

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-93277; File No. SR-NASDAQ-2021-065)

October 8, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Granting Approval of a Proposed Rule Change to Amend Nasdaq Rule 5750 (Proxy Portfolio Shares) to Provide for the Use of Custom Baskets Consistent with the Exemptive Relief Issued Pursuant to the Investment Company Act of 1940 Applicable to a Series of Proxy Portfolio Shares

I. Introduction

On August 25, 2021, The Nasdaq Stock Market LLC (“Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Nasdaq Rule 5750 (Proxy Portfolio Shares) to provide for the use of custom baskets consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940 (“1940 Act”)<sup>3</sup> applicable to a series of Proxy Portfolio Shares. The proposed rule change was published for comment in the Federal Register on September 2, 2021.<sup>4</sup> The Commission has received no comments on the proposed rule change. The Commission is approving the proposed rule change.

II. Description

The Exchange proposes to amend Nasdaq Rule 5750, which permits the listing and trading of series of Proxy Portfolio Shares. Nasdaq Rule 5750 currently requires that Proxy Portfolio Shares be issued and redeemed in a specified aggregate minimum number in return for

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

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

<sup>3</sup> 15 U.S.C. 80a.

<sup>4</sup> See Securities Exchange Act Release No. 92790 (August 27, 2021), 86 FR 49357.

the Proxy Basket<sup>5</sup> and/or cash.<sup>6</sup> The Exchange proposes to amend the definition of “Proxy Portfolio Share” in Nasdaq Rule 5750(c)(1) to permit creations and redemptions of shares in return for a Custom Basket in addition to the Proxy Basket, to the extent permitted by a fund’s exemptive relief.<sup>7</sup> Further, the Exchange proposes to define the term “Custom Basket” as a portfolio of securities that is different from the Proxy Basket and is otherwise consistent with the exemptive relief issued pursuant to the 1940 Act applicable to a series of Proxy Portfolio Shares.<sup>8</sup> The Exchange also proposes to amend the definition of “Reporting Authority” in Nasdaq Rule 5750(c)(3) to include Custom Baskets among the types of information for which

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<sup>5</sup> The term “Proxy 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 1940 Act applicable to a series of Proxy Portfolio Shares. See Nasdaq Rule 5750(c)(5). The term “Fund Portfolio” means the identities and quantities of the securities and other assets held by the investment company registered under the 1940 Act (“Investment Company”) that will form the basis for the Investment Company’s calculation of net asset value (“NAV”) at the end of the business day. See Nasdaq Rule 5750(c)(2).

<sup>6</sup> See Nasdaq Rule 5750(c)(1) (defining the term “Proxy Portfolio Share”).

<sup>7</sup> See proposed Nasdaq Rule 5750(c)(1) (defining “Proxy Portfolio Share” as a security that: (A) represents an interest in an 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; (B) is issued in a specified aggregate minimum number in return for a deposit of a specified Proxy Basket or Custom Basket, as applicable, and/or a cash amount with a value equal to the next determined NAV; (C) when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid a specified Proxy Basket or Custom Basket, as applicable, and/or a cash amount with a value equal to the next determined NAV; and (D) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter).

<sup>8</sup> See proposed Nasdaq Rule 5750(c)(6).

the Reporting Authority designated for a particular series of Proxy Portfolio Shares will be the official source for calculating and reporting such information.<sup>9</sup>

The Exchange proposes to amend Nasdaq Rule 5750(d) to incorporate specific initial and continued listing criteria relating to Custom Baskets. Specifically, the Exchange proposes to add a new initial listing requirement to stipulate that the Exchange will obtain a representation from the issuer of each series of Proxy Portfolio Shares that the issuer and any person acting on behalf of the series of Proxy Portfolio Shares will comply with Regulation Fair Disclosure under the Exchange Act (“Regulation FD”),<sup>10</sup> including with respect to any Custom Basket.<sup>11</sup> The Exchange also proposes to add a new continued listing requirement that, with respect to each Custom Basket utilized by a series of Proxy Portfolio Shares, each business day, before the opening of trading in the regular market session,<sup>12</sup> the Investment Company shall make publicly available on its website

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<sup>9</sup> See proposed Nasdaq Rule 5750(c)(3) (defining “Reporting Authority” in respect of a particular series of Proxy Portfolio Shares as the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Proxy Portfolio Shares (if the Exchange is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, the Proxy Basket; the Fund Portfolio; the Custom Basket; the amount of any cash distribution to holders of Proxy Portfolio Shares, NAV, or other information relating to the issuance, redemption or trading of Proxy Portfolio Shares).

<sup>10</sup> 17 CFR 243.100.

<sup>11</sup> See proposed Nasdaq Rule 5750(d)(1)(B)(iii). Nasdaq Rule 5750(d)(1)(B) currently provides that the Exchange will obtain a representation from the issuer of each series of Proxy Portfolio Shares that the NAV per share for the series will be calculated daily and that the NAV, the Proxy Basket, and the Fund Portfolio will be made available to all market participants at the same time when disclosed. The current requirements would be designated as Nasdaq Rule 5750(d)(1)(B)(i) and (ii).

<sup>12</sup> “Regular market session” means the trading session from 9:30 a.m. until 4:00 p.m. or 4:15 p.m. See Nasdaq Rule 4120(b)(4)(D).

the composition of any Custom Basket transacted on the previous business day, except a Custom Basket that differs from the applicable Proxy Basket only with respect to cash.<sup>13</sup>

Finally, the Exchange proposes to amend Nasdaq Rules 5750(b)(5) and (6), which contain requirements that specified parties must erect and maintain “fire walls” with respect to access to information concerning the Fund Portfolio and Proxy Basket and enact procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund Portfolio and Proxy Basket, so that these requirements would also cover information concerning Custom Baskets. As proposed to be amended, Nasdaq Rule 5750(b)(5) would require that, if the investment adviser to the Investment Company issuing Proxy Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition of and/or changes to the Fund Portfolio, the Proxy Basket, and/or the Custom Basket, as applicable. In addition, any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company’s Fund Portfolio, the Proxy Basket, and/or the Custom Basket or has access to nonpublic information regarding the Fund Portfolio, the Proxy Basket, and/or the Custom Basket, as applicable, or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund Portfolio, and/or the Proxy Basket, and/or the Custom

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<sup>13</sup> See proposed Nasdaq Rule 5750(d)(2)(A)(ii). Nasdaq Rule 5750(d)(2)(A) currently provides that the Proxy Basket will be publicly disseminated at least once daily and will be made available to all market participants at the same time. This current requirement would be designated as Nasdaq Rule 5750(d)(2)(A)(i). The Exchange also proposes to amend the title of Nasdaq Rule 5750(d)(2)(A) to “Proxy Basket and Custom Basket.” See proposed Nasdaq Rule 5750(d)(2)(A).

Basket, as applicable, or changes thereto. Proposed Nasdaq Rule 5750(b)(6) would require that any person or entity, including a custodian, Reporting Authority, distributor, or administrator, who has access to nonpublic information regarding the Fund Portfolio, the Proxy Basket, or the Custom Basket, as applicable, or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Fund Portfolio, the Proxy Basket, or the Custom Basket, as applicable, or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and 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, Proxy Basket, or Custom Basket, as applicable.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Exchange Act and rules and regulations thereunder applicable to a national securities exchange.<sup>14</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,<sup>15</sup> 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 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.

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<sup>14</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

The Exchange previously filed a proposed rule change to adopt Nasdaq Rule 5750 to permit the listing and trading of Proxy Portfolio Shares.<sup>16</sup> As discussed above, under the current rule, a series of Proxy Portfolio Shares must create or redeem shares in return for the Proxy Basket and/or cash. The Exchange is now proposing to amend Nasdaq Rule 5750 to allow a series of Proxy Portfolio Shares to create or redeem shares in return for a Custom Basket, which is a portfolio of securities that is different from the Proxy Basket, to the extent consistent with an issuer's exemptive relief under the 1940 Act.<sup>17</sup> For the reasons discussed below, the Commission finds that the proposed amendments to Nasdaq Rule 5750 to provide for the use of Custom Baskets for Proxy Portfolio Shares, to the extent permitted by an issuer's exemptive relief under the 1940 Act, are consistent with Section 6(b)(5) of the Exchange Act.

The Commission believes that the proposed changes to Nasdaq Rules 5750(b)(5) and (6) are consistent with the Exchange Act and are reasonably designed to help prevent fraudulent and

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<sup>16</sup> See Securities Exchange Act Release No. 89110 (June 22, 2020), 85 FR 38461 (June 26, 2020) (SR-NASDAQ-2020-032) (Notice of Filing and Immediate Effectiveness to Adopt Nasdaq Rule 5750 to List and Trade Proxy Portfolio Shares) ("2020 Notice"). At the time, the Exchange stated that the proposed rule change to adopt new Nasdaq Rule 5750 was substantially similar to a proposed rule change by Cboe BZX Exchange, Inc. ("BZX") to adopt BZX Rule 14.11(m) that the Commission had recently approved. See *id.* at 38461 (citing Securities Exchange Act Release No. 88887 (May 15, 2020), 85 FR 30990 (May 21, 2020) (SR-CboeBZX-2019-107) ("2020 Order")). The Exchange must file a separate proposed rule change pursuant to Section 19(b) of the Exchange Act for each series of Proxy Portfolio Shares. See Nasdaq Rule 5750(b)(1).

<sup>17</sup> In the 2020 Notice, the Exchange identified several applications for exemptive relief and subsequent orders granting certain exemptive relief under the 1940 Act and stated that it believed that each associated series of shares would qualify as Proxy Portfolio Shares under proposed Nasdaq Rule 5750. See 2020 Notice, *supra* note 16, 85 FR at 38461 n.3. The Commission has since granted exemptive relief under the 1940 Act to certain series of shares that the Exchange had identified as qualifying as Proxy Portfolio Shares to permit the creation or redemption of shares using a Custom Basket that includes instruments that are not included, or included with different weightings, in the fund's equivalent to a Proxy Basket. See, e.g., Fidelity Beach Street Trust, et al., Investment Company Act Release No. 34350 (August 5, 2021).

manipulative acts and practices. The Commission notes that, because Proxy Portfolio Shares do not publicly disclose on a daily basis information about the holdings of the Fund Portfolio, it is vital that key information relating to Proxy Portfolio Shares, including information relating to Custom Baskets, be kept confidential prior to its public disclosure and not be subject to misuse.<sup>18</sup> Accordingly, the Commission believes that the Exchange's proposal to amend Nasdaq Rules 5750(b)(5) and (6)<sup>19</sup> to apply the current "fire wall" and other requirements contained therein to those that have access to information concerning, or make decisions pertaining to, the composition of and/or changes to the Custom Baskets, in addition to the existing requirements relating to the Fund Portfolio and the Proxy Basket, is designed to prevent fraud and manipulation with respect to Proxy Portfolio Shares.

The Commission also believes that the proposed amendments to the initial and continued listing requirements for Proxy Portfolio Shares are adequate to ensure transparency of information relating to Custom Baskets utilized by a fund and to ensure that such information is available to the rest of the market participants at the same time. Specifically, prior to the opening of trading on each business day, the Investment Company will 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 Proxy Basket only with respect to cash.<sup>20</sup> In addition, prior to the initial listing of the Proxy Portfolio Shares, the Exchange will be required to obtain a representation from the issuer of each series of Proxy Portfolio Shares that the issuer and any person acting on behalf of the series of Proxy Portfolio Shares will comply with Regulation

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<sup>18</sup> See 2020 Order, supra note 16, 85 FR at 31002-03.

<sup>19</sup> See supra Section II, describing proposed Nasdaq Rules 5750(b)(5) and (6).

<sup>20</sup> See proposed Nasdaq Rule 5750(d)(2)(A)(ii).

FD, including with respect to any Custom Basket.<sup>21</sup> These measures help to mitigate concerns that certain information regarding the funds will be available only to select market participants and thereby helps to prevent fraud and manipulation.

The Commission notes that, as set forth in the definition of “Custom Basket,” a series of Proxy Portfolio Shares may only utilize Custom Baskets to the extent consistent with the exemptive relief issued pursuant to the 1940 Act applicable to such series.<sup>22</sup> The Commission further notes that all series of Proxy Portfolio Shares will continue to be subject to the existing rules and procedures that govern the listing and trading of Proxy Portfolio Shares and the trading of equity securities on the Exchange.

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<sup>21</sup> See proposed Nasdaq Rule 5750(d)(1)(B)(iii). The Commission notes that a fund’s use of, or conversations with authorized participants about, Creation Baskets that would result in selective disclosure of nonpublic information would effectively be limited by the fund’s obligation to comply with Regulation FD. See, e.g., Fidelity Beach Street Trust, et al., Investment Company Act Release No. 34326 (July 9, 2021).

<sup>22</sup> See proposed Nasdaq Rule 5750(c)(6).



IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act<sup>23</sup> that the proposed rule change (SR-NASDAQ-2021-065), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>23</sup> 15 U.S.C. 78s(b)(2).

<sup>24</sup> 17 CFR 200.30-3(a)(12).