

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-95082; File No. SR-NASDAQ-2022-035)

June 10, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the ALPS Active REIT ETF of ALPS ETF Trust to Provide for the Use of “Custom Baskets” Applicable to a Series of Proxy Portfolio Shares Listed Pursuant to Nasdaq Rule 5750

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 27, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) 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 self-regulatory organization. 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 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 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.

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

<sup>2</sup> 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

In June 2020 Nasdaq submitted a proposed rule change for immediate effectiveness with the Commission for the listing and trading, or trading pursuant to unlisted trading privileges, of Proxy Portfolio Shares under Nasdaq Rule 5750 (“Proxy Portfolio Shares”), the rule governing the listing and trading of Proxy Portfolio Shares on the Exchange.<sup>3</sup> In February 2021 Nasdaq filed a proposed rule change for immediate effectiveness to list and trade shares of the Fund under Nasdaq Rule 5750 (“ALPS Fund Filing”).<sup>4</sup> Subsequently, the Commission approved a filing to amend Nasdaq Rule 5750 (“Custom Baskets Filing”) to provide for the use of “Custom Baskets” consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940 (the “1940 Act”) applicable to a series of Proxy Portfolio Shares.<sup>5</sup> The Exchange filed this

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<sup>3</sup> Nasdaq submitted for immediate effectiveness a proposed rule change for Nasdaq Rule 5750 in Securities Exchange Act Release No. 89110 (June 22, 2020), 85 FR 38461 (June 26, 2020) (SR-NASDAQ-2020-032).

<sup>4</sup> See Securities Exchange Act Release No. 91062 (Feb. 4, 2021), 86 FR 8972 (Feb. 10, 2021) (SR-NASDAQ-2021-005).

<sup>5</sup> See Securities Exchange Act Release No. 93277 (Oct. 8, 2021), 86 FR 57227 (Oct. 14, 2021) (SR-NASDAQ-2021-065); see also Securities Exchange Act Release No. 92790 (Aug. 27, 2021), 86 FR 49357 (Sept. 2, 2021) (SR-NASDAQ-2021-065); see also

proposed rule change to permit the Fund to use Custom Baskets.

As set forth in the ALPS Fund Filing, the Fund is an actively-managed exchange-traded fund. The Shares are offered by the Trust, which was established as a Delaware statutory trust on September 13, 2007. The Commission issued an order, upon which the Trust may rely, granting certain exemptive relief under the 1940 Act.<sup>6</sup> The Trust, which is registered with the Commission as an investment company under the 1940 Act, has filed a registration statement on Form N-1A (“Registration Statement”) relating to the Fund with the Commission.<sup>7</sup> The Fund is a series of the Trust.

The Shares are currently listed and traded on the Exchange and the proposed rule change updates certain representations made in the ALPS Fund Filing to incorporate the necessary additional representations in the Custom Baskets Filing to permit the Fund to avail itself of the use of Custom Baskets.

The ALPS Fund Filing currently says that the names and quantities of the instruments that constitute the basket of securities for creations and redemptions will be the same as the Fund’s Proxy Basket, except to the extent purchases and redemptions are made entirely or in part on a cash basis. The representation adds that in the event that the value of the Proxy Basket is

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Investment Company Act Release No. 34194 (Feb. 10, 2021) (notice); see also Investment Company Act Release No. 34221 (March 9, 2021) (order).

<sup>6</sup> See ALPS ETF Trust, et al., Investment Company Act Release No. 34149 (Dec. 22, 2020) (notice); see also Investment Company Act Release No. 34181 (Jan. 21, 2021) (order); see also Investment Company Act Release No. 34194 (Feb. 10, 2021) (notice); see also Investment Company Act Release No. 34221 (March 9, 2021) (order).

<sup>7</sup> The Registration Statement, as amended to date, is available on the Commission’s website:  
[https://www.sec.gov/ix?doc=/Archives/edgar/data/0001414040/000139834422006698/fp0074021\\_485bpos-ixbrl.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/0001414040/000139834422006698/fp0074021_485bpos-ixbrl.htm).

not the same as the Fund’s net asset value (“NAV”), the creation and redemption baskets will consist of the securities included in the Proxy Basket plus or minus an amount of cash equal to the difference between the NAV and the value of the Proxy Basket, as described in more detail in the ALPS Fund Filing (the representations referred to in this paragraph are collectively referred to hereafter as the “Names and Quantities Rep”).

This Names and Quantities Rep will be updated to take into account that the Custom Baskets Filing adopted subparagraph (c)(6) under Nasdaq Rule 5750 (Definitions), which defines “Custom Basket,” for the purposes of Nasdaq Rule 5750. The issuer represents that for the purposes of this rule, the term “Custom Basket” means a 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 ALPS Fund Filing also says the Exchange will obtain a representation from the issuer of the shares of the Fund that the NAV per share of the Fund will be calculated daily and will be made available to all market participants at the same time. This representation will be updated to comply with the Custom Baskets Filing’s initial listing requirement and as reflected in Nasdaq Rule 5750(d)(1)(B). The issuer represents that (i) the NAV per share for the Fund will be calculated daily, (ii) each of the following will be made available to all market participants at the same time when disclosed: the NAV, the Proxy Basket, and the Fund Portfolio, and (iii) the issuer and any person acting on behalf of the series of Proxy Portfolio Shares will comply with Regulation Fair Disclosure under the Securities Exchange Act of 1934,<sup>8</sup> including with respect to

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<sup>8</sup> 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

any Custom Basket.

The issuer represents that it will update the representation in the ALPS Fund Filing to reflect Nasdaq Rule 5750(b)(5), as amended by the Custom Basket filing, to take into account Custom Baskets. Specifically, the issuer represents 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 Custom Basket, as applicable. 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 Custom Basket, as applicable, or has access to nonpublic information regarding the Fund Portfolio, the Proxy Basket, and/or 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 Custom Basket, as applicable, or changes thereto.

Under the ALPS Fund Filing, the issuer represents that it will continue to comply with all aspects of the listing rule and additionally will comply with the revised listing rule, Nasdaq Rule 5750(d)(2)(A), as amended by the Custom Baskets Filing, 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 market session, the investment company shall make publicly available on its website the composition of any Custom Basket transacted on the previous

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

business day, except a Custom Basket that differs from the applicable Proxy Basket only with respect to cash.

The Custom Baskets Filing added “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. The issuer represents that it will comply with this and the Custom Baskets Filing’s additional requirement in Nasdaq Rule 5750(b)(6). Thus, the issuer represents 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 the Custom Basket, as applicable.

The adviser/sub-adviser firewall representation in the ALPS Fund Filing is being updated to reflect Custom Baskets and will now state that in the event (a) the Adviser or any sub adviser registers as a broker dealer, or becomes newly affiliated with a broker dealer, or (b) any new adviser or sub adviser is a registered broker dealer or becomes affiliated with another broker dealer, it will implement and will maintain a fire wall with respect to its relevant personnel

and/or such broker dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the Fund's Portfolio, the Proxy Basket, and/or the Custom Basket, as applicable, and will be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund's Portfolio, the Proxy Basket, and/or the Custom Basket, as applicable.

The Fund will comply with the above-described conditions and with the Proxy Portfolio Shares listing rule Nasdaq Rule 5750, as amended, to provide for the use of Custom Baskets consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940<sup>9</sup> applicable to a series of Proxy Portfolio Shares. Otherwise, the listing and trading rules, including all representations made in the ALPS Fund Filing, will remain unchanged and will continue to comply with Nasdaq Rule 5750.

## 2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act in general and Section 6(b)(5) of the Act, 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, and to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that proposed rule change to update certain representations made in the ALPS Fund Filing to incorporate the necessary additional representations in the Custom Baskets Filing to permit the Fund to use Custom Baskets 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

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<sup>9</sup> 15 U.S.C. 80a et seq.

use of Custom Baskets by the Fund, and is 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 will provide flexibility in portfolio construction that may assist in reducing taxable capital gains distributions for investors and may generally improve tax efficiencies. Further, the use of Custom Baskets, to the extent permitted by the Fund's exemptive relief, may also result in narrower bid/ask spreads and smaller premiums and discounts to the NAV for Proxy Portfolio Shares to the extent that the Fund 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 the issuer of the Shares and other 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 updating the Names and Quantities Rep in the ALPS Fund Filing to take into account that the Custom Baskets Filing adopted subparagraph (c)(6) under Nasdaq Rule 5750 (Definitions), which defines "Custom Basket," for the purposes of Nasdaq Rule 5750, to mean 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, will remove impediments to and perfects the mechanism of a free and open market and, in general, protects investors and the public interest.

Additionally, the Exchange believes that updating the current representation in the ALPS Fund Filing that says the Exchange will obtain a representation from the issuer of the Shares of the Fund that the NAV per share of the Fund will be calculated daily and will be made available



to all market participants at the same time, to provide 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 Securities Exchange Act of 1934, including with respect to any Custom Basket,<sup>10</sup> will be to the benefit of the investing public and market participants.

Nasdaq believes that having the issuer update its representation in the ALPS Fund Filing to reflect Nasdaq Rule 5750(b)(5), as amended by the Custom Basket filing, to take into account Custom Baskets is designed to prevent fraudulent and manipulative acts and practices by acting as a safeguard against any misuse and improper dissemination of nonpublic information related to the Fund's Custom Basket or changes thereto.

The Exchange also believes that updating the current representation under the ALPS Fund Filing will continue to comply with all aspects of the listing rule and additionally will comply with the revised listing rule, Nasdaq Rule 5750(d)(2)(A), as amended by the Custom Baskets Filing, 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 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, will remove impediments to and perfect the mechanism of a free and open market and, in general, protect investors and the public interest.

Additionally, the Exchange believes that in accordance with the Custom Baskets Filing that added "Custom Basket" to the non-exclusive list of information relating to Proxy Portfolio

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<sup>10</sup> See Nasdaq Rule 5750(d)(1)(B).

Shares that a Reporting Authority calculates and reports, that updating the representation to include the issuer representing the Custom Baskets Filing's additional requirement set forth in Nasdaq Rule 5750(b)(6) that says 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, will remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. Nasdaq also believes that the issuer updating its representation to include that 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, will remove impediments to and perfect the mechanism of a free and open market and, in general, protect investors and the public interest.

The Exchange also believes that updating the current adviser/sub-adviser firewall representation under the ALPS Fund Filing to reflect Custom Baskets and to now state that in the event (a) the Adviser or any sub adviser registers as a broker dealer, or becomes newly affiliated with a broker dealer, or (b) any new adviser or sub adviser is a registered broker dealer or becomes affiliated with another broker dealer, it will implement and will maintain a fire wall with respect to its relevant personnel and/or such broker dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the Fund's Portfolio, the Proxy Basket, and/or the Custom Basket, as applicable, and will be subject to procedures

designed to prevent the use and dissemination of material nonpublic information regarding the Fund's Portfolio, the Proxy Basket, and/or the Custom Basket, as applicable, will remove impediments to and perfect the mechanism of a free and open market and, in general, protect investors and the public interest.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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 purposes of the Act. The Exchange believes the proposed rule change, by permitting the use of Custom Baskets by the Fund, is consistent with the Fund's exemptive relief and would be to the benefit of investors and the marketplace.

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

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)(iii) of the Act<sup>11</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>12</sup>

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires the Exchange 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

A proposed rule change filed under Rule 19b-4(f)(6)<sup>13</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>14</sup> 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 Commission notes that the Exchange represents that the Fund will comply with all representations stated herein, in particular, regarding its use of Custom Baskets, consistent with Nasdaq Rule 5750, as amended by the Custom Baskets Filing.<sup>15</sup> In addition, the Exchange represents that all other representations made in the ALPS Fund Filing remain unchanged, and the Fund will continue to comply with Nasdaq Rule 5750, as amended. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues.<sup>16</sup> Accordingly, the Commission waives the 30-day operative delay and designates the proposal operative upon filing.<sup>17</sup>

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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>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>15</sup> See supra note 5.

<sup>16</sup> See id. See also Securities Exchange Act No. 93546 (November 9, 2021) 86 FR 63429 (November 16, 2021) (SR-CboeBZX-2021-075) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Reflect a Modification to the Permitted Components of the Tracking Baskets of the Invesco Real Assets ESG ETF and Invesco US Large Cap Core ESG ETF).

<sup>17</sup> 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).

At any time within 60 days of the filing of such 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-NASDAQ-2022-035 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-2022-035. 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-2022-035 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>18</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

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<sup>18</sup> 17 CFR 200.30-3(a)(12).