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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-78642; File No. SR-NASDAQ-2016-071)

August 23, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of the First Trust CEF Income Opportunity ETF and the First Trust Municipal CEF Income Opportunity ETF

I. Introduction

On May 10, 2016, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the First Trust CEF Income Opportunity ETF (“CEF Income Opportunity Fund”) and First Trust Municipal CEF Income Opportunity ETF (“Municipal CEF Income Opportunity Fund” and collectively, “Funds”) under Nasdaq Rule 5735. On May 20, 2016, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission published notice of the proposed rule change, as modified by Amendment No. 1, in the Federal Register on May 31, 2016.<sup>4</sup> The Commission received one comment letter on the proposed rule change.<sup>5</sup> This order approves the proposed rule change, as modified by Amendment No. 1.

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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> Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2016-071/nasdaq2016071-2.pdf>.

<sup>4</sup> See Securities Exchange Act Release No. 77895 (May 24, 2016), 81 FR 34407 (NASDAQ-2016-071) (“Notice”).

<sup>5</sup> See letter from Stephanie Price, dated May 31, 2016. Because the comment is not directly relevant to the proposed rule change, the Commission does not address the comment herein.

## II. The Exchange's Description of the Proposal<sup>6</sup>

The Exchange proposes to list and trade the Shares under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by First Trust Exchange-Traded Fund VIII ("Trust"), which was established as a Massachusetts business trust on February 22, 2016.<sup>7</sup> The investment advisor to the Funds will be First Trust Advisors L.P. ("Adviser").<sup>8</sup> The Distributor will be the principal underwriter and distributor of the Shares. The Bank of New York Mellon Corporation will act as the administrator, accounting agent, custodian and transfer agent to the Funds.

### Principal Investments of the Funds

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<sup>6</sup> Additional information regarding the Fund, the Shares, and the Trust (as defined herein), including investment strategies, investment restrictions, 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 and the Registration Statement, as applicable. See Notice, supra note 4, and Registration Statement, infra note 7.

<sup>7</sup> 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. See Registration Statement on Form N-1A for the Trust, dated March 14, 2016 (File Nos. 333-210186 and 811-23147). In addition, the Exchange states that the Commission has issued an order, upon which the Trust may rely, granting certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 28468 (October 27, 2008) (File No. 812-13477).

<sup>8</sup> The Adviser is not a broker-dealer, but it is affiliated with First Trust Portfolios L.P. ("Distributor"), a broker-dealer, and has implemented and will maintain a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to a portfolio. The Funds do not currently intend to use a sub-adviser. 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 and will maintain a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to a portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. In addition, personnel who make decisions on each Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such Fund's portfolio.

The investment objective of the CEF Income Opportunity Fund will be to seek to provide current income with a secondary emphasis on total return. Under normal market conditions,<sup>9</sup> the CEF Income Opportunity Fund will seek to achieve its investment objective by investing at least 80% of its net assets in closed-end funds.<sup>10</sup>

The investment objective of the Municipal CEF Income Opportunity Fund will be to seek to provide current income. Under normal market conditions, the Municipal CEF Income Opportunity Fund will seek to achieve its investment objective by investing at least 80% of its net assets (including investment borrowings) in a portfolio of municipal closed-end funds.

#### Non-Principal Investments for Each Fund

While under normal market conditions each Fund will invest at least 80% of its net assets as described above, each Fund may invest (in the aggregate) up to 20% of its net assets in the following securities and instruments.

Each Fund may invest in exchange-traded funds (“ETFs”)<sup>11</sup> and exchange-traded notes (“ETNs”).<sup>12</sup>

Each Fund may invest in money market mutual funds that will be investment companies

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<sup>9</sup> The term “under normal market conditions” 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 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.

<sup>10</sup> The closed-end funds in which each Fund invests (“Closed-End Funds”) will be registered under the 1940 Act and listed and traded in the U.S. on registered exchanges.

<sup>11</sup> ETFs held by either Fund will be listed and traded on a national securities exchange. Each Fund may invest in inverse ETFs; neither Fund will invest in leveraged or inverse leveraged (e.g., 2X or -3X) ETFs. See Notice, supra note 4, 81 FR 34409, n.10.

<sup>12</sup> The Exchange represents that while the Funds may invest in inverse ETNs, the Funds will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) ETNs. See id. at 34409, n.11.

registered under the 1940 Act.

Each Fund may hold cash or invest in the following short-term debt instruments:<sup>13</sup>

(1) fixed rate and floating rate U.S. government securities, including bills, notes and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by U.S. government agencies or instrumentalities; (2) certificates of deposit issued against funds deposited in a bank or savings and loan association; (3) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (4) repurchase agreements,<sup>14</sup> which involve purchases of debt securities; (5) bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; and (6) commercial paper, which is short-term unsecured promissory notes.<sup>15</sup>

### III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>16</sup> In particular, the Commission finds that the

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<sup>13</sup> The Exchange represents that these short-term debt instruments will be issued by issuers having a long-term debt rating of at least BBB-/Baa3 by Standard & Poor's Ratings Services, a Division of The McGraw-Hill Companies, Inc., Moody's Investors Service, Inc. or Fitch Ratings and will have a maturity of one year or less. See id. at 34409, n.12.

<sup>14</sup> The Exchange states that each Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser to present minimal credit risks in accordance with criteria approved by the Board of Trustees of the Trust. The Adviser will review and monitor the creditworthiness of such institutions. The Adviser will monitor the value of the collateral at the time the transaction is entered into and at all times during the term of the repurchase agreement. See id. at 34409, n.13.

<sup>15</sup> The Exchange represents that each Fund may only invest in commercial paper rated A-1 or higher by S&P Ratings, Prime-1 or higher by Moody's or F1 or higher by Fitch. See id. at 34409, n.14.

<sup>16</sup> In approving this proposed rule change, the Commission has considered the proposed

proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Exchange Act,<sup>17</sup> which requires, among other things, that the Exchange’s rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission also finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,<sup>18</sup> which sets forth Congress’s 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.

The Commission 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. As stated in the Notice, 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. According to the Exchange, quotation and last-sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association (“CTA”) plans for the Shares. Quotation and last-sale information for the Closed-End Funds, ETFs, and ETNs will be available from the exchanges on which they are traded as well as in accordance with any applicable CTA plans. Pricing

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rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

<sup>18</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

information for short-term U.S. government securities, commercial paper, bankers' acceptances, repurchase agreements, bank time deposits, and certificates of deposit will be available from major broker-dealer firms and/or major market data vendors or pricing services. Pricing information for Closed-End Funds, ETFs, and ETNs will be available from the applicable listing exchange (as indicated above) and from major market data vendors. Prices for money market mutual funds will be available through the applicable fund's website or from major market data vendors. In addition, for each Fund, an estimated value, defined in Exchange Rule 5735(c)(3) as the "Intraday Indicative Value," that reflects an estimated intraday value of the Fund's Disclosed Portfolio, will be disseminated. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,<sup>19</sup> will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session.<sup>20</sup>

Nasdaq will halt 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>21</sup> Trading in the Shares also will be subject to

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<sup>19</sup> The Exchange states that the NASDAQ OMX Global Index Data Service ("GIDS") is the Nasdaq global index data feed service, offering real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs. See Notice, supra note 4, 81 FR at 34411, n.25.

<sup>20</sup> The Exchange states that premiums and discounts between the Intraday Indicative Value and the market price may occur, but that the dissemination of the Intraday Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of a Fund on a daily basis and will provide a close estimate of that value throughout the trading day. See id. at 34411.

<sup>21</sup> These may include: (1) the extent to which trading is not occurring in the securities and/or the other assets constituting the Disclosed Portfolio of a Fund; or (2) whether other

Rule 5735(d)(2)(D), which sets forth circumstances under which trading in the Shares may be halted.<sup>22</sup>

The Exchange represents that it has a general policy prohibiting the distribution of material, non-public information by its employees.<sup>23</sup> Nasdaq Rule 5735(g) further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the open-end fund's portfolio. The Exchange states that the Adviser is not a broker-dealer, but it is affiliated with the Distributor, a broker-dealer, and has implemented and will maintain a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to a portfolio. In the event (a) the Adviser or any sub-adviser registers as a broker-dealer, or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with another broker-dealer, it will implement and will maintain a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to a portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. In addition, personnel who make decisions on each Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material non-public

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unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

<sup>22</sup> The Exchange represents that it deems the Shares to be equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities. See id. at 34411.

<sup>23</sup> See id. at 34412.

information regarding such Fund's portfolio.<sup>24</sup>

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

- 1) The Shares will conform to the initial and continued listing criteria under NASDAQ Rule 5735.<sup>25</sup>
- 2) 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, and 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>26</sup>
- 3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the Closed-End Funds, ETFs, and ETNs held by the Funds with other markets and other entities that are members of the Intermarket Surveillance Group ("ISG"), and FINRA may obtain trading information regarding trading in the Shares and such securities held by the Funds from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Closed-End Funds, ETFs, and ETNs held by the Funds from markets and other entities that are members of ISG, which includes securities exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, FINRA, on behalf of

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<sup>24</sup> See supra, note 8.

<sup>25</sup> See Notice, supra note 4, 81 FR at 34412.

<sup>26</sup> See id. at 34411-12. 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 id. at 34412, n.27.

the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Funds reported to FINRA's Trade Reporting and Compliance Engine.<sup>27</sup>

- 4) The Closed-End Funds, ETFs, and ETNs held by the Funds will trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.<sup>28</sup>
- 5) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular for each Fund will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (4) the risks involved in trading the Shares during the Pre Market and Post Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Exchange Act.<sup>29</sup>

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<sup>27</sup> See id. at 34412.

<sup>28</sup> See Notice, supra note 4.

<sup>29</sup> Additionally, the Information Circular for each Fund will reference that such Fund is

- 6) For initial and continued listing, each Fund must be in compliance with Rule 10A-3 under the Exchange Act.<sup>30</sup>
- 7) Shares of Closed-End Funds, ETFs, and ETNs held by a Fund will trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.
- 8) The Funds will not invest in derivative instruments.
- 9) While the Funds may invest in inverse ETFs and ETNs, the Funds will not invest in leveraged or inverse leveraged ETFs or ETNs.<sup>31</sup>
- 10) Each 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. Each 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 such 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.
- 11) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.<sup>32</sup>

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subject to various fees and expenses described in the Registration Statement. The Information Circular for each Fund will also disclose the trading hours of the Shares of such Fund and the applicable NAV Calculation Time for the Shares. See id.

<sup>30</sup> 17 CFR 240.10A-3.

<sup>31</sup> See notes 11 and 12, supra.

12) All statements and representations made in this filing regarding (a) the description of the portfolios, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Funds to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will monitor for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.<sup>33</sup>

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice.

For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act.<sup>34</sup>

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<sup>32</sup> See id. at 34411.

<sup>33</sup> See id. at 34412.

<sup>34</sup> The Commission notes that the comment letter, supra note 5, does not raise any specific concerns about whether any aspect of the proposed rule change is inconsistent with the Exchange Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>35</sup> that the proposed rule change (SR-NASDAQ-2016-071), 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.<sup>36</sup>

Robert W. Errett  
Deputy Secretary

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

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

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