

# SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-102786; File No. SR-NYSEARCA-2025-28]

## **Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Reflect an Amendment to the Application and Exemptive Order Governing the Fidelity Women’s Leadership ETF and Fidelity Sustainability U.S. Equity ETF**

April 8, 2025.

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 April 4, 2025, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “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 reflect an amendment to the Application and Exemptive Order governing the Fidelity Women’s Leadership ETF and Fidelity Sustainability U.S. Equity ETF that are listed and traded on the Exchange under NYSE Arca Rule 8.601-E. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), 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> 15 U.S.C. 78a.

<sup>3</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 self-regulatory organization 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 those 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 parts of such statements.

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

1. Purpose

The Exchange adopted NYSE Arca Rule 8.601-E for the purpose of permitting the listing and trading, or trading pursuant to unlisted trading privileges (“UTP”), of Active Proxy Portfolio Shares, which are securities issued by an actively managed open-end investment management company.<sup>4</sup> Commentary .01 to Rule 8.601-E requires the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Active Proxy Portfolio

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<sup>4</sup> See Securities Exchange Act Release No. 89185 (June 29, 2020), 85 FR 40328 (July 6, 2020) (SR-NYSEArca-2019-95). Rule 8.601-E(c)(1) provides that “[t]he term “Active Proxy Portfolio Share” means a security that (a) is issued by a investment company registered under the Investment Company Act of 1940 (“Investment Company”) organized as an openend 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 minimum number of shares , or multiples thereof, in return for a deposit by the purchaser of the Proxy Portfolio or Custom Basket, as applicable, and/or cash with a value equal to the next determined net asset value (“NAV”); (c) when aggregated in the same specified minimum number of Active Proxy Portfolio Shares, or multiples thereof, may be redeemed at a holder’s request in return for the Proxy Portfolio or Custom Basket, as applicable, and/or cash to the holder by the issuer 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.” Rule 8.601-E(c)(2) provides that “[t]he term “Actual Portfolio” means the identities and quantities of the securities and other assets held by the Investment Company that shall form the basis for the Investment Company’s calculation of NAV at the end of the business day.” Rule 8.601-E(c)(3) provides that “[t]he term “Proxy Portfolio” means a specified portfolio of securities, other financial instruments and/or cash designed to track closely the daily performance of the Actual Portfolio of a series of Active Proxy Portfolio Shares as provided in the exemptive relief pursuant to the Investment Company Act of 1940 applicable to such series.”

Shares on the Exchange. Pursuant to this provision, the Exchange submitted a proposal to list and trade shares (“Shares”) of Active Proxy Portfolio Shares of the Fidelity Women’s Leadership ETF and Fidelity Sustainability U.S. Equity ETF<sup>5</sup> (each, a “Fund” and, together, the “Funds”) on the Exchange under NYSE Arca Rule 8.601-E. The Exchange proposes to reflect an amendment to the Prior Application and Prior Exemptive Order (as defined below) governing the listing and trading of the Funds, as follows.

Fidelity Covington Trust, Fidelity Management & Research Company LLC, and Fidelity Distributors Company LLC (the “Applicants”)<sup>6</sup> filed an amended and restated 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 Application”).<sup>7</sup> On December 10, 2019, the Commission issued an order, as subsequently amended on August 5, 2021 (the “Prior Exemptive Order”), under the 1940 Act granting the exemptions requested in the Prior Application.<sup>8</sup> The Prior Application and Prior Exemptive Order are applicable to the Funds.

Under the Prior Exemptive Order, the Funds are required to daily publish a basket of

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<sup>5</sup> On April 14, 2021, the Commission published the notice of filing and immediate effectiveness relating to the listing and trading of shares of the Fidelity Women’s Leadership ETF and Fidelity Sustainability U.S. Equity ETF. See Securities Exchange Act Release No. 91514 (April 8, 2021), 86 FR 19657 (April 14, 2021) (SR-NYSEArca-2021-23) (“Notice”).

<sup>6</sup> The original applicants were Fidelity Beach Street Trust, Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Distributors Corporation. On January 1, 2020, each of FMR Co., Inc. and certain other Fidelity investment adviser entities merged with and into Fidelity Management & Research Company. Thereafter, Fidelity Management & Research Company redomiciled as a Delaware limited liability company and was renamed Fidelity Management & Research Company LLC. FMR Co., Inc. no longer exists and is thus no longer an applicant. On January 1, 2020, Fidelity Distributors Corporation merged with and into Fidelity Investments Institutional Services Company, Inc. (“FIISC”). FIISC thereafter redomiciled as a Delaware limited liability company and was renamed Fidelity Distributors Company LLC. Fidelity Distributors Corporation also no longer exists and is no longer an applicant. Finally, the Funds have since been registered with the Commission as series of Fidelity Covington Trust. Fidelity Beach Street Trust has agreed to be removed as an applicant from the Application.

<sup>7</sup> See File No. 812-14364, dated November 8, 2019.

<sup>8</sup> See Investment Company Act Release No. 33712 (December 10, 2019); Investment Company Act Release No. 34350 (August 5, 2021).

securities and cash that, while different from the Fund’s portfolio, is designed to closely track its daily performance (“Tracking Basket”). Further, under the Prior Exemptive Order, a Fund is permitted to invest only in certain enumerated instruments (“Prior Order Investments”).<sup>9</sup> As set forth in the Notice, investments made by the Fidelity Women’s Leadership ETF and Fidelity Sustainability U.S. Equity ETF will comply with the conditions set forth in the Prior Exemptive Order.<sup>10</sup>

On July 30, 2024, as amended on November 22, 2024, January 16, 2025 and February 24, 2025, the Applicants sought to amend the Prior Exemptive Order (the “Updated Application”) to permit a Fund to invest in securities and instruments in addition to Prior Order Investments, including but not limited to fixed income securities, foreign investments that do not trade contemporaneously with Shares, and derivatives (“Amended Order Investments”).<sup>11</sup> As proposed, each Fund’s portfolio would be invested in two sleeves. A Fund will invest the first sleeve solely in Prior Order investments for which the Fund will disclose a Tracking Basket

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<sup>9</sup> Pursuant to the Prior Application and Prior Exemptive Order, the permissible investments for the Funds include only the following instruments: ETFs, exchange-traded notes, exchange-traded common stocks, common stocks listed on a foreign exchange that trade on such exchange contemporaneously with the Shares (“foreign common stocks”), exchange-traded preferred stocks, exchange-traded American Depositary Receipts, exchange-traded real estate investment trusts, exchange-traded commodity pools, exchange-traded metals trusts, exchange-traded currency trusts, and exchange-traded futures that trade contemporaneously with the Shares, as well as cash and cash equivalents, i.e., short-term U.S. Treasury securities, government money market funds, and repurchase agreements. With the exception of foreign common stocks and cash and cash equivalents, all holdings of the Funds will be listed on a U.S. national securities exchange. The Funds will not short positions, will not borrow for investment purposes, and will not purchase any securities that are illiquid investments at the time of purchase. See Notice, 86 FR at 19659, n. 12.

<sup>10</sup> See Notice, 86 FR at 19659, n. 12 & 13.

<sup>11</sup> See File No. 812-15606, dated February 24, 2025. The Funds sought the same investment flexibility to choose its investments as ETFs relying on Rule 6c-11 under the Act (“Rule 6c-11”) subject to the same portfolio holdings disclosure requirements as Rule 6c-11 ETFs with respect to Amended Order Investments. See id. The Funds are not able to operate in reliance on Rule 6c-11 under the Amended Order because they do not and will not disclose all of their portfolio holdings daily as required by the rule. See id., n.7. See also Rule 6c-11(c)(1)(i) (requiring an ETF to disclose prominently on its website, publicly available and free of charge, the portfolio holdings that will form the basis for the Fund’s calculation of per share NAV).

designed to track closely the daily performance of the sleeve (the “Semi-Transparent Sleeve”). A Fund will invest the second sleeve solely in Amended Order Investments and will publicly disclose all such investments daily in accordance with the requirements of rule 6c-11(c) under the 1940 Act (the “Fully-Transparent Sleeve”). Applicants represented that the Funds do not intend to use Amended Order Investments to hedge or otherwise offset exposure to Prior Order Investments.<sup>12</sup>

On March 31, 2025, the Commission issued an amended exemptive order (the “Amended Exemptive Order”) that, among other things, requires each Fund, to the extent it invests in Amended Order Investments, to publish a new Tracking Basket that consists of two distinct portions: (1) a first portion corresponding to the Semi-Transparent Sleeve; and (2) a second portion corresponding to the Fully-Transparent Sleeve that fully discloses all Amended Order Investments in a manner consistent with Rule 6c-11(c)(1). Under the Amended Exemptive Order, the ratio of the Fully-Transparent Sleeve portion of the Tracking Basket to the total Tracking Basket will correspond to the ratio of the Amended Order Investments to the ETF’s aggregate portfolio holdings. The ratio of the Semi-Transparent portion of the Tracking Basket to the total Tracking Basket will correspond to the ratio of all investments other than Amended Order Investments to the ETF’s aggregate portfolio holdings.<sup>13</sup> All Amended Order Investments held by a Fund will be included in the Fund’s Tracking Basket in their actual weights (i.e., they will be fully disclosed).<sup>14</sup>

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

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<sup>12</sup> See id.

<sup>13</sup> See Investment Company Act Release No. 812-15606 (March 31, 2025).

<sup>14</sup> See id.

Funds. The Funds will also continue to comply with the requirements of Rule 8.601-E.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>15</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>16</sup> in particular, in that it is 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.<sup>17</sup>

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 ensure that each of the Funds will comply with the Updated Application and the Amended Exemptive Order that permits the Funds to expand the universe of instruments in which each Fund is permitted to invest. The proposed rule change would permit the Funds to operate consistent with this updated conditions in the Updated Application and the Amended Exemptive Order. 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

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> The Exchange represents that, for initial and continued listing, the Fund will be in compliance with Rule 10A-3 under the Act, as provided by NYSE Arca Rule 5.3-E.

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.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>18</sup> and Rule 19b-4(f)(6) thereunder.<sup>19</sup> Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder. In addition, the Exchange provided the Commission with 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 the filing.<sup>20</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>21</sup> normally does not become

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>21</sup> 17 CFR 240.19b-4(f)(6).

operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),<sup>22</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 proposal may become operative immediately upon filing. The Exchange states that the Funds are currently listed and traded on the Exchange, and that the proposed rule change clarifies that the Funds will comply with the conditions set forth in the Updated Application and the Amended Exemptive Order to the extent that a Fund invests in Amended Order Investments. The Exchange also states that the Funds will continue to comply with the requirements of Rule 8.601-E, and that it believes that the proposed rule change raises no novel regulatory issue. Based on the foregoing, the Commission believes that waiver of the 30-day operative delay for this proposed rule change is consistent with the 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>23</sup>

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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>24</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

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<sup>22</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>23</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>24</sup> 15 U.S.C. 78s(b)(2)(B).



#### 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEARCA-2025-28 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-NYSEARCA-2025-28. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office

of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEARCA-2025-28 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>25</sup> 17 CFR 200.30-3(a)(12), (59).