

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92790; File No. SR-NASDAQ-2021-065)

August 27, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of 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

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 August 25, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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

The Exchange proposes 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. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, 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 proposes to amend Nasdaq Rule 5750 (Proxy Portfolio Shares)³ to provide for the use of “Custom Baskets” consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940⁴ applicable to a series of Proxy Portfolio Shares.

To effectuate this change, the Exchange proposes the following amendments to Nasdaq Rule 5750:

First, the proposed rule change adopts new subparagraph (c)(6) under Nasdaq Rule 5750 (Definitions), which defines “Custom Basket”, for the purposes of Nasdaq Rule 5750, to mean a

³ Nasdaq Rule 5750 defines the term “Proxy Portfolio Share” as a security that: (A) 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; (B) is issued in a specified aggregate minimum number in return for a deposit of a specified Proxy Basket and/or a cash amount with a value equal to the next determined net asset value; (C) when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid specified Proxy Basket and/or a cash amount with a value equal to the next determined net asset value; and (D) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.

⁴ 15 U.S.C. 80a et seq.

portfolio of securities that is different from the Proxy Basket and is otherwise consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940 applicable to a series of Proxy Portfolio Shares. The proposed rule change makes conforming amendments to the definition of Proxy Portfolio Shares in Nasdaq Rule 5750(c)(1) and Reporting Authority in Nasdaq Rule 5750(c)(3). The proposed rule change amends the definition of “Proxy Portfolio Share” in Nasdaq Rule 5750(c)(1) to provide for creations of shares in return for a deposit by the purchaser of, and redemptions of shares at a holder’s request in return for, a Custom Basket rather than a Proxy Basket to the extent permitted by a fund’s exemptive relief.

In addition, the proposed rule change amends the definition of “Reporting Authority” in respect of a particular series of Proxy Portfolio Shares in Nasdaq Rule 5750(c)(3) to provide for Custom Baskets to the extent permitted by a fund’s exemptive relief. Currently, “Reporting Authority” in respect of a particular series of Proxy Portfolio Shares means 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 amount of any cash distribution to holders of Proxy Portfolio Shares, net asset value, or other information relating to the issuance, redemption or trading of Proxy Portfolio Shares. Nasdaq Rule 5750(c)(3) further provides that a series of Proxy Portfolio Shares may have more than one Reporting Authority, each having different functions. The proposed rule change adds “Custom Basket” to the non-exclusive list of information relating to Proxy Portfolio Shares that a Reporting Authority calculates and reports, i.e., including, but not limited to, the Proxy Basket; the Fund Portfolio; the amount of any cash distribution to holders of Proxy Portfolio Shares, net

asset value, or other information relating to the issuance, redemption or trading of Proxy Portfolio Shares.

Second, the proposed rule change amends Nasdaq Rule 5750(d) (Initial and Continued Listing), which currently provides criteria that Proxy Portfolio Shares must satisfy for initial and continued listing on the Exchange, to incorporate specific initial and continued listing criteria for Custom Baskets. Specifically, 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 net asset value per share for the series will be calculated daily and that each of the following will be made available to all market participants at the same time when disclosed: the net asset value, the Proxy Basket, and the Fund Portfolio. The proposed rule change adopts an additional requirement in Nasdaq Rule 5750(d)(1)(B) providing that the Exchange will also 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 Act, including with respect to any Custom Basket.⁵

Third, the proposed Rule change amends Nasdaq Rule 5750(d)(2)(A), which currently provides that, with respect to each Proxy Basket, that it will be publicly disseminated at least once daily and will be made available to all market participants at the same time. Nasdaq Rule 5750(d)(2)(A) will be amended to provide 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

⁵ 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 trade on the basis of the information—the issuer must make public disclosure of that information.

market session, 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 Proxy Basket only with respect to cash.

The proposed rule change also makes conforming amendments to Nasdaq Rule 5750(b)(5) and (6). In particular, Nasdaq Rule 5750(b)(5) currently provides 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 and/or the Proxy Basket. Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company’s Fund Portfolio and/or the Proxy Basket or has access to nonpublic information regarding the Fund Portfolio and/or the Proxy Basket 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 or changes thereto. The proposed rule change amends Nasdaq Rule 5750(b)(5) to provide for Custom Baskets to the extent permitted by a fund’s exemptive relief. As proposed, Nasdaq Rule 5750(b)(5) provides 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, proposed Nasdaq Rule 5750(b)(5) provides that 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, the Proxy Basket, and/or the Custom Basket, as applicable, or changes thereto.

Nasdaq Rule 5750(b)(6) currently provides that any person or entity, including a custodian, Reporting Authority, distributor, or administrator, who has access to nonpublic information regarding the Fund Portfolio or the Proxy Basket or changes thereto, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Fund Portfolio or the Proxy Basket 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 or Proxy Basket. The proposed rule change similarly amends Nasdaq Rule 5750(b)(6) to provide for Custom Baskets to the extent permitted by a fund's exemptive relief. As proposed, Nasdaq Rule 5750(b)(6) provides 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.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁶ in general and Section 6(b)(5) of the Act⁷ 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, 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. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁸ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that proposed rule change to provide for the use of Custom Baskets consistent with the applicable exemptive relief applicable to a series of Proxy Portfolio Shares will perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will permit use of Custom Baskets, consistent with the applicable exemptive relief, in a manner that will benefit investors by increasing efficiencies in the creation and redemption process. More specifically, Custom Baskets provide an issuer with flexibility in portfolio construction that may assist in reducing taxable capital gains distributions for investors

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(5).

⁸ Id.

and may generally improve tax efficiencies. Further, the use of Custom Baskets, to the extent permitted by a fund's exemptive relief, may also result in narrower bid/ask spreads and smaller premiums and discounts to the net asset value for Proxy Portfolio Shares to the extent that the Investment Company utilizes Custom Baskets with fewer securities which may, in turn, allow Authorized Participants to more efficiently hedge and participate generally in the Proxy Portfolio Shares. In addition to this, the flexibility provided in the creation of Custom Baskets may serve to increase competition between issuers. The Exchange believes the proposed rule change will enhance competition among market participants overall, to the benefit of investors and the marketplace.

The Exchange also believes that amending Nasdaq Rule 5750 to incorporate specific initial listing criteria required to be met by Proxy Portfolio Shares that utilize Custom Baskets is designed to prevent fraudulent and manipulative acts and practices. The Exchange believes that the daily dissemination of the composition of any Custom Basket transacted on the previous day, except a Custom Basket that differs from the applicable Proxy Basket only with respect to cash, together with the right of Authorized Participants to create and redeem each day at the net asset value, will enable market participants to value and trade shares in a manner that will not lead to significant deviations between the bid/ask price and net asset value of shares of a series of Proxy Portfolio Shares.

Further, including Custom Baskets in the requirements of Nasdaq Rule 5750(b)(5) and (6) would act as a safeguard against any misuse and improper dissemination of nonpublic information related to a fund's Custom Basket or changes thereto. The requirement that any person or entity implement procedures reasonably designed to prevent the use and dissemination of material non-public information regarding a Custom Basket will act to prevent any individual

or entity from sharing such information externally and the internal “fire wall” requirements applicable where an entity is a registered broker-dealer or affiliated with a broker-dealer will act to make sure that no entity will be able to misuse the data for their own purposes. As such, the Exchange believes that the proposed rule change to Nasdaq Rule 5750 is designed to prevent fraudulent and manipulative acts and practices.

The Exchange also believes that the proposed initial and continued listing standards are designed to promote disclosure and transparency with respect to the use of Custom Baskets consistent with the applicable exemptive relief. Specifically, the Exchange believes that requiring as an initial listing condition that an issuer and any person acting on behalf of the series of Proxy Portfolio Shares comply with Regulation Fair Disclosure under the Act, including with respect to any Custom Basket, would further the full and fair disclosure objectives of Regulation Fair Disclosure to the benefit of the investing public and all market participants. Additionally, with respect to each Custom Basket utilized by a series of Proxy Portfolio Shares, the Exchange believes that requiring, as a continued listing condition, that each business day, before the opening of trading in the regular market session, an investment company 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, also furthers the goals of transparency and full and fair disclosure, to the benefit of investors and the public interest.

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. The Exchange believes the proposed rule change, by permitting the use of Custom Baskets, is

consistent with a fund's exemptive relief, would introduce additional competition among various ETF products to the benefit of investors.

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

No written comments were either solicited or received.

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 within such longer period 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 such 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 e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2021-065 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.

All submissions should refer to File Number SR-NASDAQ-2021-065. 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-NASDAQ-2021-065 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.⁹

Vanessa A. Countryman
Secretary

⁹ 17 CFR 200.30-3(a)(12).