

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94401; File No. SR-CboeBZX-2022-018)

March 11, 2022

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Permit Certain Series of Tracking Fund Shares issued by Fidelity Covington Trust, Which are Listed and Traded on the Exchange Pursuant to Rule 14.11(m), to Use Custom Baskets

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 9, 2022, Cboe BZX Exchange, Inc. 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 the Exchange. 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

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) proposes to permit the Fidelity Blue Chip Growth ETF, Fidelity Blue Chip Value ETF, Fidelity New Millennium ETF, Fidelity Growth Opportunities ETF, Fidelity Magellan ETF, Fidelity Real Estate Investment ETF, and Fidelity Small-Mid Cap Opportunities ETF (collectively referred to as the “Funds”), shares of which are listed and traded on the Exchange pursuant to BZX Rule 14.11(m), to use Custom Baskets.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Exchange 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. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange adopted BZX Rule 14.11(m) for the purpose of permitting the listing and trading, or pursuant to unlisted trading privileges (“UTP”), of Tracking Fund Shares, which are securities issued by an actively managed open-end management investment company.³ Exchange Rule 14.11(m)(2)(A) requires the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Tracking Fund Shares on the Exchange. Pursuant to this

³ Rule 14.11(m)(3)(A) provides that “[t]he term “Tracking Fund Share” means a security that (i) represents an interest in an investment company registered under the Investment Company Act of 1940 (“Investment Company”) organized as an open-end management investment company, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; (ii) is issued in a specified aggregate minimum number in return for a deposit of a specified Tracking Basket and/or a cash amount with a value equal to the next determined net asset value; (iii) when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid a specified Tracking Basket and/or a cash amount with a value equal to the next determined net asset value; and (iv) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter. Rule 14.11(m)(3)(E) provides that “[t]he term “Tracking Basket” means the identities and quantities of the securities and other assets included in a basket that is designed to closely track the daily performance of the Fund Portfolio, as provided in the exemptive relief under the Investment Company Act of 1940 applicable to a series of Tracking Fund Shares.”

provision, the Exchange submitted proposals to list and trade shares (“Shares”) of Tracking Fund Shares of the Fidelity Blue Chip Growth ETF, Fidelity Blue Chip Value ETF, Fidelity New Millennium ETF,⁴ Fidelity Growth Opportunities ETF, Fidelity Magellan ETF, Fidelity Real Estate Investment ETF, and Fidelity Small-Mid Cap Opportunities ETF (collectively referred to as the “Funds”).⁵

The Funds are actively-managed exchange-traded funds for which Fidelity Covington Trust (the “Issuer”), among others, submitted an application for exemptive relief (the “Application”) which was granted under an exemptive order (the “Exemptive Order”, and the Exemptive Order together with the Application the “Exemptive Relief”) issued on December 10, 2019.⁶ Pursuant to the Exemptive Order, the Funds create shares in return for a deposit by the purchaser of, and redeem

⁴ See Securities Exchange Act No. 88887 (May 15, 2020) 85 FR 30990 (May 21, 2020) (SR-CboeBZX-2019-107) (Order Granting Approval of Proposed Rule change, as Modified by Amendment No. 5, to Adopt Rule 14.11(m) and to List and Trade Shares of the Fidelity Blue Chip Growth ETF, Fidelity Blue Chip Value ETF, and Fidelity New Millennium ETF) (the “Original Order”). See also Securities Exchange Act No. 92946 (September 13, 2021) 86 FR 51941 (September 17, 2021) (SR-CboeBZX-2021-060) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Reflect an Amendment to the Application and Exemptive Order Governing the Following Funds, Shares of Which Are Listed and Traded on the Exchange Under BZX Rule 14.11(m): Fidelity Growth Opportunities ETF, Fidelity Magellan ETF, Fidelity Real Estate Investment ETF, Fidelity Small-Mid Cap Opportunities ETF, Fidelity Blue Chip Value ETF, Fidelity Blue Chip Growth ETF, and Fidelity New Millennium ETF) (the “Subsequent Notice”).

⁵ See Securities Exchange Act No. 90530 (November 30, 2020) 85 FR 78366 (December 4, 2020) (SR-CboeBZX-2020-085) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to List and Trade Shares of the Fidelity Growth Opportunities ETF, Fidelity Magellan ETF, Fidelity Real Estate Investment ETF, and Fidelity Small-Mid Cap Opportunities ETF Under Rule 14.11(m)) (the “Original Notice”, and together with the Original Order and Subsequent Notice the “Prior Filings”). See also Securities Exchange Act No. 51943 (September 13, 2021) 86 FR 51941 (September 17, 2021) (SR-CboeBZX-2021-060) (the Subsequent Notice).

⁶ See also Investment Company Act Release No. 33683 (November 14, 2019), 84 FR 64140 (November 20, 2019) (the Application) and 33712 (December 10, 2019) (the Exemptive Order) (File No. 812-14364).

shares at a holder's request in return for, a Tracking Basket or cash. Furthermore, the Original Notice and Original Order to list and trade shares of the Funds provided that each of the Funds would create and redeem their shares using the Tracking Basket or cash.

On August 5, 2021, the Exemptive Order was amended to, among other things, permit the Issuer to allow the Funds to create and redeem their shares using cash, a Tracking Basket or a "Custom Basket", which is a creation or redemption unit that differs from a fund's Tracking Basket.⁷ Additionally, on September 28, 2021 the Commission approved the Exchange's proposal to amend Exchange Rule 14.11(m) to provide for the use of Custom Baskets consistent with the Funds amended Exemptive Order.⁸

Now, the Exchange is submitting this proposal to modify representations made in the Original Notice and Original Order of each Fund that provided that creation and redemption units will occur using the Tracking Basket or cash. Specifically, the proposal permits the Funds to use a Custom Basket, in addition to a Tracking Basket or cash, to create or redeem their shares in accordance with their amended Exemptive Relief and amended Exchange Rule 14.11(m).

Accordingly, the Issuer represents that it and any person acting on behalf of such fund will comply with Regulation Fair Disclosure under the Act,⁹ including with respect to any Custom Basket. The

⁷ See Investment Company Act Release No. 34326 (July 9, 2021) 86 FR 37391 (July 15, 2021) (the notice of application to amend the Exemptive Order) and 34350 (August 5, 2021) (the order granting the amendment to the Exemptive Order) (File No. 812-15175).

⁸ See Securities and Exchange Act No. 93147 (September 28, 2021) 86 FR 54772 (October 4, 2021) (SR-CboeBZX-2021-053) (Order granting approval of a proposed rule to change to amend Rule 14.11(m) (Tracking Fund Shares) to provide the use of Custom Baskets consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940 applicable to a series of Tracking Fund Shares).

⁹ 17 CFR 243.100-243.103. Regulation Fair Disclosure provides that whenever an issuer, or any person acting on its behalf, discloses material nonpublic information regarding that issuer or its securities to certain individuals or entities—generally, securities market professionals, such as stock analysts, or holders of the issuer's securities who may well

Issuer also represents that for each Custom Basket utilized by each Fund, each business day, before the opening of trading in Regular Trading Hours (as defined in Rule 1.5(w)), the investment company shall make publicly available on its website the composition of any Custom Basket transacted on the previous business day, except a Custom Basket that differs from the applicable Tracking Basket only with respect to cash. Finally, the adviser and sub-adviser to each of the Funds each represent that a fire wall exists and will be maintained between the respective personnel at each of (i) the adviser and sub-adviser, and (ii) their respective affiliated broker-dealers with respect to access to information concerning the composition and/or changes to the applicable fund's portfolio, Tracking Basket, and/or the Custom Basket, as applicable. Specifically, the adviser and the sub-adviser each represent that the personnel who make decisions on the applicable fund's portfolio composition, Tracking Basket, and/or Custom Basket or who have access to nonpublic information regarding the Fund Portfolio,¹⁰ Tracking Basket, and/or Creation Basket or changes thereto are subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio, Tracking Basket, and/or Creation Basket. In the event that (a) the adviser or a sub-adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer; or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes newly affiliated with a broker-dealer; it will implement and maintain a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the Fund Portfolio, Tracking Basket, and/or Creation Basket, and

trade on the basis of the information—the issuer must make public disclosure of that information.

¹⁰ As defined in Rule 14.11(m)(3)(B), the term “Fund Portfolio” means the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company’s calculation of net asset value at the end of the business day.

will be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding such portfolio, Tracking Basket, and/or Creation Basket. Any person or entity, including any service provider for any of the Funds, who has access to nonpublic information regarding the Fund Portfolio, Tracking Basket, and/or Creation Basket or changes thereto for the Custom Basket Fund will be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund Portfolio, Tracking Basket or Creation Basket or changes thereto. Further, any such person or entity that is registered as a broker-dealer or affiliated with a broker-dealer, must have erected and will maintain a “fire wall” between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Fund Portfolio, Tracking Basket, or Creation Basket.

Each of the Funds will comply with the above-described conditions as well as the conditions of the Exemptive Order, as amended, and the Exchange is updating the listing rule for the Shares accordingly. Except for the changes noted above, all other representations made in the Prior Filings for each of the Funds¹¹ remain unchanged and will continue to constitute continued listing requirements for each of the Shares. The Funds will also continue to comply with the requirements of Rule 14.11(m).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹² Specifically, the Exchange believes the proposed rule change is consistent

¹¹ Supra notes 4 and 5.

¹² 15 U.S.C. 78f(b).

with the Section 6(b)(5)¹³ requirements that the rules of an exchange 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 regulating, clearing, settling, processing information with respect to, and 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 proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The proposed amendment would permit each of the Funds the use of Custom Baskets, as provided in the amended Exemptive Order. The Exchange believes the proposal to permit the Funds the use of Custom Baskets is consistent with and contemplated by Rule 14.11(m), as amended, which the Commission found to be consistent with the Act.¹⁴

Except for the changes noted above, all other representations made in the prior proposed rule changes¹⁵ remain unchanged and, as noted, will continue to constitute continuing listing requirements for the Funds.

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 purpose of the Act. As noted, the proposed amendment is intended to permit each of the Funds the use of Custom

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ Supra note 8. See also SR-CboeBZX-2022-016 (filed March 4, 2022) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to allow certain series of Tracking Fund shares to include select securities from the universe from which a Fund's investments are selected in the Fund's Tracking Basket and utilize Custom Baskets).

¹⁵ Supra notes 4 and 5.

Baskets, as provided in the amended Exemptive Order. The Exchange believes that these changes will not impose any burden on competition.

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

The Exchange neither solicited nor received comments on the proposed rule change.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁶ and Rule 19b-4(f)(6)¹⁷ thereunder.¹⁸

A proposed rule change filed under Rule 19b-4(f)(6)¹⁹ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁰ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may take effect upon filing. The Exchange represents that the Funds will continue to comply with the requirements of BZX Rule 14.11(m). The Commission believes that waiver of the 30-day operative delay is consistent with

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(6).

¹⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange satisfied this requirement.

¹⁹ 17 CFR 240.19b-4(f)(6).

²⁰ 17 CFR 240.19b-4(f)(6)(iii).

the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues.²¹ Accordingly, the Commission waives the 30-day operative delay and designates the proposal operative upon filing.²²

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or 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 e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2022-018 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

²¹ See Securities Exchange Act Release No. 93147, supra note 8.

²² For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

All submissions should refer to File Number SR-CboeBZX-2022-018. This file number should be included on the subject line if e-mail 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 website (<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 website 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-CboeBZX-2022-018 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Eduardo Aleman
Assistant Secretary

²³ 17 CFR 200.30-3(a)(12).