

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSEMKT-2016-17, and should be submitted on or before April 1, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77306; File No. SR-NYSEMKT-2016-31]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Rule 123C—Equities To Provide for How the Exchange Would Determine an Official Closing Price if the Exchange Is Unable To Conduct a Closing Transaction

March 7, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on February 25, 2016, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

The Exchange proposes to amend Rule 123C—Equities to provide for how the Exchange would determine an Official Closing Price if the Exchange is unable to conduct a closing transaction. The proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, 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, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts 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 is proposing to amend its rules to specify back-up procedures for determining an Official Closing Price for Exchange-listed securities if it is unable to conduct a closing transaction in one or more securities due to a systems or technical issue.<sup>4</sup> Specifically, the Exchange proposes to amend Rule 123C—Equities ("Rule 123C") to provide for how the Exchange would determine an Official Closing Price if the Exchange is impaired.

The Exchange developed this proposal in consultation with its affiliated exchanges, NYSE Arca, Inc. ("NYSE Arca") and New York Stock Exchange LLC ("NYSE"), and the NASDAQ Stock Market LLC ("Nasdaq"), and took into consideration feedback from discussions with industry participants, including meeting the following key goals important to market participants:

- Providing a pre-determined, consistent solution that would result in a closing print to the applicable securities information processor ("SIP")

within a reasonable time frame from the normal closing time;

- Minimizing the need for industry participants to modify their processing of data from the SIPs; and
- Providing advance notification of the applicable closing contingency plan to provide sufficient time for industry participants to route any closing interest to an alternate venue to participate in that venue's closing auction.

###### Background

The Exchange recently amended Rule 123C to add the definition of "Official Closing Price" for all Exchange-listed securities and, once implemented, will disseminate to the SIP the Official Closing Price as an "M" value.<sup>5</sup> In that filing, the Exchange amended Rule 123C(1)(e)(i) to define the "Official Closing Price" of a security listed on the Exchange as the price established in a closing transaction under paragraphs (7) and (8) of Rule 123C of one round lot or more. If there is no closing transaction in a security or if a closing transaction is less than one round lot, the Official Closing Price will be the most recent last-sale eligible trade in such security on the Exchange on that trading day.

The Exchange further amended Rule 123C(1)(e)(ii) to provide for how the Exchange would determine an Official Closing Price if the Exchange is unable to conduct a closing transaction in a security or securities due to a systems or technical issue. In such case, the Official Closing Price will be the last consolidated last-sale eligible trade for such security during regular trading hours on that trading day. The rule further provides that if there were no consolidated last-sale eligible trades in a security on a trading day when the Exchange is unable to conduct a closing transaction in a security or securities due to a systems or technical issue, the Official Closing Price of such security will be the prior day's Official Closing Price.

The Exchange also amended Rule 440B(b)—Equities to provide that Exchange systems will not execute or display a short sale order with respect to a covered security at a price that is less than or equal to the current national best bid if the price of that security decreases by 10% or more, as

<sup>5</sup> See Securities Exchange Act Release No. 76601 (Dec. 9, 2015), 80 FR 77680 (Dec. 15, 2015) (SR-NYSEMKT-2015-98). For a description of all sale conditions that are reportable to the SIP, including the "M" value, see the Consolidated Tape System Participant Communications Interface Specification, dated November 16, 2015, at 86, available here: [https://www.ctaplant.com/publicdocs/ctaplant/notifications/trader-update/cts\\_input\\_spec.pdf](https://www.ctaplant.com/publicdocs/ctaplant/notifications/trader-update/cts_input_spec.pdf).

<sup>21</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See NYSE press release dated July 22, 2015, available here: <http://ir.theice.com/press-and-publications/press-releases/all-categories/2015/07-22-2015.aspx>.

determined by the listing market for that security, from the security's Official Closing Price, as defined in Rule 123C as of the end of regular trading hours on the prior day ("Trigger Price").

#### Proposed Amendments

The Exchange proposes to amend Rule 123C(1)(e)(ii) to provide for the proposed new contingency plan of how the Exchange would determine an Official Closing Price if the Exchange is unable to conduct a closing transaction in a security or securities due to a systems or technical issue. To reflect this change, the Exchange would replace the current rule text in Rule 123C(1)(e)(ii).

As proposed, Rule 123C(1)(e)(ii) would provide that if the Exchange determines at or before 3:00 p.m. Eastern Time that it is unable to conduct a closing transaction in one or more securities due to a systems or technical issue, the Exchange would designate an alternate exchange for such security or securities. The Exchange would publicly announce the exchange designated as the alternate exchange via Trader Update.<sup>6</sup> In such case, the Official Closing Price of each security would be determined on the following hierarchy:

- Proposed Rule 123C(1)(e)(ii)(A) would provide that the Official Closing Price would be the official closing price for such security under the rules of the designated alternate exchange. For example, if the Exchange designates NYSE Arca as the alternate exchange, the Official Closing Price would be based on NYSE Arca Equities Rule 1.1(ggP), which defines how NYSE Arca establishes an official closing price.<sup>7</sup> If Nasdaq were designated as the alternate exchange, the Official Closing Price would be the official closing price established in Nasdaq Rule 4754.

The proposed 3:00 p.m. cut off time was selected in part based on discussions with market participants regarding their capability to re-direct closing-only interest in Exchange-listed securities in time to participate in the closing auction of an alternate venue. By designating an alternate exchange before 3:00 p.m. Eastern Time, the Exchange

therefore believes that market participants would be more likely to have sufficient notice to direct any closing-only interest in Exchange-listed securities to the designated alternate exchange. By providing market participants sufficient time, when possible, to route closing-only interest to an alternate venue for participation in that exchange's closing auction process, that alternate exchange's closing auction would be more likely to result in a closing price that reflects market value for such security.

If there were insufficient interest for a closing auction on the designated alternate exchange, the Exchange believes that the respective rules of NYSE Arca and Nasdaq provide for an appropriate hierarchy of which price to use to determine the Official Closing Price. For example, under NYSE Arca Rule 1.1(ggP)(1), if there is no closing auction of one round lot or more on a trading day, the official closing price under that rule is the most recent consolidated last sale eligible trade during Core Trading Hours on that trading day. That rule further provides that if there were no consolidated last sale eligible trades during Core Trading Hours on that trading day, NYSE Arca's official closing price will be the prior day's Official Closing Price. This hierarchy is similar to how the Exchange determines the Official Closing Price pursuant to Rule 123C(1)(e)(i) when there is no closing transaction of a round lot or more, except that in lieu of a closing auction, NYSE Arca uses the last consolidated last sale eligible trade rather than the last Exchange last-sale eligible trade.

- Proposed Rule 123C(1)(e)(ii)(B) would provide if the designated alternate exchange does not have an official closing price in a security, the Official Closing price would be the volume-weighted average price ("VWAP") of the consolidated last-sale eligible prices of the last five minutes of trading during regular trading hours up to the time that the VWAP is processed. The VWAP would include any closing transactions on an exchange and would take into account any trade breaks or corrections up to the time the VWAP is processed. Because the VWAP would include any last-sale eligible trades, busts, or corrections that were reported up to the time that the SIP calculates the VWAP, the Exchange believes that the VWAP price would reflect any pricing adjustments that may be reported after 4:00 p.m. ET.

As discussed above, the manner by which exchanges calculate their respective official closing prices provide for an official closing price in the

absence of a closing transaction. Accordingly, the Exchange believes that in circumstances when the Exchange designates an alternate exchange, the VWAP calculation would rarely be used to determine the Official Closing Price for an Exchange-listed security.

- Proposed Rule 123C(1)(e)(ii)(C) would provide that if the designated alternate exchange does not have an official closing price in a security and there were no consolidated last-sale eligible trades in the last five minutes of trading during regular trading hours in such security, the Official Closing Price would be the last consolidated last-sale eligible trade during regular trading hours on that trading day.

- Proposed Rule 123C(1)(e)(ii)(D) would provide that if the designated alternate exchange does not have an official closing price in a security and there were no consolidated last-sale eligible trades in a security on a trading day in such security, the Official Closing Price would be the prior day's Official Closing Price.

- Finally, proposed Rule 123C(1)(e)(ii)(E) would provide that if an Official Closing Price for a security cannot be determined under (A), (B), or (C) of proposed Rule 123C(1)(e)(ii) and there is no prior day's Official Closing Price, the Exchange would not publish an Official Closing Price for such security.

The Exchange would use the hierarchy set forth in proposed Rule 123C(1)(e)(ii)(B)–(E) only if the designated alternate exchange did not disseminate an official closing price in a security. In such case, the proposed hierarchy is based on current Rule 123C(1)(e)(i), which provides that, if the Exchange is unable to conduct a closing transaction, the Official Closing Price will be the last consolidated last-sale eligible trade for such security during regular trading hours on that trading day, and if there were no consolidated last-sale eligible trades in a security, the Official Closing Price of such security will be the prior day's Official Closing Price. In addition, the Exchange proposes to add as paragraph (E) of Rule 123C(1)(e)(ii) what would happen if there were no Official Closing Price published on the prior trading day (*i.e.*, the Exchange would not publish an Official Closing Price). The Exchange believes not publishing an Official Closing Price would be a rare occurrence, and is most likely to occur for a thinly-traded security, such as a when issued security, right, or warrant, that has been listed for trading but does not have any consolidated last-sale eligible trades.

If the Exchange determines that it is impaired before 3:00 p.m. and the

<sup>6</sup> The Exchange expects that it would designate one of its affiliated exchanges as the alternate exchange and would designate Nasdaq only if its affiliated exchanges were also impacted by the systems or technical issue.

<sup>7</sup> NYSE Arca Equities will be filing a rule proposal to amend Rule 1.1(ggP)(1) to provide that the manner by which NYSE Arca determines the Official Closing Price under that rule for securities listed on NYSE Arca would also be applicable to any securities for which NYSE Arca conducts a closing auction, including securities that trade on an unlisted trading privileges basis.

Official Closing Price for an Exchange-listed security is determined pursuant to proposed Rule 123C(1)(e)(ii), the SIP would publish the Official Closing Price for such security no differently than how the SIP publishes the Official Closing Price for an Exchange-listed security pursuant to Rule 123C(1)(e)(i).<sup>8</sup> Accordingly, if the Official Closing Price is determined pursuant to proposed Rule 123C(1)(e)(ii), recipients of SIP data would not have to make any changes to their systems because the SIP would publish the “M” last sale condition as an Exchange Official Closing Price for any impacted Exchange-listed securities.

As further proposed, Rule 123C(1)(e)(iii) would describe how the Exchange would determine the Official Closing Price for a security if the Exchange determines after 3:00 p.m. Eastern Time that it is unable to conduct a closing transaction in one or more securities due to a systems or technical issue. Based on input from market participants, the Exchange believes that, if the Exchange were to announce after 3:00 p.m. Eastern Time that it is impaired and unable to conduct a closing transaction, market participants would not have sufficient time to re-direct closing-only orders to an alternate venue. The proposed hierarchy would be similar to proposed Rule 123C(1)(e)(ii), but would not contemplate a closing transaction on a designated alternate exchange. Accordingly, in such scenario, the Exchange proposes to use the following hierarchy for determining the Official Closing Price for a security:

- Proposed Rule 123C(1)(e)(iii)(A) would provide that the Official Closing Price would be the VWAP of the consolidated last-sale eligible prices of the last five minutes of trading during regular trading hours up to the time that the VWAP is processed, including any closing transactions on an exchange. The VWAP would take into account any trade breaks or corrections up to the time of the VWAP is processed. This VWAP would be calculated in the same manner as set forth in proposed in Rule 123C(1)(e)(ii)(B), described above. However, if the Exchange’s determination that it is unable to

conduct a closing transaction is after 3:00 p.m. ET, the proposed VWAP calculation would be the primary means for determining the Official Closing Price for a security. In such case, the Exchange believes that the VWAP would appropriately reflect the pricing of a security because it would include, in a volume-weighted manner, the price and volume of closing transactions on other exchanges if market participants are able to route closing interest in Exchange-listed securities to an alternate venue for participation in a closing auction.

- Proposed Rule 123C(1)(e)(iii)(B) would provide that if there were no consolidated last-sale eligible trades in the last five minutes of trading during regular trading hours in such security, the Official Closing Price would be the last consolidated last-sale eligible trades during regular trading hours on that trading day. This proposed rule text is the same as proposed Rule 123C(1)(e)(ii)(C).

- Proposed Rule 123C(1)(e)(iii)(C) would provide that if there were no consolidated last-sale eligible trades in such security on a trading day, the Official Closing Price would be the prior day’s Official Closing Price. This proposed rule text is the same as proposed Rule 123C(1)(e)(ii)(D).

- Finally, proposed Rule 123C(1)(e)(iii)(D) would provide that if an Official Closing Price for a security cannot be determined under (A), (B), or (C) of proposed Rule 123C(1)(e)(iii) and there is no prior day’s Official Closing Price, the Exchange would not publish an Official Closing Price for such security. This proposed rule text is based on proposed Rule 123C(1)(e)(ii)(E).

Similar to how the Official Closing Price would be published under proposed Rule 123C(1)(e)(ii), if the Exchange determines that it is impaired after 3:00 p.m. and the Official Closing Price is determined pursuant to proposed Rule 123C(1)(e)(iii), the SIP would publish the Official Closing Price for such security no differently than how the SIP publishes the Official Closing Price for an Exchange-listed security pursuant to Rule 123C(1)(e)(i). Accordingly, if the Official Closing Price is determined pursuant to proposed Rule 123C(1)(e)(iii), recipients of SIP data would not have to make any changes to their systems because the SIP would publish the “M” last sale condition as an Exchange Official Closing Price for any impacted Exchange-listed securities.

For purposes of Rule 440B(b)—Equities, the Official Closing Price would still be determined based on Rule

123C and if the market is impaired, the Official Closing Price as defined in proposed Rules 123C(1)(e)(ii) and (iii) would be used for purposes of determining whether a Short Sale Price Test is triggered in a security the next trading day.

Because of the technology changes associated with this proposed rule change, the Exchange will implement the proposed back-up procedures for determining an Official Closing Price no later than 120 days after approval of this proposed rule change and will announce the implementation date via Trader Update.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>10</sup> in particular, in that it is 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, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide transparency in how the Exchange would determine the Official Closing Price in Exchange-listed securities when the Exchange is unable to conduct a closing transaction due to a systems or technical issue. The Exchange believes that the proposed amendments would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed determination of an Official Closing Price was crafted in response to input from industry participants and would:

- Provide a pre-determined, consistent solution that would result in a closing print to the SIP within a reasonable time frame from the normal closing time;
- minimize the need for industry participants to modify their processing of data from the SIP; and
- provide advance notification of the applicable closing contingency plan to provide sufficient time for industry participants to route any closing interest

<sup>8</sup> The Operating Committees of the CTA Plan, CQ Plan, and the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis approved the Impaired Market Contingency Plan under which the SIPs would print an impaired primary listing exchange’s contingency Official Closing Price as the Official Closing Price of that primary listing exchange as provided for in the rules of respective primary listing exchanges.

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

to an alternate venue to participate in that venue's closing auction

More specifically, the Exchange believes the proposed hierarchy for determining the Official Closing Price if the Exchange determines that it is impaired before 3:00 p.m. Eastern Time would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposal, which is based on input from market participants, would provide sufficient time for market participants to direct closing-only interest to a designated alternate exchange in time for such interest to participate in a closing auction on such alternate venue in a meaningful manner. The Exchange further believes that relying on the official closing price of a designated alternate exchange would provide for an established hierarchy for determining an Official Closing Price for an Exchange-listed security if there is insufficient interest to conduct a closing auction on the alternate exchange. In such case, the rules of NYSE Arca and Nasdaq already provide a mechanism for determining an official closing price for securities that trade on those markets.

The Exchange further believes that if the Exchange determines after 3:00 p.m. that it is impaired and unable the [sic] conduct a closing transaction, the proposed VWAP calculation would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide for a mechanism to determine the value of an affected security for purposes of determining an Official Closing Price. By using a volume-weighted calculation that would include the closing transactions on an affected security on alternate exchanges as well as any busts or corrections that were reported up to the time that the SIP calculates the value, the Exchange believes that the proposed calculation would reflect the correct price of a security. In addition, by using a VWAP calculation rather than the last consolidated last-sale eligible price as of the end of regular trading hours, the Exchange would reduce the potential for an anomalous trade that may not reflect the true price of a security from being set as the Official Closing Price for a security.

The Exchange further believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposal would have minimal impact on market participants. As proposed, from the perspective of market participants, even if the

Exchange were impaired, the SIP would publish an Official Closing Price for Exchange-listed securities on behalf of the Exchange in a manner that would be no different than if the Exchange were not impaired. If the Exchange determines that it is impaired after 3:00 p.m., market participants would not have to make any system changes. If the Exchange determines that it is impaired before 3:00 p.m. Eastern Time and designates an alternate exchange, market participants may have to do systems work to re-direct closing-only orders to the alternate exchange. However, the Exchange understands, based on input from market participants, that such changes would be feasible based on the amount of advance notice. In addition, the Exchange believes that designating an alternate exchange when there is sufficient time to do so would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would allow for the price-discovery mechanism of a closing auction to be available for impacted Exchange-listed securities.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues, but rather to provide for how the Exchange would determine an Official Closing Price for Exchange-listed securities if it is impaired and cannot conduct a closing transaction due to a systems or technical issue. The proposal has been crafted with input from market participants, Nasdaq, and the SIPs, and is designed to reduce the burden on competition by having similar back-up procedures across all primary listing exchanges if such exchange is [sic] impaired and cannot conduct a closing transaction.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the

Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2016-31 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-NYSEMKT-2016-31. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only

information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEMKT-2016-31 and should be submitted on or before April 1, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Robert W. Errett,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77301; File No. SR-NASDAQ-2016-028]

### 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 iSectors Post-MPT Growth ETF of ETFis Series Trust I

March 7, 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 February 23, 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 iSectors Post-MPT Growth ETF (the “Fund”), a series of ETFis Series Trust I (the “Trust”), under Nasdaq Rule 5735 (“Managed Fund Shares”).<sup>3</sup> The shares of the Fund are

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

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

<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 No. 72411 (June 17, 2014), 79 FR 35598 (June 23, 2014) (SR-NASDAQ-2014-40) (order approving listing and trading of Calamos Focus Growth ETF). The Exchange believes the proposed rule change raises no significant issues not previously addressed in those prior Commission orders. The Exchange believes the proposed rule change raises no significant issues not previously addressed in those prior Commission orders.

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. 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 be an actively managed exchange-traded fund (“ETF”). The Shares will be offered by the Trust, which was established as a Delaware statutory trust on September 20, 2012.<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 is a series of the Trust.

<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 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. 30607 (July 23, 2013). In compliance with Nasdaq Rule 5735(b)(5), which applies to Managed Fund Shares based on an international or global portfolio, the Trust’s application for exemptive relief under the 1940 Act states that the Fund will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a).

<sup>6</sup> See Registration Statement on Form N-1A for the Trust filed on December 2, 2015 (File Nos. 333-187668 and 811-22819). The descriptions of the Fund and the Shares contained herein are based, in part, on information in the Registration Statement.

Virtus ETF Advisers LLC will be the investment adviser (“Adviser”) to the Fund. iSectors, LLC will be the investment sub-adviser (“Sub-Adviser”) to the Fund. ETF Distributors LLC (the “Distributor”) will be the principal underwriter and distributor of the Fund’s Shares. The Bank of New York Mellon (“BNY Mellon”) 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, paragraph (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. Rule 5735(g) is similar to Nasdaq Rule 5705(b)(5)(A)(i); however, paragraph (g) in connection with the establishment of a “fire wall” between the investment adviser and the broker-dealer reflects the applicable open-end fund’s portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser and Sub-Adviser are not registered as broker-dealers; however the Adviser (but not the Sub-Adviser) is affiliated with a broker-dealer and has implemented a fire wall with respect to such broker-dealer

<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, 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 other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.