

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-92946; File No. SR-CboeBZX-2021-060)

September 13, 2021

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; 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

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on August 31, 2021, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) 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 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.

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

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

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

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/](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.

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.<sup>4</sup> Exchange

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<sup>4</sup> See Securities Exchange Act Release No. 88887 (May 15, 2020), 85 FR 30990 (May 21, 2020) (SR-CboeBZX-2019-107) (Notice of Filing of Amendment No. 5 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 5, to Adopt Rule 14.11(m), Tracking Fund Shares, and to List and Trade Shares of the Fidelity Blue Chip Value ETF, Fidelity Blue Chip Growth ETF, and Fidelity New Millennium ETF ("Approval Order")). 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

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 provision, the Exchange submitted proposals to list and trade shares (“Shares”) of Tracking Funds Shares of the following funds 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 (each, a “Fund” and, together the “Funds”).<sup>5</sup> The Exchange proposes to reflect an amendment to the Prior Exemptive Order (as defined below) related to the listing and trading of these Funds filed by, among others, Fidelity Beach Street Trust (the “Issuer”) as follows.

The Issuer filed a ninth amended application for an order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (the “Prior

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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.”

<sup>5</sup> On May 15, 2020, in conjunction with its approval of Rule 14.11(m), the Commission approved the proposed rule change relating to the listing and trading of shares of Fidelity Blue Chip Value ETF, Fidelity Blue Chip Growth ETF, and Fidelity New Millennium ETF. *Id.* The Commission published the notice of filing and immediate effectiveness relating to the rule change 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 on November 30, 2020. *See* Securities Exchange Release No. 90530 (November 30, 2020), 85 FR 78366 (December 4, 2020) (SR-CboeBZX-2020-085) (“Notice”).

Application”).<sup>6</sup> On December 10, 2019, the Commission issued an order (the “Prior Exemptive Order”) under the 1940 Act granting the exemptions requested in the Application.<sup>7</sup>

Under the Prior Exemptive Order, the Funds are required to publish a basket of securities and cash that, while different from the Fund’s portfolio, is designed to closely track its daily performance (i.e., the Tracking Basket). The Prior Application stated that the Tracking Basket will solely consist of a combination of (i) select recently disclosed portfolio holdings (“Strategy Components”); (ii) liquid U.S. exchange-traded funds (“ETFs”) that convey information about the types of instruments (that are not otherwise fully represented by the Strategy Components) in which a Fund invests (“Representative ETFs”); and (iii) cash and cash equivalents. As set forth in the Approval Order and in the Notice, investments made by the Funds will comply with the conditions set forth in the Prior Application and the Prior Exemptive Order.

On October 30, 2020, as amended June 30, 2021, the Issuer sought to amend the Prior Exemptive Order to permit the Issuer to also select securities from the universe from which a Fund’s investments are selected such as a broad-based market index (“Investment Universe”) in the Fund’s Tracking Basket.<sup>8</sup> On August 5, 2021, the Commission issued an amended order that,

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<sup>6</sup> See File No. 812-14364, dated November 8, 2019.

<sup>7</sup> See Investment Company Act Release No. 33712, December 10, 2019.

<sup>8</sup> See File No. 812-15175, dated June 30, 2021. The amendment also sought to provide for the use of creation baskets that include instruments that are not included, or that are included with different weightings, in the Fund’s Tracking Basket. Accordingly, the Exchange has filed a separate proposed rule change to amend Rule 14.11 to provide for the use of creation baskets that include instruments that are not included, or that are included with different weightings, in the Fund’s Tracking Basket. See Securities Exchange Act No. 92626 (August 10, 2021) 86 FR 45792 (August 16, 2021) (SR-CboeBZX-2021-053) (Notice of Filing of a Proposed Rule Change To Amend Rule 14.11(m) (Tracking Fund 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 Tracking Fund Shares).

among other things, permits the Issuer to include select securities from the Fund’s Investment Universe in the Fund’s Tracking Basket (the “Updated Exemptive Order”).<sup>9</sup> Accordingly, the Funds will comply with this condition of the Updated Application and the Updated Exemptive Order. Except for the change noted above, all other representations made in the respective rule filings remain unchanged and will continue to constitute continuing listing requirements for the Funds. 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 the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>10</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>11</sup> 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 revision is intended to reflect the change in the Updated Application and the Updated Exemptive Order that permits the

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<sup>9</sup> See Investment Company Act Release No. 34350, August 5, 2021.

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

<sup>11</sup> 15 U.S.C. 78f(b)(5).

Issuer to include select securities from the Fund's Investment Universe in the Fund's Tracking Basket. The proposed rule change would permit the Funds to operate consistent with this updated condition in the Updated Application and the Updated Exemptive Order. Furthermore, Exchange Rule 14.11(m)(4)(B)(iii) provides that the Exchange will consider the suspension of trading in and will commence delisting proceedings for a series of Tracking Fund Shares pursuant to Rule 14.12 if, among other things, the Exchange is aware that the Investment Company is not in compliance with the conditions of any exemptive order or no-action relief granted by the Commission of the Commission Staff under the 1940 Act to the Investment Company with respect to the series of Tracking Funds Shares. Therefore, the proposed rule change would allow the Exchange to enforce compliance by its members and persons associated with its members, as provided in Section 6(b)(1) of the Act.<sup>12</sup> Except for the changes noted above, all other representations made in the respective rule filings 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 purpose of the filing is to reflect an amendment to the Prior Exemptive Order governing the listing and trading of these Funds. To the extent that the proposed rule change would continue to permit listing and trading of another type of actively-managed ETF that has characteristics different from existing actively-managed and index ETFs, the Exchange believes that the proposal would benefit investors by continuing to promote competition among various ETF products.

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<sup>12</sup> 15 U.S.C. 78f(b)(1).

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 Act<sup>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>15</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that the Funds will continue to comply with the requirements of BZX Rule 14.11(m) and that waiver of the operative delay would allow the Funds to operate in a manner consistent with the Updated Application and Updated Exemptive Order. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 has satisfied this requirement.

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii).

protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.<sup>16</sup>

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.

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBZX-2021-060 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-CboeBZX-2021-060. 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

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<sup>16</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).



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-2021-060 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.<sup>17</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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