value of the Benchmark Index will be published by one or more major market data vendors every 15 seconds during the Regular Market Session.<sup>22</sup> Information about the Benchmark Index constituents, the weighting of the constituents, the Benchmark Index's methodology, and the Benchmark Index's rules will be available at no charge on the Index Provider's website. In addition, for the Fund, an estimated value, defined in Rule 5705(b)(3)(C) as the "Intraday Indicative Value," that reflects an estimated intraday value of the Fund's portfolio, will be disseminated. The Intraday Indicative Value, available on the NASDAQ Information LLC proprietary index data service,<sup>23</sup> will be based upon the current value for the components of the Disclosed Portfolio (as discussed herein) and will be updated and widely disseminated 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 from the assets' local market and may not reflect events that occur subsequent to the local market's close. Premiums and discounts between the Intraday Indicative Value and the market price may occur.

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 identities and quantities of the portfolio of securities and other assets (the "Disclosed Portfolio") held by the Fund that will form

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<sup>22</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>23</sup> Currently, the NASDAQ 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.

the basis for the Fund's calculation of NAV at the end of the business day.<sup>24</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 Nasdaq Stock Exchange, generally 4:00 p.m. Eastern time. In addition, a basket composition file, which includes the asset names, amounts and share quantities, as applicable, required to be delivered in exchange for the Fund's Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of Nasdaq, via the National Securities Clearing Corporation. The basket will represent one Creation Unit of the Fund.

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 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. The Fund's website will include a form of the prospectus for the Fund that may be downloaded 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

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<sup>24</sup> On a daily basis, the Fund will disclose on the Fund's website ([www.us.horizonsetfs.com](http://www.us.horizonsetfs.com)) 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); with respect to holdings in derivatives, the identity of the security, index, or other asset upon which the derivative is based; for options, the option strike price, quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units), and expiration of call option; maturity date, if any; coupon rate; if any; effective date, if any; market value of the holding; percentage weighting of the holding in the Fund's portfolio; and cash equivalents and the amount of cash held. The website information will be publicly available at no charge.

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.<sup>25</sup> Nasdaq will halt or pause trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (12). Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.<sup>26</sup> If the Intraday Indicative Value, the Benchmark Index value or the value of the Disclosed Portfolio is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. The Exchange also states that it has a general policy prohibiting the distribution of material, non-public information by its employees.<sup>27</sup> In addition, the Exchange states that the Adviser is not a broker-dealer; however, it is affiliated with two broker-dealers. The Exchange states that the Adviser represents that a fire wall exists around the respective personnel at the Adviser and affiliated broker-dealers who have access to information concerning changes and adjustments to the composition and/or changes to the Fund's portfolio.<sup>28</sup> In addition, the

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<sup>25</sup> See Notice, supra note 3, 83 FR at 8724.

<sup>26</sup> These may include: (1) the extent to which trading is not occurring in the securities and/or the financial instruments constituting the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. 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. Trading in the Shares also will be subject to Nasdaq Rule 5705(b)(1)(B)(iv), which sets forth circumstances under which Shares of the Fund may be halted.

<sup>27</sup> See Notice, supra note 3, 83 FR at 8725.

<sup>28</sup> See supra note 6. The Commission also notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the

Exchange represents that such personnel will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund’s portfolio.<sup>29</sup> The Exchange further states that the Index Provider is not a broker-dealer and it is not affiliated with a broker-dealer, and it has represented that a fire wall exists around personnel who have access to information concerning changes and adjustments to the Benchmark Index, and such personnel will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Benchmark Index.<sup>30</sup>

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also the Financial Industry Regulatory Authority (“FINRA”) on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>31</sup> FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, in the equity securities in which the Fund will invest,

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“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 the Advisers Act and Rule 204A-1 thereunder. 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>29</sup> See Notice, supra note 3, 83 FR at 8720.

<sup>30</sup> See id.

<sup>31</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.

and in the U.S. exchange-traded options and futures which the Fund will buy and write with other markets and other entities that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement,<sup>32</sup> and FINRA may obtain trading information regarding trading in the Shares and in such equity securities and U.S. exchange-traded options and futures from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and in such equity securities and U.S. exchange-traded options and futures from markets and other entities that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange may also obtain information from the Trade Reporting and Compliance Engine (“TRACE”), which is the FINRA developed vehicle that facilitates mandatory reporting of OTC secondary market transactions in eligible fixed income securities.

The Commission notes that the Shares and the Fund must comply with the initial and continued listing criteria in Rule 5705 for the Shares to be listed and traded on the Exchange.

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

- (1) The Shares will be subject to Rule 5705, which sets forth the initial and continued listing criteria applicable to Index Fund Shares.<sup>33</sup>
- (2) The component securities of the Benchmark Index meet all requirements of Nasdaq Rule 5705(b)(3)(A)(i) except that the Benchmark Index includes call options, which are not NMS Stocks as defined in Rule 600 of Regulation NMS.<sup>34</sup>

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<sup>32</sup> For a list of the current members of ISG, see supra note 12.

<sup>33</sup> See Notice, supra note 3, 83 FR at 8724.

<sup>34</sup> See id. at 8720.

- (3) The Exchange has the appropriate rules to facilitate transactions in the Shares during all trading sessions.<sup>35</sup>
- (4) Trading in the Shares will be subject to the existing trading surveillances, administered by Nasdaq and FINRA on behalf of the Exchange.<sup>36</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.<sup>37</sup>
- (5) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, in the equity securities in which the Fund will invest, and in the U.S. exchange-traded options and futures which the Fund will buy and write with other markets and other entities that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. FINRA may obtain trading information regarding trading in the Shares and in such equity securities and U.S. exchange-traded options and futures from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and in such equity securities and U.S. exchange-traded options and futures from markets and other entities that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange may also obtain information from FINRA's TRACE.<sup>38</sup>

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<sup>35</sup> See id. at 8724.

<sup>36</sup> See id.

<sup>37</sup> See id. at 8725.

<sup>38</sup> See id.

- (6) For initial and/or continued listing, the Fund must be in compliance with Rule 10A-3<sup>39</sup> under the Act.<sup>40</sup>
- (7) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Benchmark Index value and Intraday Indicative Value is disseminated; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Benchmark Index value and 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.<sup>41</sup>
- (8) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment).<sup>42</sup>

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<sup>39</sup> See 17 CFR 240.10A-3.

<sup>40</sup> See Notice, supra note 3, 83 FR at 8724.

<sup>41</sup> See id. at 8725.

<sup>42</sup> See id. at 8722.

- (9) Each single call option in the Benchmark Index will be traded on national securities exchanges.<sup>43</sup>
- (10) The equity securities in which the Fund will invest, and the option that the Fund will write, will be limited to U.S. exchange-traded securities and call options, respectively, and such securities will trade in markets that are members of the ISG or which are parties to a comprehensive surveillance sharing agreement with the Exchange.<sup>44</sup>
- (11) The Fund will invest at least 80% of its total assets in all of the equity securities in the Russell 2000 Index and a single written one-month out-of-the-money covered call option on the Russell 2000 Index, and the market value of the option strategy may be up to 20% of the Fund's overall net asset value.<sup>45</sup>
- (12) The Fund will utilize options in accordance with Rule 4.5 of the CEA.<sup>46</sup>
- (13) The Fund will transact only with swap dealers that have in place an ISDA agreement with the Fund.<sup>47</sup>
- (14) The Fund's short positions and its investments in swaps, futures contracts, forward contracts and options based on the Benchmark Index and Russell 2000 Index and ETFs designed to track the Benchmark Index or Russell 2000 Index will be backed by investments in cash, high-quality short-term debt securities and money-market instruments in an amount equal to the Fund's maximum liability

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<sup>43</sup> See id. at 8721.

<sup>44</sup> See id.

<sup>45</sup> See id. at 8720.

<sup>46</sup> See id. at 8721.

<sup>47</sup> See id. at 8721 n.10.

under the applicable position or contract, or will otherwise be offset in accordance with Section 18 of the 1940 Act.<sup>48</sup>

- (15) The Fund will attempt to limit counterparty risk in non-cleared swaps, forwards, and OTC option contracts by entering into such contracts only with counterparties the Adviser believes are creditworthy and by limiting the Fund's exposure to each counterparty. The Adviser will monitor the creditworthiness of each counterparty and the Fund's exposure to each counterparty on an ongoing basis.<sup>49</sup>
- (16) To limit the potential risk associated with such transactions, the Fund will segregate or " earmark " assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations arising from such transactions. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk.<sup>50</sup>
- (17) The Fund will not make investments in securities to seek to achieve a multiple or inverse multiple of an index and they will not be used to enhance leverage.<sup>51</sup>
- (18) The Fund will not invest in assets that are not described in the proposed rule change.<sup>52</sup>

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<sup>48</sup> See id. at 8721.

<sup>49</sup> See id. at 8722.

<sup>50</sup> See id. at 8722 n.14.

<sup>51</sup> See id.

<sup>52</sup> See id. at 8722.

(19) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.<sup>53</sup>

The Exchange further represents that all statements and representations made in this filing regarding the description of the portfolio, limitations on portfolio holdings or reference assets, dissemination and availability of the reference asset and intraday indicative values, and the applicability of Exchange listing rules shall constitute continued listing requirements for listing the Shares on the Exchange. 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.<sup>54</sup>

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice. For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>55</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>53</sup> See id. at 8724.

<sup>54</sup> See id. at 8725.

<sup>55</sup> 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>56</sup> that the proposed rule change (SR-NASDAQ-2018-012) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>57</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>56</sup> 15 U.S.C. 78s(b)(2).

<sup>57</sup> 17 CFR 200.30-3(a)(12).