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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93147; File No. SR-CboeBZX-2021-053]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Granting Approval 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
September 28, 2021.

I. Introduction

On August 3, 2021, Cboe BZX Exchange, Inc. (“Exchange” or “BZX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend BZX 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 (“1940 Act”)³ applicable to a series of Tracking Fund Shares. The proposed rule change was published for comment in the Federal Register on August 16, 2021.⁴ 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 BZX Rule 14.11(m), which permits the listing and trading of series of Tracking Fund Shares. BZX Rule 14.11(m) currently requires that Tracking Fund Shares be issued and redeemed in a specified aggregate minimum number in return for the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 80a.

⁴ See Securities Exchange Act Release No. 92626 (August 10, 2021), 86 FR 45792.

Tracking Basket⁵ and/or cash.⁶ The Exchange proposes to amend the definition of “Tracking Fund Share” in BZX Rule 14.11(m)(3)(A) to permit creations and redemptions of shares in return for a Custom Basket in addition to the Tracking Basket, to the extent permitted by a fund’s exemptive relief.⁷ Further, the Exchange proposes to define the term “Custom Basket” as a portfolio of securities that is different from the Tracking Basket and is otherwise consistent with the exemptive relief issued pursuant to the 1940 Act applicable to a series of Tracking Fund Shares.⁸ The Exchange also proposes to amend the definition of “Reporting Authority” in BZX Rule 14.11(m)(3)(C) to include Custom Baskets among the types of information for which the Reporting Authority designated for a particular series of Tracking Fund Shares will be the official source for calculating and reporting such information.⁹

⁵ The 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 1940 Act applicable to a series of Tracking Fund Shares. See BZX Rule 14.11(m)(3)(E). 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 BZX Rule 14.11(m)(3)(B).

⁶ See BZX Rule 14.11(m)(3)(A) (defining the term “Tracking Fund Share”).

⁷ See proposed BZX Rule 14.11(m)(3)(A) (defining “Tracking Fund Share” as a security that: (i) 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; (ii) is issued in a specified aggregate minimum number in return for a deposit of a specified Tracking Basket or Custom Basket, as applicable, and/or a cash amount with a value equal to the next determined NAV; (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 or Custom Basket, as applicable, and/or a cash amount with a value equal to the next determined NAV; and (iv) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter).

⁸ See proposed BZX Rule 14.11(m)(3)(F).

⁹ See proposed BZX Rule 14.11(m)(3)(C) (defining “Reporting Authority” in respect of a particular series of Tracking Fund Shares as the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Tracking Fund 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 Tracking Basket; the Fund Portfolio; the Custom

The Exchange proposes to amend BZX Rule 14.11(m)(4) 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 Tracking Fund Shares that the issuer and any person acting on behalf of the series of Tracking Fund Shares will comply with Regulation Fair Disclosure under the Exchange Act (“Regulation FD”),¹⁰ including with respect to any Custom Basket.¹¹ The Exchange also proposes to add a new continued listing requirement that, with respect to each Custom Basket utilized by a series of Tracking Fund Shares, each business day, before the opening of trading in Regular Trading Hours,¹² 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 Tracking Basket only with respect to cash.¹³

Finally, the Exchange proposes to amend BZX Rules 14.11(m)(2)(E) and (F), which contain requirements that specified parties must erect and maintain “fire walls” with respect to access to information concerning the Fund Portfolio and Tracking Basket and enact procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund Portfolio and Tracking Basket, so that these requirements would also cover information concerning Custom Baskets. As proposed to be amended, BZX Rule 14.11(m)(2)(E) would require

Basket; the amount of any cash distribution to holders of Tracking Fund Shares, NAV, or other information relating to the issuance, redemption or trading of Tracking Fund Shares).

¹⁰ 17 CFR 243.100.

¹¹ See proposed BZX Rule 14.11(m)(4)(A)(ii)(c). BZX Rule 14.11(m)(4)(A)(ii) currently provides that the Exchange will obtain a representation from the issuer of each series of Tracking Fund Shares that the NAV per share for the series will be calculated daily and that the NAV, the Tracking 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 BZX Rule 14.11(m)(4)(A)(ii)(a) and (b).

¹² The term “Regular Trading Hours” means the time between 9:30 a.m. and 4:00 p.m. Eastern Time. See BZX Rule 1.5(w).

¹³ See proposed BZX Rule 14.11(m)(4)(B)(ii). The Exchange also proposes to renumber the remainder of BZX Rule 14.11(m)(4)(B).

that, if the investment adviser to the Investment Company issuing Tracking Fund 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 Tracking 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 Tracking Basket, and/or the Custom Basket or has access to nonpublic information regarding the Fund Portfolio, the Tracking 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 Tracking Basket, and/or the Custom Basket, as applicable, or changes thereto. Proposed BZX Rule 14.11(m)(2)(F) 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 Tracking 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 Tracking 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, Tracking 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.¹⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹⁵ 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.

The Commission previously approved BZX Rule 14.11(m) to permit the listing and trading of Tracking Fund Shares.¹⁶ As discussed above, under the current rule, a series of Tracking Fund Shares must create or redeem shares in return for the Tracking Basket and/or cash. The Exchange is now proposing to amend BZX Rule 14.11(m) to allow a series of Tracking Fund Shares to create or redeem shares in return for a Custom Basket, which is a portfolio of securities that is different from the Tracking Basket, to the extent consistent with an issuer's exemptive relief under the 1940 Act.¹⁷ For the reasons discussed below, the Commission finds that the proposed amendments to BZX Rule 14.11(m) to provide for the use of Custom Baskets for Tracking Fund 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.

¹⁴ 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).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ See Securities Exchange Act Release No. 88887 (May 15, 2020), 85 FR 30990 (May 21, 2020) (SR-CboeBZX-2019-107) (approving proposal to adopt Rule 14.11(m) to permit the listing and trading of 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 ("2020 Order")). The Exchange must file a separate proposed rule change pursuant to Section 19(b) of the Exchange Act for each series of Tracking Fund Shares. See BZX Rule 14.11(m)(2)(A).

¹⁷ The Commission has granted exemptive relief under the 1940 Act to certain series of Tracking Fund 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 Tracking Basket. See, e.g., Fidelity Beach Street Trust, et al., Investment Company Act Release No. 34350 (August 5, 2021).

The Commission believes that the proposed changes to BZX Rules 14.11(m)(2)(E) and (F) are consistent with the Exchange Act and are reasonably designed to help prevent fraudulent and manipulative acts and practices. The Commission notes that, because Tracking Fund 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 Tracking Fund Shares, including information relating to Custom Baskets, be kept confidential prior to its public disclosure and not be subject to misuse.¹⁸ Accordingly, the Commission believes that the Exchange’s proposal to amend BZX Rules 14.11(m)(2)(E) and (F)¹⁹ 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 Tracking Basket, is designed to prevent fraud and manipulation with respect to Tracking Fund Shares.

The Commission also believes that the proposed amendments to the initial and continued listing requirements for Tracking Fund 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 Tracking Basket only with respect to cash.²⁰ In addition, prior to the initial listing of the Tracking Fund Shares, the Exchange will be required to obtain a representation from the issuer of each series of Tracking Fund Shares that the issuer and any person acting on behalf of the series of Tracking Fund Shares will comply with Regulation

¹⁸ See 2020 Order, supra note 16, 85 FR at 31002-03.

¹⁹ See supra Section II, describing proposed BZX Rules 14.11(m)(2)(E) and (F).

²⁰ See proposed BZX Rule 14.11(m)(4)(B)(ii).

FD, including with respect to any Custom Basket.²¹ 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 Tracking Fund Shares may only utilize Custom Baskets to the extent consistent with the exemptive relief issued pursuant to the 1940 Act applicable to such series.²² The Commission further notes that all series of Tracking Fund Shares will continue to be subject to the existing rules and procedures that govern the listing and trading of Tracking Fund Shares and the trading of equity securities on the Exchange.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act²³ that the proposed rule change (SR-CboeBZX-2021-053), be, and it hereby is, approved.

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

J. Matthew DeLesDernier,
Assistant Secretary.

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²¹ See proposed BZX Rule 14.11(m)(4)(A)(ii)(c). 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).

²² See proposed BZX Rule 14.11(m)(3)(F).

²³ 15 U.S.C. 78s(b)(2).

²⁴ 17 CFR 200.30-3(a)(12).