

disapprove, the proposed rule change (File No. SR-NASDAQ-2016-028).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Robert W. Errett,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77619; File No. SR-NASDAQ-2016-021]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of the Shares of the First Trust Alternative Absolute Return Strategy ETF of First Trust Exchange-Traded Fund VII

April 14, 2016.

I. Introduction

On February 16, 2016, The NASDAQ Stock Market LLC (“Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or Exchange Act”) ¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade the shares (“Shares”) of the First Trust Alternative Absolute Return Strategy ETF (“Fund”) of the First Trust Exchange-Traded Fund VII (“Trust”). The proposed rule change was published for comment in the *Federal Register* on March 2, 2016.³ On April 12, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.⁴ 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 thereto.

II. Exchange’s Description of the Proposal

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 on the Exchange. The Shares will be offered by the Trust, which was established as a Massachusetts business trust on November 6, 2012.⁵ The Trust is registered with the Commission as an investment company and has filed a registration statement on Form N-1A (“Registration Statement”) with the Commission.⁶ The Fund will be a series of the Trust.

First Trust Advisors L.P. will be the investment adviser (“Adviser”) to the Fund. First Trust Portfolios L.P. (“Distributor”) will be the principal underwriter and distributor of the Fund’s Shares. Brown Brothers Harriman & Co. will act as the administrator, accounting agent, custodian, and transfer agent to the Fund. According to the Exchange, the Adviser is not a broker-dealer, but it is affiliated with the Distributor, which is a broker-dealer. The Exchange represents that the Adviser has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of, or changes to, the portfolio.⁷ In addition, the Exchange states that personnel who make decisions on the Fund’s portfolio

“short-term high-quality.” 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 (Amendment No. 1 is available at: <http://www.sec.gov/comments/sr-nasdaq-2016-021/nasdaq2016021-1.pdf>).

⁵ According to the Exchange, the Trust has obtained an order from the Commission granting certain exemptive relief under the Investment Company Act of 1940 (“1940 Act”). See Investment Company Act Release No. 30029 (April 10, 2012) (File No. 812-13795) (“Exemptive Order”).

⁶ See Post-Effective Amendment No. 6 to Registration Statement on Form N-1A for the Trust, dated January 28, 2016 (File Nos. 333-184918 and 811-22767).

⁷ 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 or broker-dealer affiliate, as applicable, regarding access to information concerning the composition of, or changes to, the portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio. The Exchange represents that the Fund does not currently intend to use a sub-adviser.

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

The Exchange has made the following representations and statements describing the Fund and the Fund’s investment strategies, including the Fund’s portfolio holdings and investment restrictions.⁸

A. Exchange’s Description of the Fund

The Fund will be an actively-managed exchange-traded fund (“ETF”) that will seek to achieve long-term total return by using a long/short commodities strategy. Under normal market conditions,⁹ the Fund will invest in a combination of securities, exchange-traded commodity futures contracts, and other instruments, either directly or through a wholly-owned subsidiary controlled by the Fund and organized under the laws of the Cayman Islands (“First Trust Subsidiary”), as described herein.

The Fund will invest in: (1) The First Trust Subsidiary; (2) U.S. government and agency securities;¹⁰ (3) short-term

⁸ Additional information regarding the Fund, the Trust, and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, calculation of net asset value (“NAV”), distributions, and taxes, among other things, can be found in the Notice, Amendment No. 1 to the proposed rule change, Exemptive Order, and the Registration Statement, as applicable. See Notice, Amendment No. 1, Exemptive Order, and Registration Statement, *supra* notes 3–6, respectively.

⁹ The term “under normal market conditions” as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the securities, commodities or futures markets, or the financial markets generally; operational issues causing dissemination of inaccurate market information; or *force majeure* type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance. On a temporary basis, including for defensive purposes, during the initial invest-up period and during periods of high cash inflows or outflows, the Fund may depart from its principal investment strategies; for example, it may hold a higher than normal proportion of its assets in cash. During such periods, the Fund may not be able to achieve its investment objective. The Fund may adopt a defensive strategy when the Adviser believes securities and other instruments in which the Fund normally may invest have elevated risks due to political or economic factors and in other extraordinary circumstances.

¹⁰ These securities will include securities that are issued or guaranteed by the U.S. Treasury, by various agencies of the U.S. government, or by various instrumentalities, which have been established or sponsored by the U.S. government. U.S. Treasury obligations are backed by the “full faith and credit” of the U.S. government. Securities issued or guaranteed by federal agencies and U.S. government-sponsored instrumentalities may or may not be backed by the full faith and credit of the U.S. government.

⁶ 17 CFR 200.30-3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 77233 (Feb. 25, 2016), 81 FR 10925 (“Notice”).

⁴ In Amendment No. 1 to the proposed rule change, the Exchange clarified that: (a) All statements and representations made in the proposal regarding the description of the portfolio, limitations on portfolio holdings or reference assets, or the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange; (b) the issuer will advise the Exchange of any failure by the Fund to comply with the continued listing requirements; (c) pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements; and (d) if the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series rules. In addition, the Exchange clarified the description of the Fund’s investments in U.S. government and agency securities by deleting

repurchase agreements;¹¹ (4) money market instruments;¹² and (5) cash. The First Trust Subsidiary may also invest in the instruments described in the foregoing clauses (2) through (5) (collectively, "Other Investments"). Other Investments (except for cash and money market mutual funds) each will have a maturity of five years or less. The Fund (and, as applicable, the First Trust Subsidiary) will use the Other Investments for investment purposes, to provide liquidity, or to collateralize the First Trust Subsidiary's investments in exchange-traded commodity futures contracts ("Commodities").

The Fund expects to exclusively gain exposure to Commodities indirectly by investing directly in the First Trust Subsidiary. The Fund's investment in the First Trust Subsidiary may not exceed 25% of the Fund's total assets.

The Fund will not invest directly in Commodities, and neither the Fund nor the First Trust Subsidiary will invest directly in physical commodities.

B. Exchange's Description of the First Trust Subsidiary

The Fund's investment in the First Trust Subsidiary will be designed to provide the Fund with exposure to commodity markets within the limits of current federal income tax laws applicable to investment companies such as the Fund, which limit the ability of investment companies to invest directly in the derivative instruments.¹³

The First Trust Subsidiary will have the same investment objective as the Fund, but unlike the Fund, it may invest without limitation in Commodities. Eligible Commodities will be selected

based on liquidity as measured by open interest (generally, the number of contracts that are outstanding at a particular time) and volume. The list of Commodities considered for inclusion can and will change over time. Through its investment process, the Adviser will seek to maximize the total return of a long/short commodity portfolio¹⁴ while managing overall portfolio risk, sector risk, liquidity risk, margin risk, and position size risk. As stated above, in addition to Commodities, the First Trust Subsidiary may invest in Other Investments.

The First Trust Subsidiary will initially consider investing in Commodities set forth in the following table, which also provides each instrument's trading hours, exchange, and ticker symbol:

Commodity	Bloomberg exchange code ¹⁵	Exchange name	Trading hours (E.T.)	Contract ticker (generic Bloomberg ticker)
Cattle, Live/Choice Average	CME	Chicago Mercantile Exchange	18:00–17:00	LC
Cocoa	NYB	ICE Futures Exchange	04:00–14:00	CC
Cotton/1–1/16"	NYB	ICE Futures Exchange	21:00–14:30	CT
Feeder Cattle	CME	Chicago Mercantile Exchange	18:00–17:00	FC
Coffee 'C'/Colombian	NYB	ICE Futures Exchange	03:30–14:00	KC
Soybeans/No. 2 Yellow	CBT	Chicago Board of Trade	20:00–14:15	S
Soybean Meal/48% Protein	CBT	Chicago Board of Trade	20:00–14:15	SM
Soybean Oil/Crude	CBT	Chicago Board of Trade	20:00–14:15	BO
Corn/No. 2 Yellow	CBT	Chicago Board of Trade	20:00–14:15	C
Wheat/No. 2 Hard Winter	CBT	Chicago Board of Trade	20:00–14:15	KW
Wheat/No. 2 Soft Red	CBT	Chicago Board of Trade	20:00–14:15	W
Sugar #11/World Raw	NYB	ICE Futures Exchange	02:30–14:00	SB
Hogs, Lean/Average Iowa/S Minn	CME	Chicago Mercantile Exchange	18:00–17:00	LH
Crude Oil, WTI/Global Spot	NYM	New York Mercantile Exchange.	18:00–17:15	CL
Crude Oil, Brent/Global Spot	ICE	ICE Futures Exchange	20:00–18:00	CO
NY Harb ULSD	NYM	New York Mercantile Exchange.	18:00–17:15	HO
Gas-Oil-Petroleum	ICE	ICE Futures Exchange	20:00–18:00	QS
Natural Gas, Henry Hub	NYM	New York Mercantile Exchange.	18:00–17:15	NG
Gasoline, Blendstock (RBOB)	NYM	New York Mercantile Exchange.	18:00–17:15	XB
Gold	CMX	Commodity Exchange	18:00–17:15	GC
Silver	CMX	Commodity Exchange	18:00–17:15	SI
Platinum	NYM	New York Mercantile Exchange.	18:00–17:15	PL
Copper High Grade/Scrap No. 2 Wire	CMX	Commodity Exchange	18:00–17:15	HG

¹¹ The Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser to present minimal credit risks in accordance with criteria approved by the Trust's Board of Trustees ("Trust Board"). The Adviser will review and monitor the creditworthiness of these 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.

¹² For the Fund's purposes, money market instruments will include: (i) Short-term, high-quality securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; (ii) non-convertible high-quality corporate debt securities with remaining maturities of not more than 397 days; (iii) money market mutual funds; (iv) commercial paper; and (v) certificates of deposit,

bank time deposits, bankers' acceptances, and short-term negotiable obligations of U.S. and non-U.S. banks and financial institutions.

¹³ The First Trust Subsidiary, which will be advised by the Adviser, will not be registered under the 1940 Act. As an investor in the First Trust Subsidiary, the Fund, as the First Trust Subsidiary's sole shareholder, will not have the protections offered to investors in registered investment companies. However, because the Fund will wholly own and control the First Trust Subsidiary, and the Fund and the First Trust Subsidiary will be managed by the Adviser, the First Trust Subsidiary will not take action contrary to the interest of the Fund or the Fund's shareholders. The Trust Board will have oversight responsibility for the investment activities of the Fund, including its expected investment in the First Trust Subsidiary,

and the Fund's role as the sole shareholder of the First Trust Subsidiary. The Adviser will receive no additional compensation for managing the assets of the First Trust Subsidiary. In addition, the First Trust Subsidiary will enter into separate contracts for the provision of custody, transfer agency, and accounting agent services with the same or with affiliates of the same service providers that provide those services to the Fund.

¹⁴ To be "long" means to hold or be exposed to a security or instrument with the expectation that its value will increase over time. To be "short" means to sell or be exposed to a security or instrument with the expectation that it will fall in value. The Fund, through the First Trust Subsidiary, will benefit if it has a long position in a Commodity that increases in value or a short position in a Commodity that decreases in value.

Commodity	Bloomberg exchange code ¹⁵	Exchange name	Trading hours (E.T.)	Contract ticker (generic Bloomberg ticker)
Aluminum, LME Primary 3 Month Rolling Forward	LME	London Metal Exchange	15:00–14:45	LA
Lead, LME Primary 3 Month Rolling Forward	LME	London Metal Exchange	15:00–14:45	LL
Nickel, LME Primary 3 Month Rolling Forward	LME	London Metal Exchange	15:00–14:45	LN
Tin, LME Primary 3 Month Rolling Forward	LME	London Metal Exchange	15:00–14:45	LT
Zinc, LME Primary 3 Month Rolling Forward	LME	London Metal Exchange	15:00–14:45	LX

As the exchanges referenced above list additional Commodities, as currently listed Commodities on those exchanges that are not included above meet the Adviser's selection criteria, or as other exchanges list Commodities that meet the Adviser's selection criteria, the Adviser will include those Commodities in the list of possible investments of the First Trust Subsidiary. The list of Commodities and commodities markets considered for investment can and will change over time.

With respect to the Commodities held indirectly through the First Trust Subsidiary, not more than 10% of the weight¹⁶ of such instruments (in the aggregate) shall consist of instruments whose principal trading market (a) is not a member of the Intermarket Surveillance Group ("ISG") or (b) is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.¹⁷

C. Exchange's Description of the Investment Restrictions

The Fund may not invest more than 25% of the value of its total assets in securities of issuers in any one industry. This restriction will not apply to (a) obligations issued or guaranteed by the U.S. government, its agencies, or instrumentalities, or (b) securities of other investment companies.

¹⁵ The exchange codes listed are Bloomberg shorthand codes for the corresponding exchanges. The New York Board of Trade is currently owned by the ICE Futures Exchange. Bloomberg continues to use NYB as its shorthand code for certain contracts formerly traded on the New York Board of Trade.

¹⁶ To be calculated as the value of the Commodity divided by the total absolute notional value of the First Trust Subsidiary's Commodities.

¹⁷ The Exchange states that the Commodity Futures Trading Commission ("CFTC") has adopted substantial amendments to CFTC Rule 4.5 relating to the permissible exemptions, and conditions for reliance on exemptions, from registration as a commodity pool operator. As a result of the instruments that will be indirectly held by the Fund, the Fund and the First Trust Subsidiary will be subject to regulation by the CFTC and National Futures Association ("NFA") as well as additional disclosure, reporting, and recordkeeping rules imposed upon commodity pools. The Adviser has previously registered as a commodity pool operator and is also a member of the NFA.

The First Trust Subsidiary's shares will be offered only to the Fund, and the Fund will not sell shares of the First Trust Subsidiary to other investors. The Fund and the First Trust Subsidiary will not invest in any non-U.S. equity securities (other than shares of the First Trust Subsidiary).

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), deemed illiquid by the Adviser.¹⁸ The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

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

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁹ In particular, the Commission finds that the proposed

¹⁸ In reaching liquidity decisions, the Adviser may consider the following factors: The frequency of trades and quotes for the security or other instrument; the number of dealers wishing to purchase or sell the security or other instrument and the number of other potential purchasers; dealer undertakings to make a market in the security or other instrument; and the nature of the security or other instrument and the nature of the marketplace in which it trades (e.g., the time needed to dispose of the security or other instrument, the method of soliciting offers and the mechanics of transfer).

¹⁹ 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).

rule change, as modified by Amendment No. 1 thereto, is consistent with Section 6(b)(5) of the Exchange Act,²⁰ which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,²¹ which sets forth the finding of Congress that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities.

Quotation and last-sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association ("CTA") plans for the Shares. On each business day, before commencement of trading in Shares in the Regular Market Session²² on the Exchange, the Fund will disclose on its Web site the identities and quantities of the portfolio of securities, Commodities, and other assets ("Disclosed Portfolio," as defined in Nasdaq Rule 5735(c)(2)) held by the Fund and the First Trust Subsidiary that will form the basis for the Fund's calculation of NAV at the end of the business day.²³ The NAV of the Fund's

²⁰ 15 U.S.C. 78f(b)(5).

²¹ 15 U.S.C. 78k-1(a)(1)(C)(iii).

²² See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4:00 a.m. to 9:30 a.m., Eastern Time; (2) Regular Market Session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m., Eastern Time; and (3) Post-Market Session from 4:00 p.m. or 4:15 p.m. to 8 p.m., Eastern Time).

²³ 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

Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on Nasdaq, generally 4:00 p.m., Eastern Time.²⁴ 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, (including the First Trust Subsidiary’s portfolio), will be disseminated. The Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service²⁵ will be

day. The Exchange represents that 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 Web site the following information regarding each portfolio holding of the Fund and the First Trust Subsidiary, 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, commodity, or other asset or instrument underlying the holding, if any; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and percentage weighting of the holding in the portfolio. The Web site information will be publicly available at no charge.

²⁴ According to the Exchange, the Fund’s and the First Trust Subsidiary’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, non-exchange traded investments will generally be valued using prices obtained from third-party pricing services (“Pricing Service”). Specifically, money market instruments (other than money market mutual funds, certificates of deposit, and bank time deposits) and U.S. government and agency securities (collectively, “Fixed-Income Instruments”) will typically be valued using information provided by a Pricing Service. In addition, debt instruments may be valued at evaluated mean prices, as provided by Pricing Services. Fixed-Income Instruments having a remaining maturity of 60 days or less when purchased will typically be valued at cost adjusted for amortization of premiums and accretion of discounts. 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. Certificates of deposit and bank time deposits will typically be valued at cost. Money market mutual funds will typically be valued at their NAVs as reported by those funds to Pricing Services. Commodities will typically be valued at the closing price in the market where those instruments are principally traded. Because foreign exchanges may be open on different days than the days during which an investor may purchase or sell Shares, the value of the Fund’s assets may change on days when investors are not able to purchase or sell Shares. Assets denominated in foreign currencies will be translated into U.S. dollars at the exchange rate of such currencies against the U.S. dollar as provided by a Pricing Service. The value of assets denominated in foreign currencies will be converted into U.S. dollars at the exchange rates in effect at the time of valuation.

²⁵ According to the Exchange, the NASDAQ OMX Global Index Data Service (“GIDS”) is the Nasdaq

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 from the instruments’ local market and may not reflect events that occur subsequent to the local market’s close.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers’ computer screens and other electronic services. Information regarding the previous day’s closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Pricing information for Fixed-Income Instruments, certificates of deposit, bank time deposits, and repurchase agreements will be available from major broker-dealer firms, major market data vendors, and Pricing Services. Pricing information for Commodities will be available from the applicable listing exchange and from major market data vendors. Money market mutual funds are typically priced once each business day and their prices will be available through the applicable fund’s Web site or from major market data vendors. In addition, the Exchange notes that the Fund’s Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission also believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange states that it will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. The Exchange also represents that it may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. The Exchange will halt trading in the Shares under the

global index data feed service that offers 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.

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.²⁶ 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.

The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Exchange further states that the Adviser is not a broker-dealer, but is affiliated with a broker-dealer, and that the Adviser has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of, and changes to, the Fund’s portfolio.²⁷ Further, the Commission notes that the Reporting Authority²⁸ that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.²⁹

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to Nasdaq’s existing rules

²⁶ These may include: (1) The extent to which trading is not occurring in the securities, Commodities, or the other assets constituting the Disclosed Portfolio of the Fund and the First Trust Subsidiary; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

²⁷ See *supra* note 7 and accompanying text. The Exchange further represents that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (“Advisers Act”). As a result, the Adviser 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.

²⁸ Nasdaq Rule 5735(c)(4) defines “Reporting Authority.”

²⁹ See Nasdaq Rule 5735(d)(2)(B)(ii).

governing the trading of equity securities. In support of this proposal, the Exchange represented that:

(1) The Shares will be subject to Nasdaq Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.

(2) Trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange,³⁰ which are designed to detect violations of Exchange rules and applicable federal securities laws. 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.

(3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the Commodities with other markets and other entities that are members of ISG,³¹ and FINRA may obtain trading information regarding trading in the Shares and in the Commodities held by the First Trust Subsidiary from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and in the Commodities held by the First Trust Subsidiary 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 and the First Trust Subsidiary reported to FINRA's Trade Reporting and Compliance Engine ("TRACE").

(4) With respect to the Commodities held indirectly through the First Trust Subsidiary, not more than 10% of the weight³² of such instruments (in the aggregate) shall consist of instruments whose principal trading market (a) is not a member of ISG or (b) is a market with which the Exchange does not have

a comprehensive surveillance sharing agreement.

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

(6) 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 for the Fund 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.

(7) For initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Act.³³

(8) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets.

(9) The Fund's investment in the First Trust Subsidiary may not exceed 25% of the Fund's total assets. In addition, the Fund will not invest directly in Commodities, and neither the Fund nor the First Trust Subsidiary will invest directly in physical commodities.

(10) The First Trust Subsidiary's shares will be offered only to the Fund, and the Fund will not sell shares of the First Trust Subsidiary to other investors. In addition, the Fund and the First Trust Subsidiary will not invest in any non-U.S. equity securities (other than shares of the First Trust Subsidiary).

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

The Exchange represents that all statements and representations made in the 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.³⁴ 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, in the Notice, and in Amendment No. 1 to the proposed rule change. The Commission notes that the Fund and the Shares must comply with the requirements of Nasdaq Rule 5735, including those set forth in this proposed rule change, as modified by Amendment No. 1 thereto, 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 thereto, is consistent with Section 6(b)(5) of the Act³⁵ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,³⁶ that the proposed rule change (SR-NASDAQ-2016-021), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁷

Robert W. Errett,

Deputy Secretary.

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

³¹ For a list of the current members of ISG, see www.isgportal.org. The Exchange notes that not all components of the Disclosed Portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

³² To be calculated as the value of the Commodity divided by the total absolute notional value of the First Trust Subsidiary's Commodities.

³³ See 17 CFR 240.10A-3.

³⁴ 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., Amendment No. 2 to SR-BATS-2016-04, available at: <http://www.sec.gov/comments/sr-bats-2016-04/bats201604-2.pdf>. In the context of this representation, it is the Commission's view that "monitor" and "surveil" both mean ongoing oversight of the Fund's compliance with the continued listing requirements. Therefore, the Commission does not view "monitor" as a more or less stringent obligation than "surveil" with respect to the continued listing requirements.

³⁵ 15 U.S.C. 78f(b)(5).

³⁶ 15 U.S.C. 78s(b)(2).

³⁷ 17 CFR 200.30-3(a)(12).