

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77779; File No. TP 16-06]

### Order Granting Limited Exemptions From Exchange Act Rule 10b-17 and Rules 101 and 102 of Regulation M to IndexIQ ETF Trust, IQ Enhanced Core Bond U.S. ETF, IQ Enhanced Core Plus Bond U.S. ETF, IQ Leaders Bond Allocation Tracker ETF, and IQ Leaders GTAA Tracker ETF, Pursuant to Exchange Act Rule 10b-17(b)(2) and Rules 101(d) and 102(e) of Regulation M

May 6, 2016.

By letter dated May 6, 2016 (the "Letter"), as supplemented by conversations with the staff of the Division of Trading and Markets, counsel for IndexIQ ETF Trust (the "Trust"), on behalf of the Trust, the IQ Enhanced Core Bond U.S. ETF, IQ Enhanced Core Plus Bond U.S. ETF, IQ Leaders Bond Allocation Tracker ETF, and IQ Leaders GTAA Tracker ETF (each, a "Fund" and collectively the "Funds"), NYSE Arca or any national securities exchange on or through which shares issued by the Funds ("Shares") may subsequently trade, ALPS Distributors, Inc. (the "Distributor"), and persons or entities engaging in transactions in Shares (collectively, the "Requestors"), requested exemptions, or interpretive or no-action relief, from Rule 10b-17 of the Securities Exchange Act of 1934, as amended ("Exchange Act"), and Rules 101 and 102 of Regulation M, in connection with secondary market transactions in Shares and the creation or redemption of aggregations of Shares of at least 50,000 shares ("Creation Units").

The Trust is registered with the Securities and Exchange Commission ("Commission") under the Investment Company Act of 1940, as amended ("1940 Act"), as an open-end management investment company. Each Fund is an index fund that seeks to track, as closely as possible, before fees and expenses, the performance of its stated index by holding a portfolio of investments selected to correspond generally to the price and yield performance of such index.

The IQ Enhanced Core Bond U.S. ETF and the IQ Enhanced Core Plus Bond U.S. ETF seek investment results that correspond (before fees and expenses) generally to the price and yield performance of their indices, the IQ Enhanced Core Bond U.S. Index and IQ Enhanced Core Plus Bond U.S. Index, respectively. These indices were designed to weight each of the various

sectors of the investment grade fixed income market (and, in the case of the IQ Enhanced Core Plus Bond U.S. Index, the high yield fixed income securities market) based on each index's overall level of risk as measured by volatility and the total return momentum of each fixed income sector, so that each index will overweight fixed income sectors with high momentum and underweight fixed income sectors with low momentum, with constraints to maintain sector diversification.

The IQ Leaders Bond Allocation Tracker ETF and the IQ Leaders GTAA Tracker ETF seek investment results that correspond (before fees and expenses) generally to the price and yield performance of their indices, the IQ Leaders Bond Allocation Index and IQ Leaders GTAA Index, respectively. The IQ Leaders Bond Allocation Index seeks to track the "beta" portion of the returns of the ten leading bond mutual funds pursuing a global bond strategy and the IQ Leaders GTAA Index seeks to track the beta portion of the returns of the ten leading global allocation mutual funds based on fund performance and fund asset size.<sup>1</sup>

At least 80% of each Fund's portfolio holdings are, and will be, shares of some or all of the exchange-traded products ("ETPs") that are the index constituents of its stated index. Some or all of the remaining 20% may be invested in securities that are not index constituents which the advisor believes will help the Fund track its index, as well as cash, cash equivalents and various types of financial instruments including, but not limited to, futures contracts, swap agreements, forward contracts, reverse repurchase agreements, and options on securities, indices, and futures contracts. In no case will a Fund hold any non-ETP equity security issued by a single issuer in excess of 20% of such Fund's portfolio holdings.

Accordingly, each Fund intends to operate primarily as an "ETF of ETFs." Except for the fact that each Fund intends to operate primarily as an ETF of ETFs, each Fund will operate in a manner very similar to that of the ETPs held in its portfolio.

The Requestors represent, among other things, the following:

- Shares of each Fund will be issued by the Trust, an open-end management investment company that is registered with the Commission;
- The Trust will continuously redeem Creation Units at net asset value

<sup>1</sup> The global allocation mutual funds invest in a combination of equity, fixed-income, and money market securities of U.S. and foreign issuers, and may also invest in other asset classes such as commodities.

("NAV"), and the secondary market price of the Shares should not vary substantially from the NAV of such Shares;

- Shares of each Fund will be listed and traded on the NYSE Arca (the "Exchange") or other exchange in accordance with exchange listing standards that are, or will become, effective pursuant to Section 19(b) of the Exchange Act;

- Each ETP in which each Fund is invested will meet all conditions set forth in a relevant class relief letter,<sup>2</sup> or will have received individual relief from the Commission;

- All of the components of each Fund's underlying index will have publicly available last sale trade information;

- The intra-day proxy value of each Fund per share and the value of each Index will be publicly disseminated by a major market data vendor throughout the trading day;

- On each business day before the opening of business on the Exchange, each Fund's custodian, through the National Securities Clearing Corporation, will make available the list of the names and the numbers of securities and other assets of the Fund's portfolio that will be applicable that day to creation and redemption requests;

- The Exchange or other market information provider will disseminate every 15 seconds throughout the trading day through the facilities of the Consolidated Tape Association an amount representing the current value of the cash and securities held in the portfolio of a Fund but does not reflect corporate actions, expenses, and other adjustments made to such portfolio throughout the day ("Estimated NAV");

- At least 80% of each Fund's portfolio holdings are, and will be, shares of some or all of the ETPs that are the index constituents of its stated index;

- Each Fund will invest in securities that will facilitate an effective and

<sup>2</sup> Letter from Catherine McGuire, Esq., Chief Counsel, Division of Market Regulation, to the Securities Industry Association Derivative Products Committee (Nov. 21, 2005); Letter from Racquel L. Russell, Branch Chief, Division of Market Regulation, to George T. Simon, Esq., Foley & Lardner LLP (June 21, 2006); Letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Stuart M. Strauss, Esq., Clifford Chance US LLP (Oct. 24, 2006); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Benjamin Haskin, Esq., Willkie, Farr & Gallagher LLP (Apr. 9, 2007); or Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to Domenick Pugliese, Esq., Paul, Hastings, Janofsky and Walker LLP (June 27, 2007). See also Staff Legal Bulletin No. 9, "Frequently Asked Questions About Regulation M" (Apr. 12, 2002) (regarding actively-managed ETFs).

efficient arbitrage mechanism and the ability to create workable hedges;

- The Requestors believe that arbitrageurs can be expected to take advantage of price variations between each Fund's market price and its NAV;
- The arbitrage mechanism will be facilitated by the transparency of each Fund's portfolio and the availability of the Estimated NAV, the liquidity of securities and other assets held by each Fund, and the ability to acquire such securities, as well as arbitrageurs' ability to create workable hedges; and
- A close alignment between the market price of Shares and each Fund's NAV is expected.

### Regulation M

While redeemable securities issued by an open-end management investment company are excepted from the provisions of Rule 101 and 102 of Regulation M, the Requestors may not rely upon that exception for the Shares.<sup>3</sup> However, we find that it is appropriate in the public interest, and is consistent with the protection of investors, to grant a limited exemption from Rules 101 and 102 to persons who may be deemed to be participating in a distribution of Shares and the Fund as described in more detail below.

### Rule 101 of Regulation M

Generally, Rule 101 of Regulation M is an anti-manipulation rule that, subject to certain exceptions, prohibits any "distribution participant" and its "affiliated purchasers" from bidding for, purchasing, or attempting to induce any person to bid for or purchase, any security which is the subject of a distribution until after the applicable restricted period, except as specifically permitted in the rule. Rule 100 of Regulation M defines "distribution" to mean any offering of securities that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods. The provisions of Rule 101 of Regulation M apply to underwriters, prospective underwriters, brokers, dealers, or other persons who have agreed to participate or are participating in a distribution of securities. The Shares are in a continuous distribution and, as such, the restricted period in which distribution participants and their affiliated purchasers are prohibited from bidding for, purchasing, or attempting to

<sup>3</sup> While ETFs operate under exemptions from the definitions of "open-end company" under Section 5(a)(1) of the 1940 Act and "redeemable security" under Section 2(a)(32) of the 1940 Act, each Fund and its securities do not meet those definitions.

induce others to bid for or purchase, extends indefinitely.

Based on the representations and facts presented in the Letter, particularly that the Trust is a registered open-end management investment company that will continuously redeem at the NAV Creation Unit size aggregations of the Shares of each Fund and that a close alignment between the market price of Shares and each Fund's NAV is expected, the Commission finds that it is appropriate in the public interest, and consistent with the protection of investors, to grant the Trust an exemption under paragraph (d) of Rule 101 of Regulation M with respect to each Fund, thus permitting persons participating in a distribution of Shares of each Fund to bid for or purchase such Shares during their participation in such distribution.<sup>4</sup>

### Rule 102 of Regulation M

Rule 102 of Regulation M prohibits issuers, selling security holders, or any affiliated purchaser of such person from bidding for, purchasing, or attempting to induce any person to bid for or purchase a covered security during the applicable restricted period in connection with a distribution of securities effected by or on behalf of an issuer or selling security holder.

Based on the representations and facts presented in the Letter, particularly that the Trust is a registered open-end management investment company that will redeem at the NAV Creation Units of Shares of each Fund and that a close alignment between the market price of Shares and each Fund's NAV is expected, the Commission finds that it is appropriate in the public interest, and consistent with the protection of investors, to grant the Trust an exemption under paragraph (e) of Rule 102 of Regulation M with respect to the Funds, thus permitting each Fund to redeem Shares of each Fund during the continuous offering of such Shares.

### Rule 10b-17

Rule 10b-17, with certain exceptions, requires an issuer of a class of publicly traded securities to give notice of certain specified actions (for example, a dividend distribution) relating to such class of securities in accordance with Rule 10b-17(b). Based on the

<sup>4</sup> Additionally, we confirm the interpretation that a redemption of Creation Unit size aggregations of Shares of each Fund and the receipt of securities in exchange by a participant in a distribution of Shares of each Fund would not constitute an "attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period" within the meaning of Rule 101 of Regulation M and, therefore, would not violate that rule.

representations and facts in the Letter, and subject to the conditions below, we find that it is appropriate in the public interest, and consistent with the protection of investors, to grant the Trust a conditional exemption from Rule 10b-17 because market participants will receive timely notification of the existence and timing of a pending distribution, and thus the concerns that the Commission raised in adopting Rule 10b-17 will not be implicated.<sup>5</sup>

### Conclusion

*It is hereby ordered*, pursuant to Rule 101(d) of Regulation M, that the Trust, based on the representations and the facts presented in the Letter, is exempt from the requirements of Rule 101 with respect to each Fund, thus permitting persons who may be deemed to be participating in a distribution of Shares of each Fund to bid for or purchase such Shares during their participation in such distribution.

*It is further ordered*, pursuant to Rule 102(e) of Regulation M, that the Trust, based on the representations and the facts presented in the Letter, is exempt from the requirements of Rule 102 with respect to each Fund, thus permitting each Fund to redeem Shares of each Fund during the continuous offering of such Shares.

*It is further ordered*, pursuant to Rule 10b-17(b)(2), that the Trust, based on the representations and the facts presented in the Letter, and subject to the conditions below, is exempt from the requirements of Rule 10b-17 with respect to transactions in the Shares of each Fund.

This exemptive relief is subject to the following conditions:

- The Trust will comply with Rule 10b-17 except for Rule 10b-17(b)(1)(v)(a) and (b); and
- The Trust will provide the information required by Rule 10b-17(b)(1)(v)(a) and (b) to the Exchange as soon as practicable before trading begins on the ex-dividend date, but in no event later than the time when the Exchange last accepts information relating to distributions on the day before the ex-dividend date.

This exemptive relief is subject to modification or revocation at any time

<sup>5</sup> We also note that timely compliance with Rule 10b-17(b)(1)(v)(a) and (b) would be impractical because it is not possible for the Funds to accurately project ten days in advance what dividend, if any, would be paid on a particular record date. Further, the Commission finds, based upon the representations of the Requestors in the Letter, that the provision of the notices as described in the Letter would not constitute a manipulative or deceptive device or contrivance comprehended within the purpose of Rule 10b-17.

the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. Persons relying upon this exemptive relief shall discontinue transactions involving the Shares of the Funds, pending presentation of the facts for the Commission's consideration, in the event that any material change occurs with respect to any of the facts or representations made by the Requestors and, consistent with all preceding letters, particularly with respect to the close alignment between the market price of Shares and each Fund's NAV. In addition, persons relying on this exemptive relief are directed to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Sections 9(a) and 10(b), and Rule 10b-5 thereunder. Responsibility for compliance with these and any other applicable provisions of the federal securities laws must rest with the persons relying on this exemptive relief.

This order should not be considered a view with respect to any other question that the proposed transactions may raise, including, but not limited to the adequacy of the disclosure concerning, and the applicability of other federal or state laws to, the proposed transactions.

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

**Robert W. Errett,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77781; File No. SR-NASDAQ-2016-064]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of the Shares of the First Trust Strategic Mortgage REIT ETF of First Trust Exchange-Traded Fund VIII

May 6, 2016.

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> notice is hereby given that on May 3, 2016, 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 and II 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 Strategic Mortgage REIT ETF (the "Fund") of First Trust Exchange-Traded Fund VIII (the "Trust") under Nasdaq Rule 5735 ("Managed Fund Shares").<sup>3</sup> The shares of the Fund are collectively referred to herein as the "Shares."

#### 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 and discussed any comments it received on 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 the 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 Shares<sup>4</sup> on the Exchange. The Fund will

<sup>3</sup> 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. 72506 (July 1, 2014), 79 FR 38631 (July 8, 2014) (SR-NASDAQ-2014-050) (order approving listing and trading of First Trust Strategic Income ETF); 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); and 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). The Exchange believes the proposed rule change raises no significant issues not previously addressed in those prior Commission orders.

<sup>4</sup> 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

be an actively-managed exchange-traded fund ("ETF"). The Shares will be offered by the Trust, which was established as a Massachusetts business trust on February 22, 2016.<sup>5</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.<sup>6</sup> 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. The Bank of New York Mellon Corporation ("BNY") 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.<sup>7</sup> In addition,

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.

<sup>5</sup> 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) (the "Exemptive Relief").

<sup>6</sup> See Registration Statement on Form N-1A for the Trust, dated March 14, 2016 (File Nos. 333-210186 and 811-23147). The descriptions of the Fund and the Shares contained herein are based, in part, on information in the Registration Statement.

<sup>7</sup> 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 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

<sup>6</sup> 17 CFR 200.30-3(a)(6) and (9).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.