



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-74303; File No. SR-NASDAQ-2014-127]

### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change Relating to the Listing and Trading of the Shares of the Tuttle Tactical Management U.S. Core ETF of ETFis Series Trust I**

February 19, 2015

#### **I. Introduction**

On December 19, 2014, 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 shares (“Shares”) of the Tuttle Tactical Management U.S. Core ETF (“Fund”) under Nasdaq Rule 5735. The proposed rule change was published for comment in the Federal Register on January 6, 2015.<sup>3</sup> The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

#### **II. Description of the Proposed Rule Change**

The Exchange proposes to list and trade Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will

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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. 73960 (Dec. 30, 2014), 80 FR 540 (“Notice”).

be offered by ETFis Series Trust I (“Trust”), which is registered with the Commission as an investment company.<sup>4</sup> The Fund is a series of the Trust.

ETFis Capital LLC will be the investment adviser (“Adviser”), and Tuttle Tactical Management, LLC will be the investment sub-adviser (“Sub-Adviser”), to the Fund. ETF Distributors LLC will be the principal underwriter and distributor of the Fund’s Shares, and Bank of New York Mellon will act as the administrator, accounting agent, custodian, and transfer agent to the Fund.

The Exchange represents that the Adviser and Sub-Adviser are not registered as broker-dealers, and the Sub-Adviser is not affiliated with a broker-dealer; however, the Exchange represents that the Adviser is affiliated with a broker-dealer. The Exchange states 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.<sup>5</sup> The Exchange also represents that the Shares will be subject to Nasdaq Rule 5735, which sets forth the initial and

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<sup>4</sup> According to the Exchange, the Trust has filed a registration statement on Form N-1A (“Registration Statement”) with the Commission. See Registration Statement on Form N-1A for the Trust filed on July 24, 2014 (File Nos. 333-187668 and 811-22819). In addition, the Exchange states that the Trust has obtained certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 30607 (July 23, 2013) (“Exemptive Order”).

<sup>5</sup> See Nasdaq Rule 5735(g). The Exchange states that, in the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer or registers as a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, the Adviser, the Sub-Adviser, or any new adviser or sub-adviser, as the case may be, will implement a fire wall with respect to its relevant personnel and its 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.

continued listing criteria applicable to Managed Fund Shares, and that for initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Act.<sup>6</sup>

The Exchange has made the following representations and statements in describing the Fund and its investment strategy, including, among other things, portfolio holdings and investment restrictions.

A. Principal Investments of the Fund

According to the Exchange, the Fund's investment objective will be to provide long-term capital appreciation, while maintaining a secondary emphasis on capital preservation, primarily through investments in the U.S. equity market. The Sub-Adviser will employ four tactical models in seeking to achieve the Fund's investment objective: "S&P 500 Absolute Momentum," "Relative Strength Equity," "Beta Opportunities," and "Short-Term S&P 500 Counter Trend." While the Sub-Adviser will generally seek to maintain an equal weighting among these four tactical models, market movements may result in the Fund being overweight or underweight one or more of the tactical models. The Fund will be an actively managed exchange-traded fund ("ETF") that seeks to achieve its investment objective by utilizing a long-only, multi-strategy, tactically-managed exposure to the U.S. equity market. To obtain such exposure, the Sub-Adviser will invest, under normal circumstances, not less than 80% of the Fund's assets in: (1) other ETFs;<sup>7</sup> (2) exchange-traded notes ("ETNs");<sup>8</sup> (3) exchange-traded trusts that hold

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<sup>6</sup> See 17 CFR 240.10A-3.

<sup>7</sup> The Exchange states that ETFs included in the Fund will be listed and traded in the U.S. on registered exchanges. The Fund may invest in the securities of ETFs in excess of the limits imposed under the 1940 Act pursuant to exemptive orders obtained by other ETFs and their sponsors from the Commission. The ETFs in which the Fund may invest include Index Fund Shares (as described in Nasdaq Rule 5705), Portfolio Depositary Receipts (as described in Nasdaq Rule 5705), and Managed Fund Shares (as described in Nasdaq Rule 5735). While the Fund may invest in leveraged ETFs (e.g., 2X or 3X), the

commodities (“ETTs,” and together with ETFs and ETNs, collectively, “ETPs”); (4) individually selected U.S. exchange-traded common stocks (when the Sub-Adviser determines that it is more efficient or otherwise advantageous to do so); (5) money market funds; (6) U.S. treasuries; or (7) money market instruments.<sup>9</sup> To the extent that the Fund invests in ETFs or money market funds to gain domestic exposure, the Fund is considered, in part, a “fund of funds.”

B. Other Investments of the Fund

In order to seek its investment objective, the Fund will not employ other strategies outside of the above-described “Principal Investments.” However, the Fund may, from time to time, take temporary defensive positions that are inconsistent with the Fund’s principal investment strategies in an attempt to respond to adverse market, economic, political, or other conditions. In such circumstances, the Fund may also hold up to 100% of its portfolio in cash or other short-term, highly liquid investments, such as money market instruments, U.S. government obligations, commercial paper, repurchase agreements, or other cash equivalents. When the Fund takes a temporary defensive position, the Fund may not be able to achieve its investment objective.

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Fund will not invest in inverse or inverse leveraged ETFs. The shares of ETFs in which a Fund may invest will be limited to securities that trade in markets that are members of the Intermarket Surveillance Group (“ISG”), which includes all U.S. national securities exchanges, or are parties to a comprehensive surveillance sharing agreement with the Exchange.

<sup>8</sup> The Exchange represents that ETNs will be limited to those described in Nasdaq Rule 5710.

<sup>9</sup> According to the Exchange, money market instruments 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 that 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.

C. Investment Restrictions of the Fund

As stated above, the Fund will invest not less than 80% of its total assets in shares of ETPs, individually selected U.S. exchange-traded common stocks (when the Sub-Adviser determines that it is more efficient or otherwise advantageous to do so), money market funds, U.S. treasuries, or money market instruments. The Fund will not purchase securities of open-end or closed-end investment companies except in compliance with the 1940 Act. In addition, the Fund will not use derivative instruments, including options, swaps, forwards, and futures contracts, either listed or over-the-counter. Under normal circumstances, the Fund will not invest more than 25% of its total assets in leveraged ETPs. The Fund does not presently intend to engage in any form of borrowing for investment purposes, and will not be operated as a “leveraged ETF,” i.e., it will not be operated in a manner designed to seek a multiple of the performance of an underlying reference index.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities and other illiquid assets (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 or other illiquid assets. Illiquid securities and other 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.

Additional information regarding the Trust, Fund, and Shares, including investment strategies and restrictions, risks, creation and redemption procedures, fees, portfolio holdings

disclosure policies, distributions and taxes, calculation of net asset value per share (“NAV”), availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Notice, Registration Statement, and Exemptive Order, as applicable.<sup>10</sup>

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act<sup>11</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup> In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,<sup>13</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 Commission 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>14</sup> which sets forth the finding of Congress that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of

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<sup>10</sup> See Notice, supra note 3; see also Registration Statement and Exemptive Order, supra note 4.

<sup>11</sup> 15 U.S.C. 78(f).

<sup>12</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

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 and any underlying ETPs.<sup>15</sup> In addition, the Intraday Indicative Value (as defined in Nasdaq Rule 5735(c)(3)), which will be based upon the current value of the components of the Disclosed Portfolio (as defined in Nasdaq Rule 5735(c)(2)), will be available on the NASDAQ OMX Information LLC proprietary index data service<sup>16</sup> and will be updated and widely disseminated and broadly displayed at least every 15 seconds during the Regular Market Session.<sup>17</sup> On each business day, before commencement of trading in Shares in the Regular Market Session on the Exchange, the Fund will disclose on its website the Disclosed Portfolio, which will form the basis for the Fund's calculation of NAV at the end of the business day.<sup>18</sup> The NAV of the Fund will be determined once each business day, normally as of the close of trading on the New York Stock Exchange (normally 4:00 p.m. Eastern time or "E.T.").<sup>19</sup>

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<sup>15</sup> See Notice, supra note 3, 80 FR at 544.

<sup>16</sup> According to the Exchange, the NASDAQ OMX Global Index Data Service offers real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs. See id., 80 FR at 543.

<sup>17</sup> See id.

<sup>18</sup> On a daily basis, the Disclosed Portfolio will include each portfolio security and other financial instruments of the Fund with the following information on the Fund's website: (1) ticker symbol (if applicable); (2) name of security and financial instrument; (3) number of shares (if applicable); (4) dollar value of securities and financial instruments held in the Fund; and (5) percentage weighting of the security and financial instrument in the Fund. The website information will be publicly available at no charge. See id.

<sup>19</sup> See id., 80 FR at 542. The Exchange notes that, for purposes of calculating NAV, the Fund's investments will be valued at market value (i.e., the price at which a security is trading and could presumably be purchased or sold) or, in the absence of market value with respect to any investment, at fair value in accordance with valuation procedures adopted by the Board and in accordance with the 1940 Act. Common stocks and equity

Information regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.<sup>20</sup> 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.<sup>21</sup> Price information regarding the ETPs, equity securities, U.S. treasuries, money market instruments, and money market funds held by the Fund will be available through the U.S. exchanges trading such assets, in the case of exchange-traded securities, as well as automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters.<sup>22</sup> 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.<sup>23</sup> In addition, BNY Mellon, through the National Securities Clearing Corporation, will also make available on each business day, prior to the opening of business of the Exchange (currently 9:30 a.m., E.T.), the list of the names and the quantity of each security to be included (based on information at the end of the previous business day), subject to any adjustments as described below, in order to effect redemptions of Creation Unit aggregations of the Fund until

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securities (including shares of ETPs) will be valued at the last sales price on that exchange. Portfolio securities traded on more than one securities exchange will be valued at the last sale price or, if so disseminated by an exchange, the official closing price, as applicable, at the close of the exchange representing the principal exchange or market for such securities on the business day as of which such value is being determined. U.S. Treasuries are valued using quoted market prices, and money market funds are valued at the net asset value reported by the funds. For all security types in which the Fund may invest, the Fund's primary pricing source is IDC; its secondary source is Reuters; and its tertiary source is Bloomberg.

<sup>20</sup> See id., 80 FR at 544.

<sup>21</sup> See id.

<sup>22</sup> See id., 80 FR at 543.

<sup>23</sup> See id.



such time as the next-announced composition of the Fund Securities is made available.<sup>24</sup> The Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.<sup>25</sup>

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV 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>26</sup> Further, trading in the Shares will be subject to Nasdaq 5735(d)(2)(D), which sets forth circumstances under which trading in the Shares may be halted.<sup>27</sup> The Exchange also may halt trading in the Shares if trading is not occurring in the securities or the financial instruments constituting the Disclosed Portfolio or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.<sup>28</sup> Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent

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<sup>24</sup> See id., 80 FR at 542.

<sup>25</sup> See id., 80 FR at 543.

<sup>26</sup> See id. at 544.

<sup>27</sup> See id.

<sup>28</sup> See id. See also Nasdaq Rule 5735(d)(2)(C) (providing additional considerations for the suspension of trading in or removal from listing of Managed Fund Shares on the Exchange). With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Nasdaq will halt 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 also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. See Notice, supra note 3, 80 FR at 544.

the use and dissemination of material, non-public information regarding the actual components of the portfolio.<sup>29</sup> The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.<sup>30</sup> The Exchange also states that the Adviser 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 or changes to the portfolio.<sup>31</sup> The Financial Industry Regulatory Authority (“FINRA”), on behalf of the Exchange, will communicate as needed regarding trading in the Shares and other exchange-traded securities and instruments held by the Fund with other markets and other entities that are ISG members, and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares and other exchange-traded securities and instruments held by the Fund from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and other exchange-traded securities and instruments held by the Fund from

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<sup>29</sup> See Nasdaq Rule 5735(d)(2)(B)(ii).

<sup>30</sup> See Notice, *supra* note 3, 80 FR at 544.

<sup>31</sup> See *supra* note 5 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, the Sub-Adviser, and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with applicable federal securities laws as defined in Rule 204A-1(e)(4). Accordingly, procedures designed to prevent the communication and misuse of nonpublic 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.

markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.<sup>32</sup>

The Exchange represents that it 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 also made the following representations:

- (1) The Shares will be subject to Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.
- (3) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Intraday Indicative Value and 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.

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<sup>32</sup> For a list of the current members of ISG, see [www.isgportal.org](http://www.isgportal.org).

- (4) Trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and FINRA,<sup>33</sup> on behalf of the Exchange. The trading surveillance procedures are designed to detect violations of Exchange rules and applicable federal securities laws. 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.
- (5) For initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Act.<sup>34</sup>
- (6) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.
- (7) The Fund will invest at least 80% of its assets under normal market conditions in shares of ETPs, individually selected U.S. exchange-traded common stocks (when the Sub-Adviser determines that it is more efficient or otherwise advantageous to do so), money market funds, U.S. treasuries, or money market instruments. In order to seek its investment objective, the Fund will not employ other strategies outside of the above-described “Principal Investments.”
- (8) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment) and will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an

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<sup>33</sup> According to the Exchange, 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. See Notice, supra note 3, 80 FR at 544.

<sup>34</sup> 17 CFR 240.10A-3.

adequate level of liquidity is being maintained. The Fund 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.

- (9) While the Fund may invest in leveraged ETFs (e.g., 2X or 3X), the Fund will not invest in inverse or inverse leveraged ETFs. Under normal circumstances, the Fund will not invest more than 25% of its total assets in leveraged ETPs. The Fund will not be operated in a manner designed to seek a multiple of the performance of an underlying reference index.
- (10) The Fund will not use derivative instruments, including options, swaps, forwards, and futures contracts.
- (11) The Fund's investments will be consistent with the Fund's investment objective.

The Commission notes that the Fund and the Shares must comply with the requirements of Nasdaq Rule 5735 to be initially and continuously listed and traded on the Exchange. This approval order is based on all of the Exchange's representations and description of the Fund, including those set forth above and in the Notice.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>35</sup> that the proposed rule change (SR-NASDAQ-2014-127), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>36</sup>

**Brent J. Fields,**  
*Secretary.*

**BILLING CODE 8011-01p**

**[FR Doc. 2015-03812 Filed 02/24/2015 at 8:45 am; Publication Date: 02/25/2015]**

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<sup>35</sup> 15 U.S.C. 78s(b)(2).

<sup>36</sup> 17 CFR 200.30-3(a)(12).