



January 14, 2016

Brent Fields
Secretary
Securities and Exchange Commission
100 F. Street N.E.
Washington, D.C. 20549-1090

**RE: Request for Comment on Exchange-Traded Products; Exchange Act Release
No. 75165, File No. S7-11-15 ("Request for Comment")**

Dear Mr. Fields:

BATS Global Markets, Inc. ("BATS") appreciates the opportunity to respond to the Request for Comment on exchange-traded products ("ETPs"). BATS operates four registered national securities exchanges in the U.S. for the trading of equity securities, including ETPs, as well as two options markets in the U.S., and a recognized investment exchange in Europe. BATS BZX Exchange is a listing venue for ETPs, and currently lists 66 ETPs. In addition, BATS is the number one exchange operator for the trading of ETPs, with its four equity exchanges accounting for 25.7% of the daily trading volume in ETPs, more than any other exchange group. As such, BATS is acutely interested in the regulatory framework associated with the creation and SEC approval of ETPs, as well as the trading of ETPs. With that background in mind, BATS focuses its comments below primarily on the ETP listings process, the arbitrage mechanism for ETPs, establishing industry standards for definitions related to ETPs, and the events of August 24, 2015.

I. Inefficiencies Associated with the ETP Listings Process

The Commission Staff for the Division of Trading and Markets have a long-held view of their role as a gatekeeper for ETP listings and a belief, which we believe is debatable, that ETP listings fall within the scope of Section 19(b) of the Exchange Act and Rule 19b-4 thereunder and, hence, are subject to the exchange rule filing process required by these provisions. As a result of subjecting ETP listings to the rule-filing process, ETPs, after approval of their registration statement by the Division of Investment Management, must then additionally fit within existing "generic" exchange listing standards approved by the Commission, or must separately be approved by the Commission under Section 19(b)(2) of the Act, which requires a separate filing to be submitted by the proposed listing exchange on Form 19b-4, even when the ETP itself is identical or similar to an existing ETP. Further, for those ETPs that do not meet the "generic" exchange listing standards and are subject to the rule filing process, the standards of review applied by the Commission staff are not well defined and have been subject to evolution from one product to the next, often resulting in a slow, inefficient process that is both frustrating and costly to issuers and the exchanges, and likely to the Commission staff as well.

The Commission has taken steps in recent years to allow more ETPs to be listed on exchanges through the application of generic listing standards. Nonetheless, those standards tend to be exacting and any ETP that deviates from those standards in the slightest way must separately be approved for listing by the Commission under Section 19(b)(2), resulting in large numbers of ETP rule filings that must be reviewed by the Commission staff and published for comment before the ETP can go to market, a process that often takes several months or more. Further, the Commission has taken an extremely conservative approach, perhaps too conservative, in considering the adoption of generic listings standards for various categories of products. As a current example, the first managed fund shares came to market in 2008 and there have been more than 100 series of managed fund shares that have been approved for trading by the Commission, yet the initiative to create generic rules around these products is finally beginning to gain momentum.

As noted above, the Commission staff has not published well-defined criteria related to its concerns associated with the approval of an ETP for listing. According to the Request for Comment, the Commission staff is appropriately concerned with the question of whether the proposed ETP listing complies with Section 6(b)(5) of the Exchange Act, which requires that the rules of an exchange are designed to: (1) prevent fraudulent or manipulative acts, (2) promote just and equitable principles of trade, (3) foster cooperation and coordination with persons engaged in securities clearing and settlement, (4) perfect the mechanism of a free and open market and national market system, and (5) protect investors and the public interest. Application of these general principles, however, can often be subjective and BATS has experienced the application of different specific standards of review between different staff members and as between different ETPs that are nearly identical, making it difficult if not impossible to anticipate the issues that Commission staff may raise with respect to any particular ETP filing.

Moreover, because the Rule 19b-4 is an exchange filing, the exchange staff often end up being an intermediary in what can best be described as a negotiation between the Commission staff and the ETP issuer over the content of the Rule 19b-4, including extracting certain commitments from the ETP issuer through the Rule 19b-4 filing, which are, again, inherently prone to subjectivity and, hence, inconsistent and unpredictable application. Such commitments are often restrictions on the composition of the holdings of the ETP itself, even after the registration statement has been approved by the Division of Investment Management. Further, such inconsistent standards and treatment result in a competitive disadvantage to both issuers and exchanges as it relates to previously approved ETPs that are already listed and traded on another exchange because, in almost all instances, such previously approved ETPs were not subject to the same level of standards or restrictions applied by Commission staff to the newer ETP, restricting the ETPs ability to compete with nearly identical ETPs already in the market. As a consequence, in the context of ETP listings, the Rule 19b-4 process has proved to be an inefficient gatekeeper of dubious public policy benefit.

BATS recommends that the Commission engage in a comprehensive review of the current ETP listing process with the goal of removing itself wherever possible from the review of the appropriateness of listing specific ETP products, deferring instead to the exchanges' exercise

of their self-regulatory authority to act as the gatekeeper, which BATS believes is more aligned with the Congressional intent of the Exchange Act. This could be done through the provision of specific, standardized guidance to the public, which could be incorporated into additional generic listing standards that would allow all but the most novel and complex ETPs to be reviewed for approval by the exchanges. BATS believes it is critical for the Commission to conduct this review now, because increasing numbers of ETPs are anticipated to be created in the coming years, as investors grow increasingly comfortable with the ability ETPs provide for the execution of various investment strategies in a low-cost and transparent fashion.

II. ETP Liquidity and the Arbitrage Mechanism Generally

As part of the Commission staff review of Rule 19b-4 filings regarding the appropriateness of listing any particular ETP, the Commission staff is frequently concerned with the liquidity of the ETP as well as the ability of market participants to engage in arbitrage to facilitate the ETP pricing at or near the intraday value of the ETP's underlying portfolio or reference assets throughout the trading day. These concerns generally relate to transparency into the value of the ETP's portfolio, thus enabling a market maker to adequately quote a reliable two-sided market in the security and hedge its risks by taking off-setting positions in the ETP's portfolio of securities or other financial instruments, and enabling market participants to purchase or sell creation units as well as to sell the underlying portfolio to capture arbitrage profits and ensure that the ETP trades close to the value of its underlying portfolio or reference assets. BATS understands the level of focus dedicated to this vital function, but also agrees with numerous commenters' position that this arbitrage mechanism, in large part due to the role played by market makers, is generally an effective and efficient means of ensuring that intraday pricing in ETPs closely tracks the value of the underlying portfolio or reference asset. The Exchange also would like to highlight authorized participants' important role in the arbitrage mechanism. Because authorized participants are the only parties eligible to engage in the creation and redemption process, the ETP arbitrage mechanism is dependent on the active participation of authorized participants and their willingness to accept orders to create or redeem units on behalf of market makers engaging in the arbitrage process who are not authorized participants. In the event that there is only one authorized participant for a particular ETP, there is a significant reliance on that authorized participant to continuously accept requests from other firms to create or redeem and maintain the integrity of the ETP arbitrage mechanism.

Similarly, the suspension of creations and redemptions by an issuer can negatively impact liquidity and cause an ETP to trade away from the value of its underlying portfolio or reference assets. Under BATS' listing rules, an issuer is required to make prompt disclosure of the suspension to the public through a Regulation FD compliant method. In advance of the public disclosure, the issuer is required to provide the Exchange with notice of its intent to suspend creations and/or redemptions. When the Exchange receives notice of an issuer's intent to suspend creations and/or redemptions, the Exchange will issue a trade desk notice to notify relevant Exchange members which will be posted to the Exchange's website, submit an indicator of the suspension to the Securities Information Processor for broad dissemination, and consider halting trading in the ETP. While the suspension of creations and/or redemptions could reduce the efficiency of the arbitrage mechanism as it relates to intraday pricing in an ETP closely

tracking the value of the underlying portfolio or reference asset, BATS believes that its rules and procedures provide the market with sufficient time and means of notice to allow all market participants to have full information regarding the suspension prior to continued trading in the ETP. The Exchange notes that there are currently no products with suspended creations and/or redemptions that are primarily listed on BATS.

III. Arbitrage Mechanism for Exchange-Traded Notes ("ETNs")

The Commission requests comment on the extent to which ETNs offer opportunities for arbitrage. In particular, the Commission requests comment on how market participants engage in arbitrage for ETNs, the extent to which arbitrage is effective by an ETN issuer's ability to suspend and restart issuances of notes at their discretion, whether arbitrage opportunities are affected when an issuer suspends the issuance of its ETNs, and whether certain ETNs are easier or more difficult to arbitrage due to the nature of the ETN's reference asset or index, and, if so, which ones.

BATS believes that the cash-only creation and redemption mechanisms for ETNs provide market participants, including market makers and institutional investors, with similar opportunities to engage in arbitrage as are available to them with ETFs that offer in-kind creations and redemptions. From a market maker's perspective, the key difference between the in-kind and cash-only process is that a cash-only creation/redemption process additionally requires the market maker to sell/buy the accumulated hedge/basket at the same reference price and timing as used to arrive at the daily Closing Indicative Value. In an in-kind creation/redemption process, the market maker would simply deliver the hedge/basket to the issuer without having to convert it into cash. A similar process would be followed by a market maker for in-cash creations/redemptions on ETFs that support cash orders, an arbitrage mechanism that is already known to work well.

As noted above, the suspension of issuance of ETPs may restrict the ability of market participants to sell an ETP into a premium and arbitrage the market price back to fair value. This does increase the likelihood of premiums in the market price of the ETPs. But the impact of suspension of further issuance on the arbitrage mechanism should be quite similar across ETNs and other ETPs.

IV. Exemptions from Regulation M for ETNs

The Commission has issued no-action relief from Rules 101 and 102 of Regulation M to ETNs in part on the basis of assumptions that the secondary market price for such products should not vary substantially from the value of the relevant reference index. The Commission requests comment on the manner in which Regulation M extends to ETNs. In particular, the Commission notes in the Request for Comment that the secondary market price of an ETN can substantially deviate from its reference assets when the issuer of that ETN suspends issuances, and the Commission therefore asks how Rules 101 and 102 of Regulation M should apply to such products. The Commission asks whether the exemptive relief from these rules should be

limited to ETNs where there is a clear, independent index, where there is no limitation on issuances or redemptions, or where an ETN's secondary market price does not vary substantially from the relevant reference index. Further, the Commission asks whether there are any other relevant factors that should be considered in this context, whether there are any risks in maintaining the current relief for ETNs, what the benefits are of the relief, how the Commission should balance the risks against any benefits resulting from the ability of Authorized Participants to suspend issuances or redemptions, and whether relief for ETNs should contain different conditions than relief for other ETPs.

BATS believes that the absence of an exemption from Regulation M would take away an issuer's ability to keep prices in line with fair value. The availability of the creation and redemption mechanisms is critical to efficient markets on ETNs. Moreover, the distribution of the ETNs is complete at the time an ETN issuer suspends further issuance. Any material divergence between the market price of the ETNs and the intraday indicative value based on the underlying reference asset only emerges later, at a time when Rule 102 of Regulation M does not apply because the ETN issuer is no longer engaged in a distribution of the ETNs. Therefore, BATS believes that keeping the current exemptive relief framework would be the most effective approach to maintaining the efficient functioning of the ETN market place.

V. Standardized Definitions

The Commission requests comment on the extent to which the use of the term "ETF" to describe all types of ETPs is confusing to investors. While BATS does not believe that the use of the term ETF in particular has led to confusion among investors, it does believe that the failure to establish industry standard definitions for the numerous product types and regulatory regimes under which they are brought to market has inhibited the ability of investors to fully grasp the differences between the various product types that fall under the umbrella of ETPs. In particular, BATS believes that an industry-wide initiative to adopt standards for describing and classifying ETPs will foster a greater general understanding of ETPs and facilitate a broader dialogue among both investors and industry participants. The Exchange commends the efforts taken in the comment letter submitted by Deborah Fuhr and Kathleen H. Moriarty in response to the Request for Comment and believes that it should form the foundation for this initiative.¹

VI. August 24, 2015

BATS would also like to take this opportunity to provide commentary on the severe market volatility seen on August 24th, 2015, and how best to maintain orderly markets during such a time period. BATS believes that the U.S. stock market's systems performed exceptionally well on August 24th despite extreme volatility and record message traffic, handling the heaviest volume since the 2008 financial crisis. Unfortunately, this demonstration of market strength and stability was tempered by longstanding market structure issues, which

¹ See August 15, 2015 comment letter submitted by Deborah Fuhr, Managing Partner, ETFGI LLP, and Kathleen H. Moriarty, Partner, Kaye Scholer LLP, available at <https://www.sec.gov/comments/s7-11-15/s71115-23.pdf>.

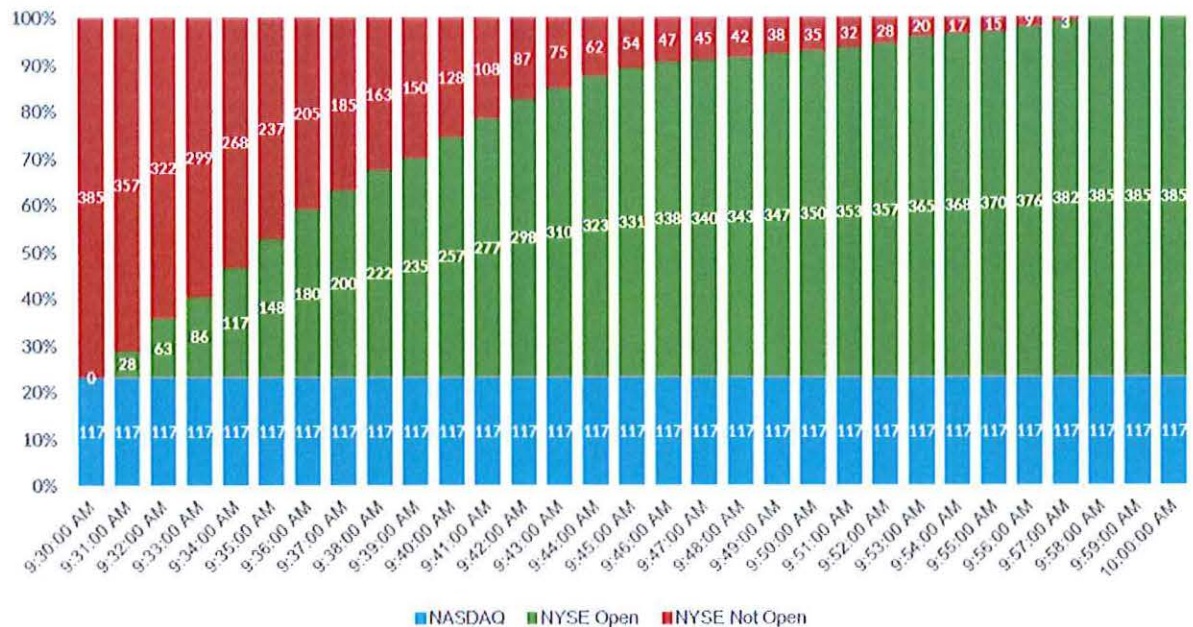
significantly impacted the day's open, leading to pricing and trading issues for certain exchange-traded products, in particular.

With futures sharply lower and market participants seeking insight into the day ahead, the New York Stock Exchange ("NYSE") invoked Rule 48 at the market open, which had the effect of degrading transparency. NYSE also relied upon a little-known requirement that forbids specialists (i.e., Designated Market Makers) from opening a stock electronically when a NYSE symbol is expected to open at a price a certain dollar amount away from the previous day's close.² This led to a time-consuming process of opening each stock manually, in turn leading to severe delays opening the NYSE market, during which time market participants were deprived of information about the state of the NYSE book.

As a result, more than 2,800 NYSE-listed securities failed to open at 9:30 a.m. with nearly 900 opening after 9:45 a.m. and about 230 opening after 10 a.m. These delays were especially harmful to equity-based ETPs given their dependence on prices in the underlying securities. In fact, 85% of the 327 ETPs that experienced a limit up/limit down (LULD) halt were equity-based ETFs, suggesting a clear pricing disruption in the underlying equity market. As observed in the chart below, nearly 50% of the S&P 500 was not open on the NYSE at 9:35 a.m. The chart below illustrates the opening issues that occurred to components of the S&P 500, leading to pricing issues for the SPDR S&P 500 ETF.

² Under this requirement, NYSE symbols aren't opened automatically if a stock would open more than 50 cents away from the closing price (stocks priced under \$20) or more than \$1.00 from the closing price (stocks priced between \$20.00 and \$49.99) or more than \$1.99 from the closing price (virtually all other stocks).

S&P 500 Components Opening Trades by Minute
August 24, 2015



As mentioned above, 85% of the 327 halted ETPs on the 24th were equity-based ETPs, again suggesting an issue with the underlying market for the equity components. More strikingly, 85 of the halted ETPs experienced five or more trading halts. These 85 ETPs made up 93% of the halts that all ETPs experienced for the day. While LULD single stock halts were designed by the market to allow for multiple halts in a single day, they certainly were not intended to result in repetitive halt events on the way down — and the way up — when volatile conditions exist. One ETP in particular experienced 11 halts in a matter of mere minutes.

Number of ETPs that had 5 or more halts:

NYSE ARCA	79
NASDAQ	6
BATS BZX	0

The evidence reviewed by BATS suggests that the multiple halts experienced by certain NYSE Arca-listed ETPs were caused by the auction process used by NYSE to resume trading after a halt. The data reveal that the NYSE Arca halt auction, which has narrow price collars to control for wild price swings, will automatically run an auction regardless of the existence — or size — of an imbalance in the auction. Furthermore, the remaining imbalance is executed against the orders in the NYSE Arca book only. In many instances, the execution of this remaining imbalance caused the ETP to trigger another, immediate LULD halt. In fact, we believe this feature led to Arca-listed ETPs experiencing more cases of multiple halts vs. ETPs

listed on other markets. We support NYSE Arca's recent decision to widen its halt resumption auction collars to align with the clearly erroneous rule threshold.³

Many market participants and observers, including BATS, believe there are a number of solutions to improve the issues highlighted above. First, investors and market participants have an expectation that markets open in a transparent manner at the published market open times. We must take steps to ensure that all of our markets open at our published opening time of 9:30 a.m. and in a coordinated way. Second, the market should re-evaluate and reconfigure the LULD mechanisms for ETPs to keep them from retriggering regularly. The exchanges successfully coordinated the LULD thresholds for halting securities during the adoption of the original LULD halts. Moreover, the exchanges need to implement standardized, consistent auction processes to reopen the securities that are subject to an LULD halt, and we would respectfully request that the Commission act to direct that harmonization.

BATS believes LULD has proved effective but could be improved. It clearly did not perform as intended on August 24th, and on behalf of the ETP issuer community and investors BATS will continue to advocate for sensible enhancements to the LULD plan and, in particular, the harmonization across exchanges of the re-opening process following a LULD halt, including (1) the setting of any collars at the clearly erroneous rule threshold, (2) preventing the re-opening of a security after a halt until a market order imbalance has been satisfied, and (3) requiring the listing exchange to calculate and enforce LULD thresholds upon re-opening until such thresholds are disseminated by the SIP and received by the exchange.

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BATS appreciates the opportunity to reply to the Request for Comment. As discussed above, the Exchange believes that ETPs provide significant benefits to investors, as evidenced by the significant growth in assets under management in ETPs, however there are several areas in which the framework under which ETPs are brought to market, traded, and discussed can be improved. BATS would welcome the opportunity to provide the Commission with any additional information that it might find useful or to further discuss any of the issues raised herein.

Sincerely,



Kyle Murray
Assistant General Counsel

³ See Trader Update regarding Enhancements to Re-Opening Auction Collars, available at: https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_New_Collars.pdf, (announcing that, pending SEC approval, NYSE Arca will be widening the parameters for collars in halt auctions at the conclusion of a halt or trading pause).

Mr. Brent Fields
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Cc: The Honorable Mary Jo White, Chair
The Honorable Michael S. Piwowar, Commissioner
The Honorable Kara M. Stein, Commissioner
Stephen Luparello, Director, Division of Trading and Markets
David Grimm, Director, Division of Investment Management