

corresponding proposed rule change with the Commission, the CFTC, or both during this thirty-day period. In that case, the emergency action would remain in effect while the agency or agencies review the corresponding proposed rule change. If either the Commission or the CFTC objects to the proposed rule change in writing, OCC is required to discontinue the emergency extension, waiver, or suspension of its rules.

III. Discussion

Section 19(b)(2)(C) of the Act⁸ directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act⁹ requires that the rules of a registered clearing agency be designed to, among other things, promote the prompt and accurate clearance and settlement of securities transactions, as well as foster cooperation and coordination amongst other persons engaged in the clearance and settlement of securities transactions.

The Commission believes that the proposed rule change is consistent with the requirements of Section 17A of the Act and the rules and regulations thereunder applicable to OCC. By giving OCC the ability to respond promptly in the event of an emergency, the proposed rule change will help to minimize the risk of a disruption to OCC's clearance and settlement services. This will help facilitate the prompt clearance and settlement of securities transactions, and will also enable OCC to coordinate its actions with those of other clearing agencies that already possess emergency powers similar to those at issue here. Further, the proposed rule change circumscribes OCC's emergency powers by requiring it to notify the Commission and the CFTC whenever OCC invokes those powers, and by further requiring OCC to discontinue any changes made under those powers if the Commission or the CFTC, as applicable, objects. These procedural safeguards will help to ensure that OCC exercises its emergency powers only in a manner that is consistent with the requirements of the Act and the rules and regulations thereunder.

IV. Conclusion

On the basis of the foregoing, the Commission concludes that the proposal is consistent with the

requirements of the Act, particularly the requirements of Section 17A of the Act¹⁰ and the rules and regulations thereunder.

It is therefore *ordered*, pursuant to Section 19(b)(2) of the Act,¹¹ that proposed rule change SR-OCC-2013-23, as amended, be and hereby is *approved*.¹²

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.¹³

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71575; File No. SR-FINRA-2013-054]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change Relating to a Capacity Management Plan

February 19, 2014.

I. Introduction

On December 24, 2013, Financial Industry Regulatory Authority, Inc. ("FINRA") 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 adopt a Capacity Management Plan ("Plan") for the Alternative Display Facility ("ADF") and to amend the ADF Certification Record ("Certification"). The proposed rule change was published for comment in the **Federal Register** on January 8, 2014.³ The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The ADF is a quotation collection and trade reporting facility that provides

ADF Market Participants the ability to post quotations, display orders and report transactions in NMS stocks⁴ for submission to the Securities Information Processors ("SIPs") for consolidation and dissemination to vendors and other market participants. In addition, the ADF delivers real-time data to FINRA for regulatory purposes, including enforcement of requirements imposed by Regulation NMS.⁵

To ensure that the ADF has sufficient capacity to handle the volume of quote, order and trade data submitted to the ADF without maintaining unused data capacity, FINRA proposes to adopt the Plan for those FINRA members that opt to utilize the ADF for quoting and trade reporting. According to FINRA, the proposed Plan is similar to the approach of other data plans, notably the Consolidated Tape Association Plan ("CTA Plan") and the Consolidated Quotation Plan ("CQ Plan"; together, "CTA/CQ Plans"),⁶ which serve as the consolidated data plans for securities listed on the New York Stock Exchange, BATS, NYSE Arca, NYSE MKT and other regional exchange-listed securities.⁷

Pursuant to the Plan, each ADF Trading Center would complete an initial ADF Trading Center Capacity Certification process,⁸ including testing its connectivity to the ADF. In addition, each ADF Trading Center would submit volume projections for current and future peak data reporting levels on a quarterly basis, and on demand from FINRA.⁹ Specifically, the Plan would provide a timeframe by which ADF Trading Centers submit initial and final volume projections for the next two calendar quarters, with final volume projections tested and certified by FINRA in the event of a capacity upgrade. The Plan also would provide ADF Trading Centers with the ability to increase and decrease their capacity projections for the second quarter, subject to certain limitations, in the event that their actual capacity usage deviates from their projected capacity usage. In addition, under the Plan, FINRA would honor an ADF Trading Center's capacity requests and build out to support the ADF Trading Center's

⁴ See 17 CFR 242.600(b)(47).

⁵ See 17 CFR 242.600 et seq.

⁶ The CTA/CQ Plans and the Unlisted Trading Privileges Plan are collectively referred to as the "NMS data plans."

⁷ See Notice, *supra* note 3 at 1414.

⁸ Each ADF Trading Center would also be required to complete an annual recertification.

⁹ ADF Trading Centers would submit separate volume projections for CTA securities and UTP securities, and project their volume for quotations, media trade reports, total trade reports, and order reports.

¹⁰ 15 U.S.C. 78q-1.

¹¹ 15 U.S.C. 78s(b)(2).

¹² In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹³ 17 CFR 200.30-3(a)(12).

¹⁴ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 71224 (Jan. 2, 2014), 79 FR 1414 ("Notice").

⁸ 15 U.S.C. 78s(b)(2)(C).

⁹ 15 U.S.C. 78q-1(b)(3)(F).

peak projected capacity requirements. Each ADF Trading Center, however, would still partake in quarterly volume tests before it is certified to a specific volume level.

The Plan would also set forth fees for excess and shortfall capacity usage, and provides that FINRA would pass through any penalties incurred under the NMS data plans among the ADF Trading Centers that exceed their projected message traffic.¹⁰ However, FINRA would not assess the excess or shortfall capacity usage fees for the first quarter during which an ADF Trading Center begins operating on the ADF. If an ADF Trading Center begins operations mid-quarter, FINRA would waive these fees only for the remainder of that quarter. Similarly, FINRA would not assess any SIP penalties for the first quarter during which an ADF Trading Center begins operating on the ADF if it exceeds its projected message traffic during this time. If an ADF Trading Center begins operations mid-quarter, FINRA would waive any SIP capacity penalties only for the remainder of that quarter.

In addition, under the Plan, FINRA would be able to make mid-quarter extraordinary system upgrades to accommodate higher message volume or higher message per second throughput, and assess ADF Trading Centers that exceed their certified capacity for those costs accordingly. Moreover, to the extent that an ADF Trading Center's data usage, in the sole discretion of FINRA staff, materially exceeds the ADF Trading Center's certified capacity, the Plan would allow FINRA to incrementally reduce the ADF Trading Center's data port sessions to ensure that data levels stay at or below reasonable levels. Such termination may occur on an intra-day basis and would be proportionate to the extent to which the data overage threatens the ADF system's stability and/or the ability of FINRA to meet its regulatory obligations with respect to the operation of the ADF. Further, the Plan specifies that infrastructure costs associated with building and implementing the capacity and environments (including, but not limited to, labor, hardware, software, installation, testing, etc., as well as associated on-going operational costs) would be borne by FINRA except for extraordinary upgrades.

Finally, in addition to adopting the Plan, FINRA also proposes to amend the

Certification to (i) require ADF Trading Centers to comply with the Plan, and (ii) make other minor or non-substantive changes, such as revising the means by which an ADF Trading Center may provide information and replacing references to NASD with FINRA.

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 15A of the Act¹¹ and the rules and regulations thereunder applicable to a national securities association.¹² In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,¹³ which requires, among other things, that the rules of a national securities association 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 also finds that the proposal is consistent with Section 15A(b)(5) of the Act,¹⁴ which requires that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

The Commission believes that FINRA's proposed Plan should help to ensure that FINRA is able to maintain a high level of operability for the ADF, as well as enhance FINRA's ability to submit accurate volume projections to the NMS data plans. The Commission notes that under the proposed Plan, each ADF Trading Center would be required to submit its projected capacity needs and that FINRA would honor those requests subject to quarterly volume tests. ADF Trading Centers, however, would still have the ability to increase and decrease their capacity projections for their second quarter, subject to certain limitations, in the event that their actual capacity usage deviates from their projected capacity usage.¹⁵ In addition, FINRA would have the ability to make mid-quarter

extraordinary upgrades and to incrementally reduce an ADF Trading Center's data port sessions in the event that the ADF Trading Center's data usage threatens the ADF system's stability or the ability of FINRA to meet its regulatory obligations with respect to the operation of the ADF.¹⁶

Accordingly, the Commission believes that FINRA's proposed Plan should help to ensure that the ADF has sufficient capacity to handle the volume of quote, order, and trade data submitted to the ADF, while also avoiding the need for FINRA to expend unnecessary resources to maintain unused data capacity and providing flexibility to ADF Trading Centers in projecting their capacity needs.

The Commission also believes that FINRA's proposed fees and the pass-through of any SIP penalties are consistent with the Act. The Commission believes that the fees should help to ensure that ADF Trading Centers provide meaningful volume projections to ensure adequate, without unnecessary, capacity. The Commission notes that the fees and SIP penalties would not be assessed during an ADF Trading Center's first quarter of operations on the ADF or a portion thereof. In this regard, the Commission believes that the proposal should allow a new ADF Trading Center the opportunity to acquire data on its quote, order, and trade reporting activity on the ADF prior to making capacity projections to which the fees and SIP penalties would apply.

The Commission believes that FINRA's proposed changes to the Certification are also consistent with Act. The Commission believes that requiring an ADF Trading Center to certify that it will comply with the terms of the Plan should help facilitate FINRA's ability to administer the ADF. Moreover, the change to the Certification relating to the manner in which an ADF Trading Center would provide public notice of certain information should increase the means through which such notice may be provided. The other remaining changes to the Certification, such as changes references from NASD to FINRA and TRACS to ADF, should make the Certification more accurate and up-to-date.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 15A(b)(5) and (b)(6) of the Act¹⁷ and the rules and regulations thereunder

¹¹ 15 U.S.C. 78f.

¹² 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).

¹³ 15 U.S.C. 78o-3(b)(6)

¹⁴ 15 U.S.C. 78o-3(b)(5)

¹⁵ See Notice, *supra* note 3 at 1418.

¹⁶ See Notice, *supra* note 3 at 1419.

¹⁷ 15 U.S.C. 78o-3(b)(5) and (6).

¹⁰ FINRA is proposing to codify the excess fees set forth in the Plan as new FINRA Rule 7581, and the shortfall fees as new FINRA Rule 7582. FINRA also proposes to codify the provision in the Plan providing for the pass-through of any SIP penalties as new FINRA Rule 7583.

applicable to a national securities association.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-FINRA-2013-054) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Kevin M. O'Neill,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71572; File No. SR-NASDAQ-2014-019]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of Shares of the First Trust Managed Municipal Fund of First Trust Exchange-Traded Fund III

February 19, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 7, 2014, The NASDAQ Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to list and trade the shares of the First Trust Managed Municipal ETF (the “Fund”) of First Trust Exchange-Traded Fund III (the “Trust”) under Nasdaq Rule 5735 (“Managed Fund Shares”).³ The shares

of the Fund are collectively referred to herein as the “Shares.”

The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com/>, at Nasdaq’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

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 Shares⁴ on the Exchange. The Fund will be an actively-managed exchange-traded fund (“ETF”). The Shares will be offered by the Trust, which was established as a Massachusetts business

2013) (SR-NASDAQ-2012-147) (order approving listing and trading of First Trust High Yield Long/Short ETF); 66489 (February 29, 2012), 77 FR 13379 (March 6, 2012) (SR-NASDAQ-2012-004) (order approving listing and trading of WisdomTree Emerging Markets Corporate Bond Fund). Additionally, the Commission has previously approved the listing and trading of a number of actively-managed funds on NYSE Arca, Inc. pursuant to Rule 8.600 of that exchange. *See, e.g.*, Securities Exchange Act Release Nos. 68870 (February 8, 2013), 78 FR 11245 (February 15, 2013) (SR-NYSEArca-2012-139) (order approving listing and trading of First Trust Preferred Securities and Income ETF); 64643 (June 10, 2011), 76 FR 35062 (June 15, 2011) (SR-NYSEArca-2011-21) (order approving listing and trading of WisdomTree Global Real Return Fund). The Exchange believes the proposed rule change raises no significant issues not previously addressed in those prior Commission orders.

⁴ A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) (the “1940 Act”) organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Index Fund Shares, listed and traded on the Exchange under Nasdaq Rule 5705, seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

trust on January 9, 2008.⁵ 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. (the “Distributor”) will be the principal underwriter and distributor of the Fund’s Shares. Brown Brothers Harriman & Co. (“BBH”) will act as the administrator, accounting agent, custodian and transfer agent to the Fund.

Paragraph (g) of Rule 5735 provides that if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.⁷ In addition,

⁵ 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. 30029 (April 10, 2012) (File No. 812-13795) (the “Exemptive Relief”). In addition, on December 6, 2012, the staff of the Commission’s Division of Investment Management (“Division”) issued a no-action letter (“No-Action Letter”) relating to the use of derivatives by actively-managed ETFs. *See* No-Action Letter dated December 6, 2012 from Elizabeth G. Osterman, Associate Director, Office of Exemptive Applications, Division of Investment Management. The No-Action Letter stated that the Division would not recommend enforcement action to the Commission under applicable provisions of and rules under the 1940 Act if actively-managed ETFs operating in reliance on specified orders (which include the Exemptive Relief) invest in options contracts, futures contracts or swap agreements provided that they comply with certain representations stated in the No-Action Letter.

⁶ *See* Post-Effective Amendment No. 2 to Registration Statement on Form N-1A for the Trust, dated December 20, 2013 (File Nos. 333-176976 and 811-22245). The descriptions of the Fund and the Shares contained herein are based, in part, on information in the Registration Statement.

⁷ An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the “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

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Commission approved Nasdaq Rule 5735 in Securities Exchange Act Release No. 57962 (June 13, 2008), 73 FR 35175 (June 20, 2008) (SR-NASDAQ-2008-039). There are already multiple actively-managed funds listed on the Exchange; *see, e.g.*, Securities Exchange Act Release Nos. 69464 (April 26, 2013), 78 FR 25774 (May 2, 2013) (SR-NASDAQ-2013-036) (order approving listing and trading of First Trust Senior Loan Fund); 68972 (February 22, 2013), 78 FR 13721 (February 28,