

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Eduardo A. Aleman,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-80614; File No. SR-NASDAQ-2017-029]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 2, 3, and 4, to List and Trade Shares of the Gabelli Small Cap Growth Fund and the Gabelli RBI Fund Under Nasdaq Rule 5745

May 5, 2017.

I. Introduction

On March 17, 2017, The NASDAQ Stock Market LLC (“*Nasdaq*” or “*Exchange*”) filed with the Securities and Exchange Commission (“*Commission*”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“*Act*”) ¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade common shares (“*Shares*”) of the Gabelli Small Cap Growth NextShares™ (“*Gabelli Small Cap Growth Fund*”) and the Gabelli RBI NextShares™ (“*Gabelli RBI Fund*”) (each, a “*Fund*,” and collectively, the “*Funds*”) under Nasdaq Rule 5745. The proposed rule change was published for comment in the *Federal Register* on March 31, 2017.³ On April 13, 2017, the Exchange filed Amendment No. 2 to the proposed rule change; on April 24, 2017, the Exchange filed Amendment No. 3 to the proposed rule change; and on May 3, 2017, the Exchange filed Amendment No. 4 to the proposed rule change.⁴ The Commission received no

comments on the proposed rule change. This order grants approval of the proposed rule change, as modified by Amendment Nos. 2, 3, and 4.

II. Exchange’s Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Funds under Nasdaq Rule 5745, which governs the listing and trading of Exchange-Traded Managed Fund Shares, as defined in Nasdaq Rule 5745(c)(1). Each Fund is a series of the Gabelli NextShares™ Trust (“*Trust*”).⁵ The Exchange represents that the Trust is registered with the Commission as an open-end investment company and that it has filed a registration statement on Form N-1A (“*Registration Statement*”) with the Commission with respect to the Funds.⁶ Gabelli Funds, LLC (“*Adviser*”) will be the Adviser to the Funds.

regarding the investments of each Fund; (d) modifies the continued listing representations to conform to Nasdaq rules; and (e) makes other technical, non-substantive corrections in the proposed rule change. Amendment No. 2 is available at: <https://www.sec.gov/comments/sr-nasdaq-2017-029/nasdaq2017029-1701356-149968.pdf>. Amendment Nos. 3 to the proposed rule change is a partial amendment in which the Exchange clarifies that, under normal market conditions, the Gabelli RBI Fund invests primarily in equity securities, such as common stock, of domestic and foreign services and equipment companies focused on physical asset development, including roads, bridges, and infrastructure (RBI). Amendment No. 3 is available at: <https://www.sec.gov/comments/sr-nasdaq-2017-029/nasdaq2017029-1717445-150417.pdf>. Amendment No. 4 to the proposed rule change is a partial amendment in which the Exchange clarifies that the Reporting Authority (as defined in Nasdaq Rule 5745) will implement and maintain, or ensure that the Composition File (as defined in Nasdaq Rule 5745) will be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the Fund’s portfolio positions and changes in the positions. Amendment No. 4 is available at: <https://www.sec.gov/comments/sr-nasdaq-2017-029/nasdaq2017029-1734987-150973.pdf>. Because Amendment Nos. 2, 3, and 4 to the proposed rule change do not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment Nos. 2, 3, and 4 are not subject to notice and comment.

⁵ According to the Exchange, the Commission has issued an order granting the Trust and certain affiliates of the Trust exemptive relief under the Investment Company Act of 1940 (“*1940 Act*”). See Investment Company Act Release No. 31608 (May 19, 2015) (File No. 812-14438). The Exchange represents that, in compliance with Nasdaq Rule 5745(b)(5), which applies to Shares based on an international or global portfolio, the Trust’s application for exemptive relief under the 1940 Act states that the Trust will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with 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, as amended.

⁶ See Registration Statement on Form N-1A for the Trust dated March 14, 2017 (File Nos. 333-211881 and 811-23160).

G.distributors, LLC, will be the principal underwriter and distributor of the Funds’ Shares. The Bank of New York Mellon will act as custodian and transfer agent. BNY Mellon Investment Servicing (US) Inc. will act as the sub-administrator to the Funds. Interactive Data Pricing and Reference Data, Inc. will calculate the Intraday Indicative Value (as described below) for the Funds.

The Exchange has made the following representations and statements in describing the Funds.⁷ According to the Exchange, each Fund will be actively managed and will pursue the various principal investment strategies described below.⁸

A. Principal Investment Strategies

1. The Gabelli Small Cap Growth Fund

The Gabelli Small Cap Growth Fund seeks to provide a high level of capital appreciation. Under normal market conditions, the Gabelli Small Cap Growth Fund invests at least 80% of its net assets, plus borrowings for investment purposes, in equity securities of companies that are considered to be small companies at the time the Gabelli Small Cap Growth Fund makes its investment. The Gabelli Small Cap Growth Fund invests primarily in the common stocks of companies, which the Adviser believes are likely to have rapid growth in revenues and above average rates of earnings growth. The Adviser currently characterizes small companies for the Gabelli Small Cap Growth Fund as those with total common stock market values of \$3 billion or less at the time of investment.

2. The Gabelli RBI Fund

The Gabelli RBI Fund seeks to provide above average capital-appreciation. Under normal market conditions, the Gabelli RBI Fund primarily invests in equity securities, such as common stock, of domestic and foreign services and equipment companies focused on physical asset development, including roads, bridges, and infrastructure (RBI). The Adviser

⁷ The Commission notes that additional information regarding the Trust, the Funds, and the Shares, including investment strategies, risks, creation and redemption procedures, calculation of net asset value (“*NAV*”), fees, distributions, and taxes, among other things, can be found in the Notice, Amendment Nos. 2, 3, and 4, and Registration Statement, as applicable. See *supra* notes 3, 4, and 6, respectively, and accompanying text.

⁸ According to the Exchange, additional information regarding the Funds will be available on one of two free public Web sites (www.gabelli.com or www.nextshares.com), as well as in the Registration Statement for the Funds.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 80315 (March 27, 2017), 82 FR 16075 (“*Notice*”).

⁴ On April 11, 2017, the Exchange filed Amendment No. 1 to the proposed rule change and, on April 13, 2017, the Exchange withdrew Amendment No. 1. Amendment No. 2 to the proposed rule change replaces and supersedes the original filing in its entirety. In Amendment No. 2, the Exchange: (a) Represents that the Adviser will maintain a fire wall with respect to its affiliated broker-dealer regarding access to information concerning the composition of, and/or changes to, each Fund’s portfolio; (b) represents that personnel who make decisions on each Fund’s portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding each Fund’s portfolio; (c) provides additional detail

selects companies which it believes are currently undervalued and have the potential to benefit from domestic and global reinvestment and development of physical assets, including roads, bridges, and other infrastructure-related industries.

B. Portfolio Disclosure and Composition File

Consistent with the disclosure requirements that apply to traditional open-end investment companies, a complete list of each Fund's current portfolio positions will be made available at least once each calendar quarter, with a reporting lag of not more than 60 days. The Funds may provide more frequent disclosures of portfolio positions at its discretion.

As defined in Nasdaq Rule 5745(c)(3), the "Composition File" is the specified portfolio of securities and/or cash that a Fund will accept as a deposit in issuing a creation unit of Shares, and the specified portfolio of securities and/or cash that a Fund will deliver in a redemption of a creation unit of Shares. The Composition File will be disseminated through the National Securities Clearing Corporation once each business day before the open of trading in Shares on that day and also will be made available to the public each day on a free Web site.⁹ Because each Fund seeks to preserve the confidentiality of its current portfolio trading program, a Fund's Composition File generally will not be a pro rata reflection of the Fund's investment positions. Each security included in the Composition File will be a current holding of a Fund, but the Composition File generally will not include all of the securities in the Fund's portfolio or match the weightings of the included securities in the portfolio. Securities that the Adviser is in the process of acquiring for a Fund generally will not be represented in the Fund's Composition File until their purchase has been completed. Similarly, securities that are held in a Fund's portfolio but are in the process of being sold may not be removed from its Composition File until the sale is substantially completed. A Fund creating and redeeming Shares in kind will use cash amounts to supplement the in-kind transactions to the extent necessary to ensure that creation units are purchased and redeemed at NAV. The Composition File also may consist entirely of cash, in which case it will

not include any of the securities in a Fund's portfolio.¹⁰

C. Intraday Indicative Value

For each Fund, an estimated value of an individual Share, defined in Nasdaq Rule 5745(c)(2) as the "Intraday Indicative Value" ("IIV") will be calculated and disseminated at intervals of not more than 15 minutes throughout the Regular Market Session¹¹ when Shares trade on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the IIV will be calculated on an intraday basis and provided to Nasdaq for dissemination via the Nasdaq Global Index Service. The IIV will be based on current information regarding the value of the securities and other assets held by a Fund.¹² The purpose of the IIV is to enable investors to estimate the next-determined NAV so they can determine the number of Shares to buy or sell if they want to transact in an approximate dollar amount.¹³

D. NAV-Based Trading

Because Shares will be listed and traded on the Exchange, Shares will be available for purchase and sale on an intraday basis. Shares will be purchased and sold in the secondary market at prices directly linked to a Fund's next-determined NAV using a trading protocol called "NAV-Based Trading." All bids, offers, and execution prices of Shares will be expressed as a premium/discount (which may be zero) to a Fund's next-determined NAV (*e.g.*, NAV – \$0.01, NAV + \$0.01).¹⁴ A Fund's

NAV will be determined each business day, normally as of 4:00 p.m., E.T. Trade executions will be binding at the time orders are matched on Nasdaq's facilities, with the transaction prices contingent upon the determination of NAV. Nasdaq represents that all Shares listed on the Exchange will have a unique identifier associated with their ticker symbols, which will indicate that the Shares are traded using NAV-Based Trading.

According to the Exchange, member firms will utilize certain existing order types and interfaces to transmit Share bids and offers to Nasdaq, which will process Share trades like trades in shares of other listed securities.¹⁵ In the systems used to transmit and process transactions in Shares, a Fund's next-determined NAV will be represented by a proxy price (*e.g.*, 100.00) and a premium/discount of a stated amount to the next-determined NAV to be represented by the same increment/decrement from the proxy price used to denote NAV (*e.g.*, NAV – \$0.01 would be represented as 99.99; NAV + \$0.01 as 100.01).

To avoid potential investor confusion, Nasdaq represents that it will work with member firms and providers of market data services to seek to ensure that representations of intraday bids, offers, and execution prices of Shares that are made available to the investing public follow the "NAV – \$0.01/NAV + \$0.01" (or similar) display format. Specifically, the Exchange will use the NASDAQ Basic and NASDAQ Last Sale data feeds to disseminate intraday price and quote data for Shares in real time in the "NAV – \$0.01/NAV + \$0.01" (or similar) display format. Member firms may use the NASDAQ Basic and NASDAQ Last Sale data feeds to source intraday Share prices for presentation to the investing public in the "NAV – \$0.01/NAV + \$0.01" (or similar) display format.

Alternatively, member firms may source intraday Share prices in proxy price format from the Consolidated Tape and other Nasdaq data feeds (*e.g.*,

on market factors, including the balance of supply and demand for Shares among investors, transaction fees, and other costs in connection with creating and redeeming creation units of Shares, the cost and availability of borrowing Shares, competition among market makers, the Share inventory positions and inventory strategies of market makers, the profitability requirements and business objectives of market makers, and the volume of Share trading.

¹⁵ According to the Exchange, all orders to buy or sell Shares that are not executed on the day the order is submitted will be automatically cancelled as of the close of trading on that day. Prior to the commencement of trading in a Fund, the Exchange will inform its members in an Information Circular of the effect of this characteristic on existing order types.

¹⁰ In determining whether a Fund will issue or redeem creation units entirely on a cash basis, the key consideration will be the benefit that would accrue to the Fund and its investors.

¹¹ See Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4:00 a.m. to 9:30 a.m. Eastern Time ("E.T."); (2) Regular Market Session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m. E.T.; and (3) Post-Market Session from 4:00 p.m. or 4:15 p.m. to 8:00 p.m. E.T.).

¹² IIVs disseminated throughout each trading day would be based on the same portfolio as used to calculate that day's NAV. Each Fund will reflect purchases and sales of portfolio positions in its NAV the next business day after trades are executed.

¹³ In NAV-Based Trading, prices of executed trades are not determined until the reference NAV is calculated, so buyers and sellers of Shares during the trading day will not know the final value of their purchases and sales until the end of the trading day. The Exchange represents that the Registration Statement, Web site and any advertising or marketing materials will include prominent disclosure of this fact. The Exchange states that although IIVs may provide useful estimates of the value of intraday trades, they cannot be used to calculate with precision the dollar value of the Shares to be bought or sold.

¹⁴ According to the Exchange, the premium or discount to NAV at which Share prices are quoted and transactions are executed will vary depending

⁹ The Exchange represents that the free Web site containing the Composition File will be www.nextshares.com.

Nasdaq TotalView and Nasdaq Level 2) and use a simple algorithm to convert prices into the “NAV – \$0.01/NAV+\$0.01” (or similar) display format. Prior to the commencement of trading in a Fund, the Exchange will inform its members in an Information Circular of the identities of the specific Nasdaq data feeds from which intraday Share prices in proxy price format may be obtained.

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 Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁶ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁷ which requires, among other things, that the Exchange’s rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Shares will be subject to Rule 5745, which sets forth the initial and continued listing criteria applicable to Exchange-Traded Managed Fund Shares. A minimum of 50,000 Shares for each Fund and no less than two creation units of each Fund will be outstanding at the commencement of trading on the Exchange.

Nasdaq 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. Every order to trade Shares of the Funds is subject to the proxy price protection threshold of plus/minus \$1.00, which determines the lower and upper thresholds for the life of the order and provides that the order will be cancelled at any point if it exceeds \$101.00 or falls below \$99.00.¹⁸ With certain exceptions, each order also must contain the applicable order attributes, including routing instructions and time-in-force information, as described in Nasdaq Rule 4703.¹⁹

Nasdaq also represents that trading in the Shares will be subject to the existing

trading surveillances, administered by both Nasdaq and the Financial Industry Regulatory Authority, Inc. (“FINRA”) on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.²⁰ The Exchange represents that these surveillance procedures are adequate to properly monitor trading of Shares on the Exchange and to deter and detect violations of Exchange rules and applicable federal securities laws. FINRA, on behalf of the Exchange, will communicate as needed with, and may obtain information from, other markets and entities that are members of the Intermarket Surveillance Group (“ISG”) ²¹ regarding trading in the Shares, and in exchange-traded securities and instruments held by the Funds (to the extent those exchange-traded securities and instruments are known through the publication of the Composition File and periodic public disclosures of a Fund’s portfolio holdings). In addition, the Exchange may obtain information regarding trading in the Shares, and in exchange-traded securities and instruments held by the Funds (to the extent those exchange-traded securities and instruments are known through the publication of the Composition File and periodic public disclosures of a Fund’s portfolio holdings), from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

Prior to the commencement of trading in a Fund, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares in creation units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the IIV and Composition File is disseminated; (d) the requirement that members deliver a prospectus to investors purchasing

Shares prior to or concurrently with the confirmation of a transaction; and (e) information regarding NAV-Based Trading protocols.

The Information Circular also will identify the specific Nasdaq data feeds from which intraday Share prices in proxy price format may be obtained. As noted above, all orders to buy or sell Shares that are not executed on the day the order is submitted will be automatically cancelled as of the close of trading on that day, and the Information Circular will discuss the effect of this characteristic on existing order types. In addition, Nasdaq intends to provide its members with a detailed explanation of NAV-Based Trading through a Trading Alert issued prior to the commencement of trading in Shares on the Exchange.

Nasdaq states that the Adviser is not a registered broker-dealer; however, it is affiliated with a broker-dealer and has implemented and will maintain a fire wall with respect to its affiliated broker-dealer regarding access to information concerning the composition of, and/or changes to, each Fund’s portfolio.²² The Reporting Authority²³ will implement and maintain, or ensure that the Composition File will be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding a Fund’s portfolio positions and changes in the positions.²⁴ In the event that (a) the Adviser registers as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-

²² See Amendment No. 2, *supra* note 4. The Exchange further represents that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (“Advisers Act”). As a result, the Adviser 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 (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above. See Amendment No. 2, *supra* note 4, at note 9.

²³ See Nasdaq Rule 5745(c)(4).

²⁴ See Amendment No. 4, *supra* note 4.

¹⁶ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ See Nasdaq Rule 5745(h).

¹⁹ See Nasdaq Rule 5745(b)(6).

²⁰ The Exchange states that FINRA provides surveillance of trading on the Exchange pursuant to a regulatory services agreement, and that the Exchange is responsible for FINRA’s performance under this regulatory services agreement.

²¹ For a list of the current members of ISG, see www.isgportal.org. The Exchange notes that not all components of a Fund’s portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

adviser to a Fund is a registered broker-dealer or becomes affiliated with a broker-dealer, such new adviser or sub-adviser will implement and maintain a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as the case may be, regarding access to information concerning the composition of, and/or changes to, a Fund's portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.²⁵

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,²⁶ which sets forth Congress' 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. Information regarding NAV-based trading prices, best bids and offers for Shares, and volume of Shares traded will be continuously available on a real-time basis throughout each trading day on brokers' computer screens and other electronic services. All bids and offers for Shares and all Share trade executions will be reported intraday in real time by the Exchange to the Consolidated Tape²⁷ and separately disseminated to member firms and market data services through the Exchange data feeds.

Once a Fund's daily NAV has been calculated and disseminated, Nasdaq will price each Share trade entered into during the day at the Fund's NAV plus/minus the trade's executed premium/discount. Using the final trade price, each executed Share trade will then be disseminated to member firms and market data services via a File Transfer Protocol ("FTP") file²⁸ that will be created for exchange-traded managed funds and will be confirmed to the

member firms participating in the trade to supplement the previously provided information with final pricing.

The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily (on each business day that the New York Stock Exchange is open for trading) and provided to Nasdaq via the Mutual Fund Quotation Service ("MFQS") by the fund accounting agent. As soon as the NAV is entered into the MFQS, Nasdaq will disseminate the NAV to market participants and market data vendors via the Mutual Fund Dissemination Service so that all firms will receive the NAV per share at the same time.

The Exchange further represents that it may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in Nasdaq Rule 4120 and in Nasdaq Rule 5745(d)(2)(C). Additionally, the Exchange may cease trading the Shares if other unusual conditions or circumstances exist that, in the opinion of the Exchange, make further dealings on the exchange detrimental to the maintenance of a fair and orderly market. To manage the risk of a non-regulatory Share trading halt, Nasdaq has in place back-up processes and procedures to ensure orderly trading. Prior to the commencement of market trading in the Shares, the Funds will be required to establish and maintain a public Web site through which its current prospectus may be downloaded.²⁹ A separate Web site (www.nextshares.com) will include additional information concerning the Funds updated on a daily basis, including the prior business day's NAV, and the following trading information for that business day expressed as premiums/discounts to NAV: (a) Intraday high, low, average, and closing prices of Shares in Exchange trading; (b) the midpoint of the highest bid and lowest offer prices as of the close of Exchange trading, expressed as a premium/discount to NAV ("Closing Bid/Ask Midpoint"); and (c) the spread between highest bid and lowest offer prices as of the close of Exchange trading ("Closing Bid/Ask Spread."). The www.nextshares.com Web site will also contain charts showing the frequency distribution and range of values of trading prices, Closing Bid/

Ask Midpoints, and Closing Bid/Ask Spreads over time.

The Exchange represents that all statements and representations made in the filing regarding: (a) The description of the Funds' portfolio, (b) limitations on portfolio holdings or reference assets, (c) dissemination and availability of the reference asset or intraday indicative values, or (d) the applicability of Exchange listing rules shall constitute continued listing requirements for listing the Shares on the Exchange. The issuer has represented to the Exchange that it will advise the Exchange of any failure by either Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements.³⁰ If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures for the Fund under the Nasdaq 5800 Series.

This approval order is based on all of the Exchange's representations, including those set forth above, in the Notice, and Amendment Nos. 2, 3, and 4,³¹ and the Exchange's description of the Funds. The Commission notes that the Funds and the Shares must comply with the requirements of Nasdaq Rule 5745 and the conditions set forth in this proposed rule change to be listed and traded on the Exchange on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos. 2, 3, and 4, is consistent with Section 6(b)(5)³² and Section 11A(a)(1)(C)(iii) of the Act,³³ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,³⁴ that the proposed rule change (SR-NASDAQ-2017-029), as modified by Amendment

²⁵ See Amendment No. 2, *supra* note 4.

²⁶ 15 U.S.C. 78k-1(a)(1)(C)(iii).

²⁷ Due to systems limitations, the Consolidated Tape will report intraday execution prices and quotes for Shares using a proxy price format. Nasdaq has represented that it will separately report real-time execution prices and quotes to member firms and providers of market data services in the "NAV - \$0.01/NAV+\$0.01" (or similar) display format, and will otherwise seek to ensure that representations of intraday bids, offers and execution prices for Shares that are made available to the investing public follow the same display format.

²⁸ According to Nasdaq, FTP is a standard network protocol used to transfer computer files on the Internet. Nasdaq will arrange for the daily dissemination of an FTP file with executed Share trades to member firms and market data services.

²⁹ The Exchange represents that the Web site containing this information will be www.gabelli.com.

³⁰ The Commission notes that certain other proposals for the listing and trading of Managed Fund Shares include a representation that the exchange will "surveil" for compliance with the continued listing requirements. See, e.g., Securities Exchange Act Release No. 78005 (Jun. 7, 2016), 81 FR 38247 (Jun. 13, 2016) (SR-BATS-2015-100). In the context of this representation, it is the Commission's view that "monitor" and "surveil" both mean ongoing oversight of a fund's compliance with the continued listing requirements. Therefore, the Commission does not view "monitor" as a more or less stringent obligation than "surveil" with respect to the continued listing requirements.

³¹ See *supra* notes 3 and 4.

³² 15 U.S.C. 78f(b)(5).

³³ 15 U.S.C. 78k-1(a)(1)(C)(iii).

³⁴ 15 U.S.C. 78s(b)(2).

Nos. 2, 3, and 4, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁵

Eduardo A. Aleman,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-80606; File No. SR-NYSEArca-2017-05]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To List and Trade Shares of Direxion Daily Crude Oil Bull 3x Shares and Direxion Daily Crude Oil Bear 3x Shares Under NYSE Arca Equities Rule 8.200

May 5, 2017.

I. Introduction

On January 23, 2017, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) ¹ of the Securities Exchange Act of 1934 (“Act”) ² and Rule 19b-4 thereunder, ³ a proposed rule change to list and trade shares (“Shares”) of Direxion Daily Crude Oil Bull 3x Shares and Direxion Daily Crude Oil Bear 3x Shares (each a “Fund,” and collectively the “Funds”) under NYSE Arca Equities Rule 8.200. The proposed rule change was published for comment in the **Federal Register** on February 7, 2017.⁴ On March 16, 2017, pursuant to Section 19(b)(2) of the Act,⁵ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁶ The Commission has received no comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of

the Act ⁷ to determine whether to approve or disapprove the proposed rule change.

II. Exchange’s Description of the Proposal

The Exchange proposes to list and trade Shares of the Funds under NYSE Arca Equities Rule 8.200, Commentary .02, which governs the listing and trading of Trust Issued Receipts.⁸ Each Fund is a series of the Direxion Shares ETF Trust II (“Trust”), a Delaware statutory trust.⁹ The Trust and the Funds are managed and controlled by Direxion Asset Management, LLC (“Sponsor”).¹⁰ Bank of New York Mellon will be the custodian and transfer agent for the Funds. U.S. Bancorp Fund Services, LLC is the administrator for the Funds. Foreside Fund Services, LLC serves as the distributor of the Shares.

The Exchange has made the following representations and statements in describing the Funds and their investment strategies, including the Funds’ portfolio holdings and investment restrictions.¹¹

A. Investment Objectives of the Funds

The investment objective of the Direxion Daily Crude Oil Bull 3X Shares is to seek, on a daily basis,¹² investment

results that correspond (before fees and expenses) to a multiple three times (3x) of the daily performance of the Bloomberg WTI Crude Oil SubindexSM (a subindex of the Bloomberg Commodity IndexSM) (“Benchmark”).¹³ The investment objective of the Direxion Daily Crude Oil Bear 3X Shares is to seek, on a daily basis,¹⁴ investment results that correspond (before fees and expenses) to three times (3x) the inverse of the performance of the Benchmark. The Benchmark is intended to reflect the performance of crude oil as measured by the price of West Texas Intermediate crude oil futures contracts traded on the New York Mercantile Exchange (which is part of the Chicago Mercantile Exchange), including the impact of rolling,¹⁵ without regard to income earned on cash positions. According to the Exchange, the Funds will not be directly linked to the “spot” price of crude oil.¹⁶

B. Investments of the Funds

In seeking to achieve the Funds’ investment objectives, the Exchange states that the Sponsor will utilize a mathematical approach to determine the type, quantity, and mix of investment positions that the Sponsor believes, in combination, should produce daily returns consistent with the Funds’ respective objectives.¹⁷ The Sponsor would rely on a pre-determined model to generate orders that result in repositioning the Funds’ investments in accordance with their respective investment objectives.

According to the Exchange, each Fund will seek to achieve its investment objectives by investing, under normal market conditions,¹⁸ substantially all of

of its return for each day compounded over the period and thus will usually differ from a Fund’s multiple times the return of the Benchmark for the same period. *See Notice, supra* note 4, 82 FR at 9609.

¹³ According to the Exchange, the Benchmark is a “rolling index,” which means that the index does not take physical possession of any commodities. *See id.* at 9609 n.7.

¹⁴ *See supra* note 12.

¹⁵ The Exchange states that futures contracts held by the Funds near expiration are generally closed out and replaced by contracts with a later expiration as required by the Benchmark. The Exchange states that this process is referred to as “rolling,” and that the Funds do not intend to hold futures contracts through expiration, but instead to “roll” their respective positions. *See Notice, supra* note 4, 82 FR at 9609 n.8.

¹⁶ *See id.* at 9609.

¹⁷ *See id.*

¹⁸ The Exchange states that the term “normal market conditions” includes, but is not limited to, the absence of trading halts in the applicable financial markets generally; operational issues (e.g., systems failure) causing dissemination of inaccurate market information; or force majeure type events

³⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ *See* Securities Exchange Act Release No. 79916 (February 1, 2017), 82 FR 9608 (“Notice”).

⁵ 15 U.S.C. 78s(b)(2).

⁶ *See* Securities Exchange Act Release No. 80265 (March 22, 2017), 82 FR 14778. The Commission designated May 8, 2017 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ Commentary .02 to NYSE Arca Equities Rule 8.200 applies to Trust Issued Receipts that invest in “Financial Instruments.” The term “Financial Instruments,” as defined in Commentary .02(b)(4) to NYSE Arca Equities Rule 8.200, means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars, and floors; and swap agreements.

⁹ According to the Exchange, on December 14, 2016, the Trust filed with the Commission a registration statement on Form S-1 under the Securities Act of 1933, as amended, relating to the Funds (File No. 333-215091) (“Registration Statement”).

¹⁰ According to the Exchange, the Sponsor is registered as a commodity pool operator with the Commodity Futures Trading Commission and is a member of the National Futures Association. *See Notice, supra* note 4, 82 FR at 9608.

¹¹ The Commission notes that additional information regarding the Trust, the Funds, and the Shares, including investment strategies, risks, net asset value (“NAV”) calculation, creation and redemption procedures, fees, availability of information, trading rules and halts, surveillance, information bulletins, distributions, and taxes, among other information, is included in the Notice and the Registration Statement, as applicable. *See Notice and Registration Statement, supra* notes 4 and 9, respectively.

¹² According to the Exchange, the Funds do not seek to achieve their investment objectives over a period greater than a single trading day. The Exchange states that a single trading day is measured from the time a Fund calculates its NAV to the time of a Fund’s next NAV calculation. The Exchange states that the return of a Fund for a period longer than a single trading day is the result