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By Electronic Submission

rule-comments@sec.gov
Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

RE: File No. S7-15-18 – Comment on Proposed ETF Rule

Dear Mr. Fields:

Invesco Ltd. (“Invesco”)¹ is pleased to have the opportunity to comment on the Securities and Exchange Commission’s (the “Commission”) proposed rule regarding the regulation of exchange-traded funds (“ETFs”) published in the Federal Register on July 31, 2018 (the “Proposed Rule”).² Invesco is a leading independent global investment manager with approximately \$987.8 billion in assets under management as of July 31, 2018. Invesco is a global company focused on investment management, and our services are provided through a wide range of strategies and vehicles, including traditional open-end mutual funds, closed-end funds, ETFs, collective trust funds, separately managed accounts, real estate investment trusts, unit investment trusts, and other pooled vehicles. Our indirect wholly-owned U.S. registered investment adviser subsidiaries, including Invesco Advisers, Inc., Invesco Capital Management LLC and their investment adviser affiliates, advise or sponsor mutual funds, ETFs, closed-end funds and unit investment trusts for a broad client base.

As one of the pioneering firms in the ETF industry, Invesco has observed and actively participated in the evolution of ETFs over the past two decades. As noted in the Proposal Release, over the past 25 years, the conditions and representations required to receive the necessary exemptive relief to offer ETFs have changed significantly.³ The result has been an uneven and fragmented field in which ETF providers have had to operate. Additionally, as the regulatory framework has developed, the industry has seen a significant increase in ETF product offerings, sponsors entering the field and growth of ETF assets. Invesco believes

¹ As used herein, “Invesco” may refer to Invesco Ltd. or one of its affiliates, including Invesco Capital Management, LLC, adviser to Invesco’s U.S. ETFs.

² Release Nos. 33-10515; IC-33140; File No. S7-15-18. Available on the Federal Register at 83 FR 37332 (the “Proposal Release”).

³ Proposal Release at pg. 6.



that this popularity supports the notion that investors (both institutional and retail) have embraced and sought out the investment features of ETFs. However, such evolution and growth have come with certain undesirable effects. As the Commission has recognized,⁴ the variation among exemptive orders relied on from sponsor to sponsor (largely dependent on when such sponsor sought exemptive relief) has created a regulatory framework that inherently creates an uneven playing field and burdens both sponsors and the Commission with navigating the complicated exemptive relief process, and requires continued monitoring and compliance. Further, Invesco believes that the limitations and difficulties associated with the current regulatory regime negatively impact investors, as investment options, features and competition may be hindered, at times, solely as a result of a certain sponsor in a certain circumstance operating under a slightly different regulatory structure.

If adopted, the Commission's proposal to simplify and modernize the regulatory framework governing ETFs and enhance information to investors not only will level the playing field for ETF sponsors, but also will significantly benefit ETF shareholders by standardizing the ETF market for "plain vanilla" products. The Proposed Rule, if adopted, will achieve this in three major ways. As more extensively discussed throughout this Comment Letter, the Proposed Rule will: (i) reduce regulatory complexity; (ii) provide regulatory fairness to ETF sponsors and benefits to shareholders; and (iii) provide ETFs with operational flexibility and the ability to engage in future innovation.

(i) Reduction of Regulatory Complexity

The Proposed Rule reduces regulatory complexity by focusing on the core aspects of what it means to be an ETF while eliminating other aspects of current ETF regulation that are not required of other registered investment companies. For example, the Proposed Rule would eliminate various regulatory distinctions between Index-Based ETFs, Self-Indexed ETFs, and Active ETFs (each as defined below).⁵ In doing so, the rule will effectively place ETFs on equal footing with mutual funds, where such regulatory distinctions do not exist. Furthermore, by replacing a complex, often byzantine set of conditions and representations that underlie current exemptive orders with a clear, concise rule, the Commission will allow compliance personnel to reduce focus on exemptive order compliance and provide much-needed bandwidth to attend to other important areas of focus. Invesco applauds these proposed changes. As an investment adviser of open-ended mutual funds, Active ETFs, Index-Based ETFs and Self-Indexed ETFs, Invesco strongly believes that, while imposing different regulatory requirements on ETFs was appropriate at the time of the original exemptive orders, in light of the changing market environment and the evolution of the ETF market, those distinctions are no longer necessary.⁶

(ii) Provision of Regulatory Fairness

The Proposed Rule, if adopted, will place ETFs that rely on it on equal footing. This is particularly pronounced in the area of basket construction. Current exemptive orders provide different relief to sponsors with respect to their use of custom (or "flexible") baskets, The Proposed Rule would remove that differential treatment, and by doing so will allow for more robust competition by standardizing the industry's approach in this area.⁷ Additionally, the elimination of the distinction between differing types of Index-Based ETFs and Active ETFs will allow every ETF, regardless of investment approach, to rely on the same set of rules, consistently applied. Invesco supports the leveling of the playing field since we believe that it will create

⁴ Proposal Release at pg. 6.

⁵ See Section I.A. of this Comment Letter.

⁶ An expanded discussion of this topic and an analysis of the related provisions of the Proposed Rule are included in Section I.A. of this Comment Letter.

⁷ As we explain in Section IV.(v). of this Comment Letter, basket flexibility also provides great benefits to ETF investors.



a competitive market that encourages innovation and provides a very strong incentive to sponsors to maximize best outcomes for their clients and will greatly benefit investors, without creating artificial “winners” and “losers.”

(iii) Operational Flexibility

Older ETF exemptive orders generally are more restrictive in certain respects as compared to newer orders. The older orders are based on a significant number of representations that may reflect older practices that are no longer common in the industry. The Proposed Rule would free older ETFs from the burden of having to comply with these representations and would give those ETFs the ability to revise and innovate with respect to their investments and operations in a way that benefits shareholders and the investing public.

The remainder of this Comment Letter addresses specific issues raised in the Proposal Release.

I. Treatment of ETF Strategies under the Proposed Rule

Investors today have a great range of options available to them when considering investments in ETFs. ETFs are often broadly grouped into two primary types – ETFs that have a stated investment objective of obtaining returns that correspond to the returns of a securities index (“Index-Based ETFs”) and ETFs that are actively managed toward an investment objective that does not seek to track an index (“Active ETFs”). As both Active ETFs and Index-Based ETFs have innovated in areas of investment strategy, index tracking (including tracking “smart-beta” indexes and “self-indexing”),⁸ and other operational features, the differences in regulatory risk created by Active ETFs and Index-Based ETFs have dissipated. As such, as detailed below, Invesco strongly supports the elimination of the historical distinctions between Index-Based ETFs (of varying strategies) and Active ETFs in the Proposed Rule.

A. Index-Based ETFs and Active ETFs

The historical evolution of ETFs and their exemptive orders has created an uneven playing field between Index-Based ETFs and Active ETFs. Most notably, exemptive order conditions relating to required portfolio transparency have differed between the two kinds of ETFs, principally reflecting the Commission’s early concern about the effectiveness of the arbitrage mechanism for Active ETFs. As noted in the Proposal Release, in the last decade this concern has dissipated, and Active ETFs have become a meaningful portion of the ETF market.⁹ Moreover, as a sponsor to 10 Active ETFs and over 200 Index-Based ETFs, Invesco closely monitors trading activity and market behavior of both types of ETFs and has not identified any operational issues or strains on the effectiveness of the arbitrage mechanism due to the active or passive investment nature of an ETF. Further, although Invesco believes meaningful descriptions of investment strategy (which can include broad grouping by certain characteristics, including tracking error, correlation and overlap of portfolio securities with index securities) are helpful to investors when making investment decisions, limiting such categorization to simply Index-Based ETFs and Active ETFs is inherently problematic. Each ETF has its own strategy and accompanying risks, and although all Index-Based ETFs generally share certain characteristics, as do all Active ETFs, the wide spectrum of offerings within each category, and the multitude of differing characteristics among them, make the current Commission-imposed regulatory distinction between Index-Based ETFs and Active ETFs antiquated and unhelpful. Accordingly, Invesco believes that eliminating the regulatory distinction between Index-Based

⁸ As used herein, “Self-Indexing” refers to an Index-Based ETF’s tracking of an underlying index that is compiled, maintained or otherwise developed by an affiliate of the Index-Based ETF’s adviser, distributor or both (such ETFs referred to herein as “Self-Indexed ETFs”).

⁹ Proposal Release at pg. 25.



ETFs and Active ETFs is appropriate and furthers the Commission's goal of creating a consistent and transparent regulatory framework for ETFs. As noted in the Proposal Release (and our discussion under "Reduction of Regulatory Complexity" in the introduction to this Comment Letter), this approach is also consistent with the regulation of mutual funds.¹⁰

B. Conditions Specific to Index-Based ETFs

In removing the distinction between Index-Based ETFs and Active ETFs, the Proposed Rule does not include certain historical conditions regarding how Index-Based ETFs track underlying indexes (conditions that are necessarily inapplicable to Active ETFs). Specifically, with certain variations, exemptive orders for Index-Based ETFs generally include a requirement that the Index-Based ETFs invest a defined minimum amount of their assets in the component securities of the underlying index.¹¹ Invesco supports the approach under the Proposed Rule and believes that the primary consideration for managing an ETF should be meeting its investment objective. Although the amount invested in the underlying index naturally reflects the pursuit of the investment objective, codifying minimum investment levels unnecessarily limits portfolio management discretion to the detriment of investors. In certain circumstances, investing in securities not included in an underlying index by, for example, investing in a substitute security or investment vehicle such as another ETF that provides exposure to index components, may eliminate or reduce the cost to achieve an Index-Based ETF's investment objective.

The requirement to invest a minimum amount of portfolio securities in index securities also can create compliance challenges if, for example, certain markets close or certain asset classes become unavailable due to governmental decisions. For example, the recent U.S. sanctions on Russia prohibited U.S. investors (including ETFs) from purchasing certain Russian bonds, which resulted in higher tracking error for funds managed against an index that included Russian bonds and, in extreme cases, resulted in violation of the ETF's minimum investment requirement.

C. Conditions Relating to Affiliated Index Providers

Currently, exemptive orders that permit an Index-Based ETF to track an index developed and maintained by an affiliated index provider contain certain conditions that are unique to such orders. The Commission has imposed such conditions because of concerns that Self-Indexed ETFs could potentially raise certain regulatory and risk issues including, among others: (i) the potential ability of an affiliated person to manipulate an underlying index to the benefit or detriment of the Self-Indexed ETF; and (ii) conflicts of interest that may arise with respect to the personal trading activity of personnel who may have access to or knowledge of the changes to an underlying index's composition methodology or constituent securities in an underlying index prior to the time that information is made publicly available. In response to these potential issues, exemptive orders for Self-Indexed ETFs have been subject to representations and conditions requiring the creation of information barriers and specific policies and procedures to be adopted by the Self-Indexed ETF's sponsor. Such policies, which cover cross trades, trade aggregation and allocation, and use of material non-public information by associated persons, are in addition to policies and procedures in place at the sponsor.

As an ETF sponsor that has received exemptive relief permitting Self-Indexing, Invesco has diligently established information barriers, policies and procedures as required by such relief. While we believe that

¹⁰ Proposal Release at pg. 26.

¹¹ Similarly, current exemptive orders for Index-Based ETFs include representations regarding correlation between the Index-Based ETF and the underlying index over time that are eliminated in the Proposed Rule.



the risks identified in those exemptive orders are real, Invesco believes that most of those risks are already present when the same firm manages multiple client accounts and are not unique to ETFs and that such risks are appropriately mitigated through compliance with the Investment Company Act of 1940, as amended (the “Act”) and the Investment Advisers Act of 1940, as amended (the “Advisers Act”). Specifically, Rule 38a-1 under the Act and Rule 206(4)-7 under the Advisers Act, require a Self-Indexed ETF and its adviser, respectively, to bear responsibility for determining the appropriate control environment to adequately prevent violations of securities laws, subject, as applicable, to the oversight of the Self-Indexed ETF’s board of trustees. Placing such responsibility on the adviser and the ETF, as compared to mandating a set of procedures pursuant to rule making, would be more beneficial since: (i) the adviser is best suited to understand its own operations and business and to design a control environment that is aligned with its particular operations and business; and (ii) it would give the adviser the flexibility to adapt policies and procedures over time in order to appropriately and quickly respond to developments and innovations with respect to self-indexing. As a result, Invesco supports the Commission’s proposal to eliminate specific requirements for Self-Indexed ETFs.

II. ETF Types Excluded from the Proposed Rule

As detailed in the Proposal Release, the scope of the Proposed Rule does not include ETFs that: (i) are organized as unit investment trusts (“UITs”); (ii) seek to exceed the performance of a market index by a specified multiple or to provide returns that have an inverse relationship to the performance of a market index, over a fixed period of time (“Leveraged ETFs”); or (iii) are structured as a share class of a fund that issues multiple classes of shares representing interests in the same portfolio (“Share Class ETFs”).¹²

A. Exclusion of UITs from the Proposed Rule

Invesco agrees with the Commission’s proposal to keep UITs outside of the scope of the Proposed Rule, as we believe that the nuances associated with the UIT legal structure would make their inclusion impractical. As noted in the Proposal Release,¹³ the first ETFs were established as UITs (“UIT ETFs”), and some of the largest ETFs are organized as UIT ETFs (e.g., SPDR S&P 500 ETF Trust (SPY) and Invesco QQQ Trust, Series 1 (QQQ), for which Invesco operates as sponsor). Invesco believes that QQQ and other UIT ETFs should continue to rely on their respective current exemptive orders. With regard to the fee structure for UIT ETFs, the Commission asks in the Proposal Release whether the Proposed Rule, if it were to include UIT ETFs, should provide an exemption from Section 26(a)(2)(C) of the Act to permit the payment of certain expenses associated with the creation and maintenance of the ETF.¹⁴ In response, although (as noted) Invesco does not advocate for UIT ETFs to be within the scope of the Proposed Rule, we believe that the Commission should be open to discussions about potential updates to those UIT ETFs’ exemptive orders to account for the evolution of the market. Since the launch of UIT ETFs, sponsors have begun to provide a multitude of services to the UIT ETFs, including chief compliance officer services (not contemplated in the UIT ETFs’ exemptive relief because such exemptive orders preceded the adoption of Rule 38a-1 of the Act),¹⁵ capital markets support, ongoing trading services (which are not needed for traditional UITs that do not rebalance to the extent and frequency as do UIT ETFs), investor education. Accordingly, we request that the Commission and its staff remain open to additional UIT ETF exemptive

¹² Proposal Release at fn 7.

¹³ Proposal Release at pg. 17.

¹⁴ Proposal Release at pg. 22.

¹⁵ 68 FR 74729 (December 24, 2003). Rule 38a-1 under the Act became effective on February 5, 2004. For reference, QQQ has an inception date of March 10, 1999.



relief under Section 26 of the Act that would properly account for this expansion of sponsor services while safeguarding investor protection.

B. Exclusion of Leveraged ETFs from the Proposed Rule

Invesco believes that Leveraged ETFs present highly-specific and accentuated risks that are unusual in some ways inconsistent with the ETF structure. Although Invesco does not express a view as to the appropriateness of Leveraged ETFs for investors, we nonetheless believe that such ETFs do not fall into the category of “plain vanilla” ETFs that the Proposed Rule is intended to codify. As such, Invesco supports Leveraged ETFs being excluded from the Proposed Rule and being regulated under exemptive orders tailored for such ETFs.

C. Exclusion of Share Class ETFs from the Proposed Rule

As discussed throughout this Comment Letter, the ETF industry has for many decades been highly innovative. The evolution of products and discourse regarding ETFs that has occurred through active participation by many groups, including the Commission, sponsors and market participants, has fueled the development of a robust and popular market that has been widely embraced by investors. One cornerstone to such innovation has been the adaptation and expansion upon previously novel ideas. The Proposed Rule itself reflects a long history of various industry participants honing concepts, expanding functionality and establishing best practices. While one sponsor may blaze a trail in a “first-of-its-kind” product offering, inevitably such innovation is adopted, and often improved, by a competing sponsor, ultimately benefitting investors. Although Invesco has an extensive history of being the originating sponsor behind numerous ETF innovations, we have never offered a strategy or product protected by patents or giving Invesco, and only Invesco, the ability to make a certain offering in the marketplace. This is not an accident. Invesco strongly believes that a healthy market and the overall ETF evolution rely on the free exchange of ideas and an open framework that allows for such competition.

Conversely, Invesco believes that the evolution and improvement described above could not occur (and has not occurred) in areas controlled by a limited number of participants with sole ownership of patented processes. While we agree that excluding Share Class ETFs from the Proposed Rule is appropriate given the nuances associated with those products, we nonetheless urge the Commission to abstain from regulatory actions that allow only certain players to obtain benefits from innovation. Failure to do so would run contrary to the Commission’s stated interests in creating a consistent, transparent and efficient regulatory framework that would level the playing field for sponsors.¹⁶ Providing specifically tailored relief to patent-protected strategies would force the rest of the industry to refrain from building enhanced versions of that base strategy, limiting innovation and preventing activities that would result in the best outcome for their clients. Such relief also runs contrary to the best interest of shareholders, who bear the cost in the event a patent holder allows the payment of a license fee for the “privilege” of replicating a patent-protected strategy.

III. Exemptive Relief under the Proposed Rule

Due the operational structure of ETFs and, in part, historical interpretations of certain provisions of the Act, ETFs have not been able to operate in accordance with all provisions of the Act and therefore have needed, at a minimum, to receive relief from those provisions. The Proposed Rule addresses each such necessary

¹⁶ Proposal Release at pg. 16.



exemption and codifies relief for ETFs. Invesco is broadly supportive of the Proposed Rule and largely concurs with the Commission's approach, as more fully detailed below.

A. Treatment of ETF Shares as "Redeemable Securities"

As noted in the Proposal Release,¹⁷ a defining feature of open-end funds is that they offer "redeemable securities" as defined by the Act.¹⁸ Because ETF shares have generally only been redeemable to the ETF in large creation unit aggregations ("Creation Units"), an interpretive question has existed as to whether such shares should be viewed as meeting that definition. As such, ETFs intending to operate as an open-end fund have requested exemptive relief from the relevant provisions of the Act. The Proposed Rule, however, takes a different approach to this issue and would explicitly consider an ETF share to be a "redeemable security."¹⁹ For the reasons outlined below, Invesco is supportive of the Proposed Rule's approach.

By defining shares of an ETF as redeemable securities, the Commission would acknowledge that permitting redemptions by ETFs only in creation unit-sized lots is consistent with the concept of a redeemable security under Section 2(a)(32), and that limiting redemptions in such a manner does not affect the status of an ETF as an open-end management investment company pursuant to Section 5(a)(1) of the Act. This approach has immediate beneficial results for ETFs and the investing public. First, as the Proposal Release notes, this approach will clarify that ETFs are fully subject to the requirements of the Act and its rules that apply to all open-end funds. As a result, the Proposed Rule eliminates any potential confusion as to how ETFs should be treated under the Act. Second, ETFs would be able to take advantage of certain exemptions under the Securities Exchange Act of 1934, as amended (the "1934 Act") that apply to redeemable securities issued by an open-end management investment company. The ability to rely on the carve-out from these rules (i.e., Rule 10b-17, Rules 101 and 102 of Regulation M and Rule 11d1-2 under the 1934 Act) would provide ETFs with flexibility to rely on these rules without the need to comply with various exemptive conditions or no-action representations that act to limit flexibility of ETFs without providing any significant regulatory protection.

B. Trading of ETF Shares at Market-Determined Prices

Section 22(d) of the Act and Rule 22c-1 thereunder generally require the shares of registered investment companies to be purchased and sold only at the net asset value ("NAV") per share next calculated by the investment company. As ETF shares are traded in secondary market transactions at market-determined prices, their operation and trading runs contrary to these provisions. The Proposed Rule codifies existing exemptions granted to ETFs and allows secondary market transactions to occur at market-determined prices.²⁰

In the Proposal Release's discussion of the exemptions from Section 22(d) of the Act and Rule 22c-1 thereunder, the Commission focused on how an effective arbitrage mechanism generally limits the frequency and magnitude of ETF shares trading at a premium or discount to NAV. In general, Invesco appreciates the Commission's analysis and confidence in a properly-functioning arbitrage mechanism and, in general, has observed market behaviors in line with the data presented in the Proposal Release.²¹ As noted in later sections of this Comment Letter, Invesco does not believe that all of the specific requirements

¹⁷ Proposal Release at pg. 37.

¹⁸ Section 2(a)(32) of the Act.

¹⁹ Proposal Release at pg. 37.

²⁰ Proposal Release at pg. 41.

²¹ Proposal Release at pgs. 43-45.



of the conditions included in the Proposed Rule are necessary to ensure the arbitrage mechanism operates efficiently, but overall we concur with the premise that an efficient arbitrage mechanism adequately addresses potential concerns regarding shareholder dilution, unjust discrimination or preferred treatment among investors, and the orderly distribution of ETF shares.

The ETF ecosystem and the role of arbitrage in its secondary market pricing do not in all circumstances result in an efficient market. Although premiums and discounts are generally small, there are many circumstances that may give rise to their existence, and, depending on the nature of such circumstances, premiums and discounts can become exacerbated or prolonged. Such circumstances may include, but are not limited to: (i) unexpected changes in the embedded liquidity of securities held by an ETF; (ii) changes in market dynamics; (iii) the closure of a market on which underlying securities trade; (iv) investor sentiment; (v) a trading halt in any of the underlying securities or the ETF itself; and (vi) unexpected suspensions in the creation/redemption process for an ETF. However, Invesco agrees with the Commission's view²² that, on balance, given the historically insignificant and short duration of unusual premiums and discounts experienced by ETFs, and the relatively low risks presented to investors as a result, ETF investors are likely to weigh the potential benefits of ETFs against any potential for market price deviations when selecting an investment in ETFs.

Additionally, Invesco believes that many of the conditions of the Proposed Rule operate both to increase the likelihood of an efficient arbitrage mechanism and to promote investor education with respect to any inherent risks. However, because the circumstances that give rise to problems with the arbitrage mechanism are varied, interrelated and fairly unpredictable (e.g., extreme market stress), Invesco believes that proscriptive regulation likely would fail to account for all occurrences. As such, as discussed below, Invesco believes that principle-based guidelines to facilitate preparation for, disclosure of, and response to, arbitrage mechanism breakdowns are more effective than mandated procedures and disclosures.

C. Affiliated Transactions

Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such person, from selling any security or other property to or purchasing any security from that company. Purchases and redemptions of Creation Units are typically effected in kind, and, absent an exemption, Section 17(a) prohibits these in-kind purchases and redemptions by affiliated persons of the ETF. As a result, the Commission has historically granted exemptions from Section 17(a) to ETFs with respect to such creation and redemption activities. The Proposed Rule codifies such exemptions, limiting the applicability to persons who are affiliated with the ETF (or who are affiliated persons of such persons) solely by reason of: (i) holding with the power to vote 5 percent or more of an ETF's shares; or (ii) holding with the power to vote 5 percent or more of any investment company that is an affiliated person of the ETF.

As noted in the Proposal Release,²³ the exemption from Section 17(a) is similar to an exemption that the Commission proposed in 2008.²⁴ At that time, a number of commenters urged the Commission to expand the exemption beyond 5% holders and include other affiliates of the ETF as well.²⁵ Invesco agrees with the previous comments on this topic and believes the expansion of the exemption is appropriate. Although the Commission has expressed concern about the potential for undue influence by an affiliate (leading to "cherry-picking" of securities held by an ETF or "dumping" of securities onto an ETF), particularly in instances where a flexible basket is used, such activity would clearly run afoul of an ETF adviser's fiduciary

²² Proposal Release at pg. 47.

²³ Proposal Release at pg. 52.

²⁴ Exchange-Traded Funds, Investment Company Act Release No. 28193 (March 11, 2008).

²⁵ The Proposal Release notes a few examples of such comments at fn. 144.



duty, as well as potentially constitute market manipulation and misuse of nonpublic information under federal securities laws.

D. Additional Time for Delivering Redemption Proceeds

Section 22(e) of the Act generally prohibits a registered open-end management investment company from postponing the date of satisfaction of redemption requests for more than seven days after the tender of a security for redemption. For ETFs that invest in securities that trade in foreign markets, compliance with that provision is difficult due to differing settlement cycles and local market holidays. Accordingly, current exemptive orders for ETFs generally provide an exemption from Section 22(e) of the Act so that ETFs can pay redemption proceeds within 14 calendar days following the tender of Creation Units for redemption.

The Proposed Rule would codify existing relief and grant an exemption from Section 22(e) of the Act to permit an ETF to delay satisfaction of a redemption request for more than seven days if a local market holiday, or series of consecutive holidays, extended delivery cycles for transferring foreign investments to redeeming authorized participants, or the combination thereof, prevents timely delivery of the foreign investment included in the ETF's basket. To rely on this exemption, an ETF would be required to deliver foreign investments as soon as practicable, but in no event later than 15 days after their tender to the ETF. The Proposed Rule also includes a sunset provision that would have the exemption expire in ten years.

Invesco believes that except in instances of extraordinary events causing U.S. exchanges to close, a well-designed, simple domestic equity ETF should not need the flexibility to delay the settlement of a redemption outside of the seven-day window of the Act. As such, with respect to ETF holdings that trade on a domestic exchange, we feel that any Section 22(e) exemption should be limited to instances when U.S. exchanges are halted or closed for a full trading session or more.

Conversely, as noted above, ETFs holding securities that trade on foreign exchanges may need to delay settlement for reasons beyond acute market disruption (such as foreign holidays and extended delivery cycles). Accordingly, Invesco is supportive of broader 22(e) relief for ETFs with foreign holdings. However, Invesco believes that the ability to delay delivery of redemption proceeds should be limited solely to the securities that are affected by a foreign holiday, extended settlement cycle or market closure, but not extend to other securities that are not impacted (whether foreign or domestic). Pursuant to standard accounting practices for ETFs, when a redemption is executed, the ETF's portfolio is updated to reflect the delivery of the basket on the trade date, despite anticipated settlement times. As such, because Invesco believes that prompt delivery of redemption proceeds is important, and split delivery (settling securities as soon as possible, even if the entire basket does not settle at once) is not detrimental to the operation or management of an ETF (e.g., tracking error is not impacted when settlement of certain securities in a basket is delayed), Invesco advocates for delayed delivery flexibility being only applicable to securities that require it.

As a technical matter, we note that the Proposed Rule specifically limits the relief from Section 22(e) to ETF holdings of securities issued by foreign entities for which there is no established U.S. public trading market.²⁶ Invesco believes that such a limited scope is unnecessary and potentially harmful, particularly for Index-Based ETFs. Across the industry, indexes utilized by ETFs vary in their treatment of foreign issuers, with many opting to include the security that is traded on the local exchange, even when a U.S. exchange-traded version exists. Under the Proposed Rule, an ETF tracking such index would not be able to make use of the Section 22(e) relief for those holdings and, therefore, would be forced to invest in the

²⁶ Proposal Release at pg. 58.



U.S. listed issuance in order to avoid risks of violating Section 22(e) during a foreign holiday. As a result, the ETF would potentially be subject to greater tracking error and, because the securities traded on the local markets can have greater trading volume and liquidity, potentially absorb the costs and trading challenges associated with thinly-traded portfolio holdings. As Invesco believes such negative impact outweighs the concerns of delayed settlements in instances of foreign holidays or market closures, we encourage the Commission to make the Section 22(e) relief available to any ETF that holds a security that is traded on a foreign market.

Further, Invesco urges the Commission to reconsider the sunset provision related to this exemption. Although the Proposal Release enumerates various reasons why the Commission believes delayed delivery should not be necessary in the future, primarily citing technological advancement and a global movement toward shorter settlement times,²⁷ Invesco believes that the combination of the speculative nature of such statements and the potential negative impacts to ETFs should certain holdings continue to require more than seven days to deliver make the sunset provision inadvisable. Additionally, currently there are certain foreign markets that have holidays that last for nearly (or entirely) seven business days (e.g., Taiwan), such that even with technological advancement, delivery in seven days may continue to be a challenge. The Commission seems to acknowledge this possibility, suggesting alternatives for ETFs should more time still be required after the expiration of the sunset such as cash redemptions or requesting additional exemptive relief.²⁸ As a practical matter, if global markets advance to the point that securities always settle within seven days and if ETFs are required to deliver redemption proceeds as soon as practicable, no ETF would need to rely on the exemption, and the protections of the sunset provision would be unnecessary. As such, the sunset provision could only serve to limit the ability of an ETF to rely on what would otherwise be a useful and needed exemption. The suggested alternatives of using cash redemptions, which is less beneficial to shareholders, or pursuing additional targeted exemptive relief, which runs counter to the purpose of the Proposed Rule generally, are unattractive solutions to the problem presented by a sunset provision.

Finally, in the Proposal Release, the Commission requested feedback as to whether the Proposed Rule should require disclosure in an ETF's Statement of Additional Information ("SAI") of foreign holidays an ETF expects may prevent timely delivery of foreign investments and the maximum number of days it anticipates it would need to deliver foreign investments.²⁹ Although ETFs have typically included such information in their SAIs pursuant to a condition of their exemptive relief, Invesco believes such information is best included on the ETF's website. Generally speaking, ETF websites can be updated more regularly, investors usually find them more accessible than a SAI, and websites are usually more "user-friendly." For these reasons, Invesco advocates for the requested disclosure to be included on the ETF's website and not in its SAI.

IV. Conditions for Reliance on the Proposed Rule

Within the current regulatory framework, ETFs must comply with certain conditions contained within their respective exemptive relief in order to rely on such relief. The Proposed Rule likewise contains conditions that, with a few notable exceptions (as discussed below), are generally consistent with those applicable to ETFs currently. Our comments on the conditions relate to: (i) issuance and redemption of shares; (ii) listing

²⁷ Proposal Release at pgs. 56-57.

²⁸ Proposal Release at fn. 156.

²⁹ Proposal Release at pg. 61.



on a national securities exchange; (iii) intraday indicative value (“IIV”); (iv) transparency and disclosure of portfolio holdings; (v) basket flexibility and posting; (vi) website disclosure; and (vii) marketing.

(i) Issuance and Redemption of Shares

Invesco believes that the current structure of issuance and redemption of ETF shares is appropriate and functions effectively in the market. As such, we support the Proposed Rule’s requirement that an ETF must issue and redeem Creation Units to (and from) APs in exchange for baskets and a cash balancing amount,³⁰ reflecting current operational practices and exemptive relief conditions. Invesco believes that the provision facilitates the arbitrage mechanism and no alternative formulations need be considered. Further, with respect to the definition of “AP,” Invesco believes the Proposed Rule should use the definition of “authorized participant” included in Form N-CEN since different definitions may lead to confusion and regulatory inconsistency/ambiguity.

With respect to the Proposed Rule’s treatment of Creation Units, Invesco notes that, historically, ETFs have included representations regarding the Creation Unit sizes applicable to the ETFs in their exemptive applications. Invesco believes that such inclusion in the exemptive applications has been primarily illustrative in nature and not a material element to the relief. Additionally, recent no-action relief under the 1934 Act³¹ has supported the view that ETFs can function appropriately in markets with varying Creation Unit sizes, and overall, Invesco believes that specific limits (either low or high) on the size of a Creation Unit are unnecessary for inclusion in the Proposed Rule. ETF sponsors are inherently incentivized to set Creation Unit sizes at levels that promote effective arbitrage and allow an ETF to acquire securities in a manner that adheres to the portfolio management strategy while avoiding an adverse effect on portfolio tracking and performance. In addition, Invesco notes that the dollar amount of a Creation Unit is institutional in nature and will be set so that it is in line with market demand. As such, the responsibility for setting appropriate Creation Unit sizes (and related dollar amounts) is best placed on the ETF sponsors, rather than being fixed by regulation.

The Proposal Release also discusses ETFs directly or indirectly suspending creations.³² As a general matter, Invesco concurs with the Commission’s observation that suspensions of creations are overall harmful to investors and should occur only in extraordinary circumstances for limited periods. Such extraordinary circumstances are unpredictable by their nature, and therefore Invesco discourages the Commission from including specific limits on when creations may be suspended. Further, it is important to distinguish suspending creations (which would only occur in extraordinary circumstances) and refusing a particular creation order (which may occur more frequently in the ordinary course of transacting with APs).

With respect to transaction fees, Invesco strongly believes that transaction fees on both creations and redemptions provide portfolio management tools that may be used for the benefit and protection of ETF shareholders. We view the current transaction fee framework established by Rule 22c-2 under the Act, which caps redemption fees at 2%, as continuing to be workable. However, in certain instances, an ETF and its shareholders would benefit from greater flexibility and the ability to charge redemption transaction fees in excess of 2%. For example, when an ETF cannot deliver a security in kind (e.g., when in-kind transactions are prohibited by the foreign market on which it trades), ETFs will typically deliver to the AP cash in-lieu based on the current valuation of the security and then charge a transaction fee to reflect the

³⁰ Proposal Release at pg. 62.

³¹ Order Granting Limited Exemptions from Exchange Act Rule 10b-17 and Rules 101 and 102 of Regulation M to Certain Index-Based ETFs Pursuant to Exchange Act Rule 10b-17(b)(2) and Rules 101(d) and 102(e) of Regulation M. Release No. 34-82234 (December 7, 2017); Invesco Capital Management LLC, SEC No-Action Letter (pub. avail. September 20, 2018).

³² Proposal Release at pg. 67.



actual cost of liquidating the position. Typically, such fee is simply reflective of brokerage costs. However, in certain cases, such as when the market on which the security trades is closed, the ETF will also include in the transaction fee the difference between the cash in-lieu amount calculated on the trade date and the actual sale price of the security (reflecting market movement). Although in most instances such differences do not exceed 2%, if a market were closed for a number of days during which there was pronounced downward market movement, a case can arise where an ETF delivered cash in-lieu of one amount, but could only sell the applicable security (a few days later) for much less without the ability to charge the amount of the difference that exceeds 2% back to an AP. The resulting shortfall is ultimately born by the ETF and its shareholders. As such, Invesco is supportive of a flexible approach to transaction fees and encourages the Commission to raise the 2% cap established by Rule 22c-2 under the Act with respect to ETFs.

With regard to calculation of fees and transparency, the Rule Proposal requests comment on whether the Commission should consider requiring ETFs to disclose information regarding transaction fees in their registration statement or on Form N-CEN.³³ Invesco would urge the Commission against imposing any such requirements. Although we consider the ability to charge transaction fees to be essential for the protection of existing shareholders, we believe that required disclosure of transaction fees charged is potentially confusing and could undermine any benefits from such disclosure. As noted above, transaction fees may be charged based on a number of factors, including the actual costs of buying the securities and any associated slippage (which is more acute and more difficult to quantify when transacting in foreign markets). While transaction fees protect existing shareholders from possible shareholder dilution resulting from the purchase or redemption of Creation Units, there is no consistency in the methodology that different sponsors use to quantify those fees. For example, when a cash-in-lieu creation results in an ETF purchasing securities on a foreign market, some ETF sponsors apply a transaction fee to cover the exchange rate difference, while others do not. Also, and based on the relevant asset class, some sponsors may apply a fixed transaction fee for transacting in certain ETFs while applying fees calculated on “actuals” for transactions in other ETFs. Because there is a lack of uniformity across the industry and across ETFs, any disclosure (whether in aggregate dollar amount or percentage) would be difficult for investors to interpret, particularly when comparing investment options. Further, unlike other operational charges and costs, transaction fees are backward-looking and vary widely from trade to trade. Since any disclosure would necessarily be historical, it would likely not provide a useful indication of future transaction activity. As such, Invesco believes strongly that a disclosure requirement for transaction fees should not be included in the final rule.

(ii) Listing on a National Securities Exchange

The Proposed Rule defines an ETF, in part, as a fund that issues shares that are listed on a national securities exchange and traded at market-determined prices.³⁴ This definition is generally in line with how the current ETF market operates, and Invesco concurs that being listed on an exchange is a critical aspect of that market. However, a practical application of this concept requires an understanding of what it means to be “listed” on an exchange. For example, national securities exchanges have listing standards that all listed issuers must meet to keep their shares trading on such exchange.³⁵ If a listed company fails to continuously meet such listing standards, it may face a number of repercussions from the exchange, including being deemed

³³ Proposal Release at pg. 136.

³⁴ Proposal Release at pg. 70.

³⁵ See, for example, NYSE Arca, Inc. Rule 5.2(j)(3) governing the listing of investment company units.



“below compliance” or becoming subject to delisting procedures.³⁶ Additionally, exchanges have a number of circumstances (some dependent on trading activity, others dependent on issuer events) in which they will halt trading of an issuer’s shares. As Invesco does not believe that instances of temporary “below compliance” notices or trading halts should result in a failure to meet the definition of ETF, we support the Proposed Rule’s narrow focus on solely whether the shares are listed.

(iii) Intraday Indicative Value

A condition of current exemptive orders is that an ETF’s listing exchange or other major market data provider will disseminate, every 15 seconds (60 seconds for international ETFs) during regular trading hours, through the facilities of the Consolidated Tape Association or other widely disseminated means, the IIV. The Proposed Rule, however, has not codified this condition for the reasons discussed in the Proposal Release.³⁷ As discussed below, Invesco supports this approach.

We note that Invesco’s goal is to ensure that investors have all the appropriate and necessary information they need to make informed investment choices. We also believe that ensuring investors do not receive confusing and misleading information plays an important part in achieving that goal. Therefore, we agree with the Commission’s analysis and conclusion that IIVs are no longer needed.³⁸ We additionally note that the IIV does not generally serve as an arbitrage tool and concur with the observation that most APs utilize proprietary technology to calculate an IIV in real time (and often at far more frequent intervals than currently required pursuant to ETF exemptive orders). As such, we support the Proposed Rule’s proposal not to include an IIV condition and further advocate that the Commission consider removing similar requirements from any other regulatory positions of the Commission and its staff such as applicable 1934 Act relief, as well as working with other agencies and exchanges to remove similar requirements from relevant rules or regulations.

(iv) Portfolio Holdings – Daily Transparency

As noted in the Proposal Release, the Commission has long held that portfolio transparency is key to an effective arbitrage mechanism. Accordingly, with one notable exception,³⁹ current exemptive orders generally require some level of portfolio transparency, but the specifics of such conditions are not consistent across all sponsors. The Proposed Rule would harmonize such conditions and require daily portfolio holdings disclosure.⁴⁰ ETFs would be required to: (i) post such portfolio holdings on each business day prior to the opening of regular trading on the primary listing exchange of the ETF’s shares, and (ii) effect such posting before the ETF starts accepting orders for the purchase or redemption of Creation Units.⁴¹ In each case, the Commission has indicated that the ETF sponsor’s website is the optimal way to convey such information. Invesco agrees with this view, noting that building a separate data feed would involve additional costs and internal resources, and argues against any additional dissemination requirements, such as filing on EDGAR.⁴²

³⁶ See, for example, NYSE Arca, Inc. “Exchange Traded Fund Continued Listing Rules” available at https://www.nyse.com/publicdocs/nyse/regulation/nyse-arca/NYSE_Arca_Continued_Listing_Standards_FAQ.pdf.

³⁷ Proposal Release at pg. 74.

³⁸ Proposal Release at pg. 74.

³⁹ Share Class ETFs are not required to provide portfolio transparency beyond what is required by the Act, giving such Share Class ETFs a significant competitive advantage in the offering and operation of ETFs.

⁴⁰ Proposal Release at pg. 78.

⁴¹ Proposal Release at pg. 77.

⁴² Proposal Release at pg. 81.



(a) *Posting Holdings prior to the Opening of the Markets*

Invesco was the first sponsor to receive exemptive relief to manage active ETFs.⁴³ Based on our 10-year history in offering and managing Active ETFs, we have reasons to believe that portfolio transparency may have hindered product innovation, client demand and offerings in this space. For a number of reasons, including concerns about “front-running,” “piggy-backing” and the potential ability to reverse engineer active investment strategies, ETF sponsors have been reticent to fully embrace the Active ETF structure due to portfolio transparency requirements (whether on a same-day or one-day lag basis). Accordingly, Invesco believes that for investors to have the same breadth of investment options within the ETF framework that exist in other investment company wrappers (e.g., mutual funds), a solution needs to provide adequate protections against such concerns for Active ETFs while still promoting an efficient arbitrage mechanism for all ETFs. To that end, Invesco encourages the Commission to establish different portfolio holdings transparency requirements for Active ETFs and Index-Based ETFs as described below.

Index-Based ETFs are designed to be predictable. As such, disclosure of portfolio holdings does not present opportunities for market participants to capitalize on such information in a way that might be detrimental to the ETF and is, indeed, a critical tool to improve the arbitrage mechanism and tighten spreads. Conversely, Active ETF investors are long term investors that, generally, seek investment results that outperform a specific benchmark. While Active ETFs trade at a price that is close to NAV, the decision to invest in a given Active ETF is more driven by the ETF’s performance and investment strategy than the width and impact of the spread.

Invesco supports a requirement of daily portfolio disclosure (based on the portfolio as of the close of the prior business day) as included in the Proposed Rule for Index-Based ETFs. However, reflecting the different nature and investment mandates of Active ETFs and Index-Based ETFs, Invesco proposes that the Commission allow Active ETFs to delay the disclosure of portfolio holdings for at least two days. We are confident that delayed disclosure will still allow for an effective arbitrage mechanism, as APs will be able to price their exposure and hedge their investments against the daily creation and redemption baskets⁴⁴ while mitigating the risks that have historically impeded the creation of Active ETFs by market participants.

To the extent that the Commission accepts Invesco’s suggestion or approves another suggestion regarding the publication of portfolios of Active ETFs, Invesco respectfully requests that such approach should be available to all ETF sponsors and not just those sponsors who have applied for relief based on strategies protected by patents, as this would run contrary to the creation of a level playing field. As noted previously, Invesco strongly believes that providing relief to patent-protected structures could thwart innovation by the rest of the industry or could force an ETF adviser to pay a license fee in order to introduce similar Active ETFs, which ultimately could make ETFs more expensive for investors and reduce investor choice.

(b) *Posting Holdings prior to Accepting Orders*

Section (c)(1) of the Proposed Rule would require an ETF to disclose on its website the portfolio holdings that will form the basis of the next calculation of NAV “[b]efore the opening of regular trading on the primary listing exchange of the ETF’s shares and before the ETF starts accepting orders for the purchase or redemption of Creation Units.”⁴⁵ Although for most ETFs this provision would not be problematic, the

⁴³ Order granted on February 27, 2008.

⁴⁴ See the following section, entitled “Creation and Redemption Baskets.”

⁴⁵ Proposal Release at pg. 273.



requirement does not take into account the practical implications of ETFs that opt for utilization of “T-1 Orders” at times of significant portfolio turnover or to manage foreign investments.

Some ETFs that hold securities domiciled globally allow APs to transmit creation and redemption orders after the cut-off time for calculating that day’s NAV. In accordance with Rule 22c-1 under the 1940 Act, those orders (received after hours) are priced at the next calculated NAV. Receipt of the order after hours does not change the conditions imposed on the AP, since these orders are subject to the same requirements as if it were made the next day, including basket composition (announced prior to markets open the next day) and pricing (determined at the time of the next NAV calculation, typically 4:00 p.m. ET the next day). However, this process allows the ETF to “put the money to work” as soon as the foreign exchanges are open for business, which may be during U.S. night hours.

There are many advantages to ETFs accepting T-1 Orders that ultimately benefit investors. Most notably, T-1 Orders provide an opportunity for ETF sponsors to utilize most, if not all, of the trading day in foreign markets, which can result in better execution scenarios. Additionally, portfolio managers can better benchmark their trades in such foreign markets against the underlying index, minimizing tracking error.

The Proposed Rule’s requirement that portfolio holdings be made available before the ETF starts accepting orders for the purchase or redemption of Creation Units necessarily means that T-1 Orders could not be accepted until the ETF has catalogued and posted the holdings for the following trading day. Generally, this process would need to start at 4:00 p.m. ET and would make it impossible to open the T-1 window until the process has concluded and the holdings have been posted. In the case of Invesco, due to the size and number of ETFs, this process generally takes approximately 2-3 hours, which means that we would not be able to start accepting T-1 Orders until 7:00pm ET. Additionally, the Proposed Rule’s additional requirements relating to portfolio disclosures would likely increase the amount of time necessary to finalize the holdings file and make it available to investors.

Moving the timing of the T-1 Order window later into the evening, so as to ensure that it occurs after the publication of holdings data, would also be a potentially costly exercise for sponsors, custodians, and market participants. For sponsors and custodians, additional staffing requirements (portfolio management, operations, trading, and compliance staff) would be required to cover an additional work shift. This would be necessary for trading cash in lieu of in-kind security delivery. By extension, additional personnel would be necessary as well for market participants in terms of data consumption as well as execution of creation and redemption trades. Additionally, delaying the T-1 Order window would correspond with some international markets already being open or opening for trading, potentially shortening the trading sessions available to participants to transact in underlying basket constituents. Operationally there would also be no buffer in terms of process or data delays because the order window would not be made available until holdings are published. It could be expected there would be instances where a process failure would negate the availability of a T-1 window for that night, potentially limiting a participant’s ability to place an ETF order before transacting in international markets in the underlying constituents. This could have adverse impacts on fund pricing and liquidity as the market participant would be forced to transact in the underlying securities on the day after the ETF order is placed, which also would occur if the T-1 Order window was completely eliminated on an ongoing basis. Given all of the additional demands in terms of costs and staffing, the proposed holdings disclosure requirements would also favor large ETF sponsors, custodians, and market participants to the detriment of smaller competitors.

Invesco is supportive of transparency and believes it is an integral part of an ETF’s operation. That said, Invesco believes that, even though the U.S. market is closed at the time of placing a T-1 Order, APs nonetheless need adequate information to sufficiently hedge their order to minimize the risk of undesirable



pricing effects. As such, Invesco believes that the Commission should consider requiring ETF sponsors to provide APs with certain information (but not full portfolio holdings) to alleviate the operational difficulties explained above and allow the T-1 Order window to open as it does now.

As an alternative to the dissemination of portfolio holdings, Invesco would suggest providing APs with the following information regarding the ETF prior to the acceptance of T-1 Orders: (i) the last-published portfolio holdings; (ii) applicable corporate action information; (iii) index change data; and (iv) an updated basket file. We believe this package of information, required in a consistent manner across the industry, would be time efficient and provide APs with the information that they need to effectively hedge orders for creation or redemption and price the ETFs at the open of the U.S. markets, thus ensuring an effective arbitrage mechanism. We also note that this method is preferable to delivering a portfolio holdings file, not only for the reasons outlined previously concerning delays, but also because any portfolio holdings file that is produced would only include executed positions and not account for trades anticipated in global markets overnight. Accordingly, the portfolio holdings would be merely a snapshot of the ETF at market close and would not reflect the next day's starting portfolio.

(v) Creation and Redemption Baskets

A significant provision in the Proposed Rule is the permitted use of "flexible baskets" by all ETFs (termed "custom baskets" under the Proposed Rule).⁴⁶ Currently, only certain ETFs have exemptive relief that allows them to take advantage of flexible baskets.

The ability of ETFs to transact in kind (in the case of a creation, accepting deposit securities in exchange for ETF shares, and in the case of a redemption, delivering portfolio securities in exchange for ETF shares) is a key feature of ETFs. Many of the pronounced benefits of ETFs compared to other pooled investment options, including, but not limited to, tax efficiency, low transaction costs and minimized dilution of shares, are partially or fully a by-product of the in-kind transaction. In facilitating such creation and redemption activity, ETFs disseminate a basket of securities that will be accepted in exchange for a Creation Unit (for creations) and a basket of securities that will be delivered in exchange for a Creation Unit (for redemptions). Generally speaking, a "standard basket" is one that reflects a pro-rata slice of the ETF's underlying securities. A "Flexible Basket" therefore is one that deviates from such pro-rata slice of the ETF's portfolio, whether due to the omission of certain portfolio securities, different weightings of securities or the inclusion of securities not yet in the ETF's portfolio (which only would occur in a Flexible Basket for creation).

As one of the few ETF sponsors that has been able to transact with Flexible Baskets, Invesco has experienced first-hand their many benefits. Flexible Baskets provide a critical portfolio management tool, the benefits of which ultimately inure to shareholders. Flexible Baskets give ETFs a way to add, remove and reweight portfolio securities without transacting in the market and incurring transaction costs and experiencing tax consequences. Such benefits are particularly important to smaller ETFs and ETFs that hold securities that are not as widely available (such as fixed income securities), where Flexible Baskets allow an ETF to manage portfolio concentration, security weighting and other portfolio characteristics while still taking advantage of the benefits of in-kind transactions. Additionally, Flexible Baskets are an optimal management tool when dealing with regular market and issuer occurrences such as trading halts in a particular security, pending corporate actions, and instances where either the fund or the AP is prohibited from receiving (or delivering) a security. Although current exemptive relief that does not permit Flexible Baskets nonetheless allows for cash to be delivered (or received) in lieu of certain securities, such action

⁴⁶ Proposal Release at pg. 88.



still requires an ETF to transact in the market and incur associated costs and experience potential negative tax implications.

Another instance where Flexible Baskets is a valuable option for ETFs is with respect to “T-1 Baskets.” A T-1 Basket does not reflect the current portfolio of an ETF, but rather reflects the portfolio that the ETF expects to have once the next day’s anticipated trades are completed. Such Flexible Baskets are particularly useful at times when an ETF has predictable, significant portfolio changes, such as when an Index-Based ETF is rebalancing. In addition to the benefits of Flexible Baskets described above, T-1 Baskets also provide an essential means by which Index-Based ETFs can minimize tracking error while keeping transaction costs low. By extension, such methods have the added benefit of providing transparency to the market regarding the ETF’s holdings post rebalancing and help market participants estimate what a post-effective NAV would be, thus allowing for accurate ETF pricing in secondary markets. In this way, the T-1 Baskets further assist APs in maintaining an effective arbitrage mechanism.

Invesco agrees that the practice of Flexible Baskets, if not properly administered, may lead to potential risks and abuses. Accordingly, Invesco supports the Commission’s proposal to require a sound compliance oversight protocol to monitor an adviser’s utilization of this practice. In this regard, Invesco believes that a sponsor should develop written policies and procedures governing basket construction that are broad enough to cover the myriad facts and circumstances that may arise, and does not agree with the Commission’s proposal to require policies and procedures with detailed parameters for the construction and acceptance of Flexible Baskets. It is our view that the imposition of too many parameters will most likely complicate the portfolio manager’s ability to efficiently and effectively manage the portfolio to the shareholders’ benefit, which we consider to be an ETF sponsor’s primary goal. As such, Invesco believes that the responsibility to develop bespoke policies and procedures that capture the unique circumstances of a sponsor’s business and operations is best allocated to the sponsor itself.

Additionally, when discussing required policies and procedures for ETF sponsors utilizing Flexible Baskets, the Proposal Release suggests it may be appropriate to have employees outside of portfolio management review components of Flexible Baskets before approving a creation or redemption.⁴⁷ Invesco invites the Commission to reconsider this view and omit any such requirement from the rule or accompanying guidance, as it would limit portfolio management’s ability to effectively employ Flexible Baskets in real-time, ultimately hindering the ETF and its shareholders from realizing the maximum benefit Flexible Baskets offer. As we have stated before, Invesco believes that the determination and handling of Flexible Baskets is a portfolio management function and, therefore, the primary contribution to the process by other professionals (e.g., Legal, Compliance or Risk) should be with respect to identifying governing principles and establishing appropriate control protocols. Instituting a compliance framework built on such principles and protocols, coupled with necessary training and monitoring, mitigates the risks associated with potential abuses of the Flexible Basket tool without requiring the active involvement of non-portfolio management personnel in the review and approval of each order prior to acceptance. We further note that since the Proposed Rule already requires Flexible Basket policies to identify individuals (by title or role) that are required to review each Flexible Basket for compliance with such policies, adding another, non-portfolio-management reviewer would likely create redundancy, add delays and stymie the Flexible Basket mechanism to the detriment of shareholders. As such, we advocate against any additional real-time active involvement by parties outside of portfolio management and, overall, we encourage the Commission to avoid such granular policy requirements in the Proposed Rule generally. As noted previously in this Comment Letter, we believe that Rule 38a-1 under the Act and Rule 206(4)-7 under the Advisers Act

⁴⁷ Proposal Release at pg. 97



appropriately place responsibility for crafting the necessary control environment to adequately prevent violations of securities laws on the ETF and its adviser. Therefore, we believe the duty to establish the scope, particulars and responsible parties for appropriate and lawful basket construction should remain with the ETF sponsor and should not stem from heightened regulatory specificity.

Invesco similarly does not believe that detailed requirements in the Proposed Rule regarding the creation and substance of a record or other recordkeeping requirements⁴⁸ are necessary, but we do believe that the Proposed Rule should require the ETF sponsor to review flexible basket policies and procedures, including records as the sponsor believes necessary to do so, on a frequency that the ETF sponsor deems reasonable and appropriate to maintain adequate controls. To the extent the Proposed Rule mandates that the ETF sponsor adopt a flexible basket policy under the Funds' Rule 38a-1 compliance program, this policy and these procedures should be reviewed, assessed for effectiveness and reported to the ETF's Board at least on an annual basis.

Additionally, with respect to posting Flexible Baskets on the ETF's website, Invesco believes that such dissemination could be confusing since the composition of the Flexible Baskets can vary extensively throughout the day. Further, Flexible Baskets are, by their nature, negotiated baskets, and a requirement to post the Flexible Basket that culminates from such negotiation prior to executing on it could delay the process to the point that the market conditions and opportunity will cease to exist, thereby defeating the purpose of the Flexible Basket altogether. Invesco also does not believe that publishing Flexible Baskets serves the investing public generally. Although, as noted above, Invesco believes that an adequate control and governance framework requires ex-ante review of Flexible Baskets, we see no utility in publishing such Flexible Basket data for public consumption. The arbitrage mechanism can, and has, functioned efficiently without such a posting requirement to date, and therefore we feel no additional operational requirements, particularly when such requirements can potentially diminish the effectiveness of Flexible Baskets, are necessary.

(vi) Website Disclosure

The Proposal Release observes that there has been significant increase in the use of ETF websites as a primary source for gathering information about such investments.⁴⁹ As an initial premise, Invesco agrees with this assessment and supports efforts to shift disclosure requirements away from traditional sources (such as prospectuses and SAIs) toward ETF websites. However, the main concern for any regulation regarding ETF disclosure should be ensuring that investors get essential information without becoming overloaded with confusing and potentially misleading data. For this reason, although Invesco is largely supportive of the disclosure requirements included in the Proposed Rule, we urge the Commission to reconsider certain elements, as described below.

As noted in the Proposal Release, current exemptive orders require certain disclosures relating to daily NAV, closing market price of shares, and premium and discount information.⁵⁰ Such requirements are reflected in the Proposed Rule, thereby codifying current practice. As an initial matter, Invesco believes that NAV and market price information are important and useful to investors, and we therefore agree with their continued inclusion in required disclosure. Moreover, we agree with the two-pronged approach to the definition of "market price" included in the Proposed Rule,⁵¹ as a definition that solely relies on closing

⁴⁸ Proposal Release at fn 256.

⁴⁹ Proposal Release at pg. 107.

⁵⁰ Proposal Release at pg. 108.

⁵¹ Proposal Release at pg. 110.



price will often capture a stale price that does not reflect further market movement between the last trade and the close of the market.

With respect to premium and discount information, we believe that such data does not provide the same benefit to shareholders as NAV and market price. This is particularly true with respect to the Commission's consideration of intraday premium and discount information, which the Commission correctly notes can be impacted by a multitude of factors and would be impracticable to calculate in a meaningful way. It is Invesco's view that without a clear and effective way of deriving information, such information should not be disseminated. Additionally, the expansion of the information proposed to be provided regarding premiums and discounts⁵² may cause investors to believe that that information is more important than investment performance, which Invesco submits would be inappropriate.

Invesco does, however, commend and support the Commission's proposal to require an ETF to add disclosure to its website when its premium or discount has been greater than 2% for seven consecutive days.⁵³ Invesco believes that daily premium and discount information is an important metric for both sponsors and investors and as such, already tracks the metric closely. Furthermore, Invesco notes that our metrics suggest that it would be unusual for an ETF's premium or discount to exceed 2% for an amount of time that would trigger the disclosure requirement and, therefore, such disclosure would not be burdensome.

(vii) Marketing

A repeated theme throughout the Proposal Release, and echoed in this Comment Letter, is how much the ETF industry has grown and gained acceptance over the past two decades.⁵⁴ When the first exemptive orders were granted, the Commission appropriately took steps to limit investor confusion between the novel product structure and more traditional investment vehicles, such as mutual funds. Since that time, however, investors (both institutional and retail) have embraced ETFs, extinguishing such concerns. For this reason, Invesco supports the Commission's decision to omit marketing conditions from the Proposed Rule that would be intended to clearly distinguish ETFs from mutual funds.⁵⁵ We believe the investing public understands that, by their nature, ETFs are purchased on the secondary market at current trading prices and have different features from mutual funds. Mandating disclosure to that effect is unnecessary and needlessly duplicative of an ETF's existing responsibility to provide investors with sufficient disclosures to make an informed investment decision.

With regard to the classification of ETFs, Invesco believes that not all ETFs are created equal. Levered ETFs, commodity pools and exchange-traded notes only have one common element with "traditional" ETFs in that they are all traded on a regulated exchange. However, these products present performance attributions, risks and material differences in their legal structure that we believe should be clearly understood by investors prior to making an investment. Accordingly, Invesco believes that only ETFs that fall within the four corners of the Proposed Rule should be able to market themselves using the "ETF" acronym and that other acronyms should be used to market the other products (e.g., leveraged ETFs using the acronym "LVRD ETFs"; exchange-traded commodity pools using the acronym "ETCs"; etc.).

V. Recordkeeping

Invesco notes that ETFs generally implement robust recordkeeping programs pursuant to their policies and procedures and does not believe that it is necessary for the Proposed Rule to prescribe anything further.

⁵² Proposal Release at pg. 117.

⁵³ Proposal Release at pg. 119.

⁵⁴ See, e.g., Proposal Release at pg. 6.

⁵⁵ Proposal Release at pg. 130.



With that said, Invesco agrees with the proposed five-year record retention timeline and would be amenable to the Commission's proposal to require the filing of form of AP agreements with registration statements, as such agreements generally are standard.

Additionally, Invesco notes that an ETF's fixed transaction fee and a description of the variable fee are currently disclosed in the SAI. We have considered the Commission's questions regarding whether the Proposed Rule should require additional disclosure relating to an ETF's transaction fees (e.g., aggregate transaction fees paid over a specified period of time) and determined that the additional information would not benefit an investor and could be misleading due to the unpredictability of the fees associated with some types of transactions, for example cash in-lieu transactions. We further note that transaction fees are used to defray investment costs, thereby providing a benefit to investors.

VI. 1934 Act Relief

The Proposal Release also requests comment as to whether exemptions should also be provided for other provisions of the 1934 Act from which ETFs typically seek relief on behalf of broker-dealers who sell fund shares (the "Additional 1934 Act Provisions"). Each of these rules applies to broker-dealers that may sell shares of the ETFs, not to the ETFs themselves. Invesco believes that such a broad-based exemption for broker-dealers selling ETFs would be appropriate and complementary to the regulatory approach the Commission is pursuing. Currently, broker-dealers who sell shares of ETFs rely on a variety of class relief letters or specific, bespoke relief under the 1934 Act. In general, most broker-dealers rely primarily on class relief granted in Securities Industry Association (pub. avail. Nov. 21, 2005) (the "SIA Letter") (in the case of index ETFs) or WisdomTree Trust (pub. avail. May 9, 2008) (the "WisdomTree Letter") (in the case of transparent actively managed ETFs), or on a subsequent modification of one of these letters. The SIA Letter references factual representations that are not obviously referenced by or linked to the relief granted, that may no longer be germane to ETFs, or that draw distinctions between various ETFs in a way the Proposed Rule does not. Providing relief from these provisions would permit ETFs the flexibility to rely on the full modernization of their operations under the Proposed Rule without having to contend with conflicting obligations under the 1934 Act.

We believe that the conditions for such relief could be derived from certain conditions contained in the SIA Letter and the WisdomTree Letter. The relief in both of these letters is based primarily on whether an ETF is a "Qualifying ETF" and, if so, whether the selling broker dealers have met various other conditions set forth in the SIA Letter. Under the SIA Letter, a Qualifying ETF must meet three separate tests:

1. The ETF shares are issued by an open-end investment company or unit investment trust registered with the Commission under the Investment Company Act;
2. The ETF shares are listed and trade on a market that has obtained approval from the Commission pursuant to Section 19(b) of the 1934 Act of a rule change regarding the listing and trading of the ETF shares on the market (or that is relying on Rule 19b-4(e) to list and trade the ETF shares); and
3. The ETF (a) consists of a basket of twenty or more Component Securities, with no one Component Security constituting more than 25% of the total value of the ETF, and is managed to track a particular index all of the components of which are publicly available;⁵⁶ or (b) solely for purposes of the exemptive relief for Broker-Dealer APs from Section 11(d)(1) of the Exchange Act, is an

⁵⁶ The Wisdom Tree Letter dispenses with the requirement that a transparent actively managed ETF be "managed to track a particular index all of the components of which are publicly available."



ETF that has obtained certain relief from the requirements of Section 11(d)(1) for certain broker-dealers in letters that pre-date the SIA letter.

Invesco believes that relief from the Additional 1934 Act Provisions could be appropriately conditioned on the first two conditions, with a modified version of the third condition.⁵⁷ The first two conditions are easily addressed in the context of the Proposed Rule, because similar concepts are embedded in the definition of “Exchange Traded Fund” contained in Rule 6c-11(a). With regard to the third condition, Invesco suggests that this condition (as modified by the WisdomTree Letter) be kept intact, but with an additional alternative. The rule should permit any ETF that relies on Rule 6c-11 and that is Regulated Investment Company and meets the diversification requirements of Section 851(b)(3) of Subchapter M of the Internal Revenue Code of 1986 (the “IRC”) to be deemed to be a Qualifying ETF. This approach would encompass ETFs that, as pertinent here, have:

1. at least 50% of the value of their assets in:
 - a. cash and cash items, Government securities and securities of other regulated investment companies, and
 - b. other securities provided that securities of no one issuer exceeds 5% of the value of the fund, and no more than 10 percent of the outstanding voting securities of the issuer, and
2. not more than 25 percent of the value of its total assets is invested in:
 - a. the securities (other than Government securities or the securities of other regulated investment companies) of any one issuer,
 - b. the securities (other than the securities of other regulated investment companies) of two or more issuers which the taxpayer controls and which are determined, under regulations prescribed by the Secretary, to be engaged in the same or similar trades or businesses or related trades or businesses.

This modified condition would permit an alternative diversification measurement under which most ETFs currently operate.⁵⁸ As a result, the goal of the original condition – that of ensuring that only an appropriately diversified ETF was the subject of the relief – would be preserved, but would be preserved in a way that provides maximum investment flexibility for the ETF, which is already cognizant of the parameters of the IRC. If an ETF was a Qualifying ETF under this test, transactions in its shares would be exempted from the provisions of the Additional 1934 Act Provisions provided that the broker-dealers otherwise met the broker-dealer representations and conditions contained in the SIA Letter. Invesco believes that this approach provides an easily understood and easy to apply set of conditions that dovetails with the regulatory structure of the Proposed Rule while still honoring the core structure of the SIA letter. Such a position could be issued under the 1934 Act in the same manner as the SIA Letter and WisdomTree Letter contemporaneously with the adoption of the Proposed Rule under the 1940 Act.

In addition to the modifications to the relief from Additional 1934 Act Provisions discussed above, Invesco encourages the Commission to review any other ways in which relief granted by the Commission and its staff to ETFs and ETF market participants under the 1934 Act contains details, facts, or requirements that are inconsistent with the approach to ETF operations reflected in the Proposed Rule. For example, as

⁵⁷ In addition, broker-dealers have to satisfy the conditions in the SIA letter that apply to them. Invesco believes that these conditions continue to be appropriate.

⁵⁸ To the extent an ETF was not a regulated investment company, it would still be able to rely on the other two prongs of the condition.



discussed above, Invesco supports the Commission's determination that the Proposed Rule should not mandate a particular maximum or minimum Creation Unit size for all types of ETFs. As noted, we believe that ETF advisers are inherently incentivized to set Creation Unit sizes and dollar amounts at levels that promote effective arbitrage and allow an ETF to acquire securities in a manner that adheres to the portfolio management strategy while not having an adverse effect on portfolio tracking and performance. To the extent that any relief from 1934 Act provisions contemplates certain minimum Creation Unit sizes or dollar amounts, such details would be at cross-purposes with the regulatory flexibility that the Commission intends to provide under the Proposed Rule. Accordingly, we believe that the Commission should use this rule making process under the Act as an opportunity to modernize the ETF regulatory regime under the 1934 Act by allowing for corresponding flexibility and ensuring consistent parameters for ETF operations.

VII. Disclosure Issues

A. Form N-1A Disclosure

Invesco applauds the Commission's thoughtful proposal to update Form N-1A disclosures for ETFs. Invesco agrees with the Commission's proposal to eliminate and/or combine under Item 3 duplicative disclosures with respect to Items 6 and 11 of Form N-1A.⁵⁹ These proposed disclosure changes are consistent with the Commission's historical position that prospectus disclosure should be presented to investors in a clear, concise and understandable manner.⁶⁰ We commend the Commission in its proposal to differentiate ETF narrative fee disclosure descriptions from those of mutual funds in order to, among other things, assist retail investors in better understanding potential indirect costs unique to the purchase and sale of ETF shares on the secondary market, while generally not burdening retail investors with complex and unnecessary disclosures on fees, processes and procedures more applicable to market makers and APs when purchasing or redeeming ETF shares directly from the issuer.

Specifically, under Item 6 of Form N-1A, Invesco agrees with the Commission's proposal to remove duplicative disclosure on Creation Unit sizes as this information is not necessarily useful for retail investors purchasing ETF shares on the secondary market and such information is covered in whole and/or in part in other disclosures, including in new Form N-CEN. Moreover, due to the relationships that ETF sponsors generally have with market makers and APs, the parameters on Creation Unit sizes would most likely already have been communicated and understood by these parties as they purchase and redeem ETF shares directly from the issuer. This understanding by market makers and APs of the sometimes complex purchase and redemption process leads Invesco to agree with the Proposal Release that Item 11 disclosure in Form N-1A with respect to Creation Unit sizes generally, not just Creation Units with not less than 25,000 shares, also should be removed from the prospectus due to the already robust flow of information to market makers and APs. In addition, information relevant to premiums and discounts is already disclosed on a timely basis on ETF websites and therefore does not need to be duplicated in the registration statement.

Invesco also agrees with the Commission's proposal to add new disclosure to Item 3 of Form N-1A with respect to narrative disclosures on fees, direct and indirect, that may impact investors when buying, holding and selling shares of open-end management investment companies—ETFs *and* (emphasis added) mutual funds. Moreover, Invesco agrees with the new narrative disclosure requirements specific to ETFs with respect to indirect costs unique to ETFs, such as potential costs associated with trading on secondary markets. However, Invesco disagrees with the proposed requirement for the disclosure to be formatted as

⁵⁹ Proposal Release at pgs. 171 – 176.

⁶⁰ Commission's Adopting Release File No, S7-28-07, *Enhanced Disclosure and New Prospectus Delivery Option For Registered Open-End Management Investment Companies* ("Summary Disclosure Final Release") at pg. 18.



a question and answer section (“Q&A”). While Invesco does not necessarily believe there is anything inherently confusing about Q&A formatted disclosure, as it is used quite frequently in both ETF and mutual fund proxy statements, it is the mandating of the disclosure, without taking into account the larger form and context of the overall summary prospectus, that causes concern. For example, the Q&A format may add substantial length to the summary prospectus due to the practicalities of formatting a separate Q&A section into the otherwise paragraph form narrative disclosures of the summary, resulting in a document that will inevitably exceed the intended three- to four-page length of the summary prospectus.⁶¹ Invesco also believes that because the mandated Q&A format is outside of the typical presentation of traditional plain English narrative prospectus disclosure it may inadvertently put undue prominence on this section to the detriment of other prospectus disclosures that are not in the Q&A format. The Q&A formatted disclosure will stand out and possibly raise the question to the investor as to why this section of disclosure seems more significant than other narratives in the prospectus such as the fee table lead in or investment strategy and risk section. Invesco believes that the proposed narrative disclosure on additional fees may be helpful to investors and foster better understanding on the inherent costs associated with trading ETF shares on the secondary market, but that it should be shown in narrative format, as all other disclosures are shown, and not mandated by the Commission to be disclosed as a Q&A.

Invesco is similarly concerned with the Commission’s proposal requiring a new table on historical bid-ask spread amounts.⁶² Historical bid-ask spreads, like past performance numbers, are not necessarily indicative of future bid-ask spreads and have the potential to create investor confusion and put ETFs and their sponsors at risk for prospectus liability arising from an investor’s purchase or redemption order that exceeds historical bid-ask spreads. Accordingly, we urge the Commission to reconsider this disclosure requirement.

Finally, the Commission asks whether a new registration form should be used for ETFs and/or whether an additional summary-type document should be required to report on specific ETF metrics.⁶³ Invesco believes strongly that new and/or additional ETF disclosure documents are unnecessary and could be quite costly and confusing. Invesco, like many ETF sponsors, also sponsors mutual funds and other pooled investment vehicles, and uses systems, process and procedures to develop, maintain and file with the Commission ETF prospectuses and SAIs along the same lines as it does its mutual fund products. For example, Invesco uses one overall summary prospectus solution for ETFs and mutual funds. Splitting ETFs off into a new and/or additional form would only add costs and complexity without any real investor benefits.

B. Bid-Ask Spread Disclosure

The Proposal Release also expands on the disclosure currently mandated by exemptive orders to include certain information about bid-ask spreads.⁶⁴ Invesco strongly disagrees with the inclusion of such requirements and believes the result would potentially create investor confusion, inappropriate expectations, and unnecessary complexity and cost. Although the concept of a bid-ask spread midpoint is somewhat straightforward in theory (the Proposal Release adequately summarizes it as “the difference between the highest price a buyer is willing to pay to purchase shares of an ETF (bid) and the lowest price a seller is willing to accept for shares of an ETF (offer)”⁶⁵), the actual calculation of such bid-ask spreads is highly technical, and more importantly, there is no universal or standardized agreement about the most

⁶¹ Summary Disclosure Final Release at pg. 16.

⁶² Proposal Release Figure 1 at pg. 155.

⁶³ Proposal Release at pgs. 176-78.

⁶⁴ Proposal Release at pg. 114.

⁶⁵ Proposal Release at pg. 114-115.



appropriate way to document it accurately. For example, although Invesco currently monitors the bid-ask spreads of its ETFs, the methodology utilized differs from that of other ETF sponsors, APs, exchanges and market data providers, such as Bloomberg. As a result, even though the Instructions to Item 3 of the Proposed Rule attempt to standardize the information provided by ETF sponsors, that particular formulation would not necessarily be universally adopted by all market participants. Accordingly, although the Proposed Rule might elevate investors' understanding of the significance of bid-ask spreads, it would not prevent the industry from having widely divergent approaches, making it impossible for investors to get consistent information.

Beyond concerns regarding industry consistency, Invesco further believes bid-ask spread information can be potentially confusing, misleading or otherwise harmful to shareholders. Although historical bid-ask spreads are a useful tool for ETF sponsors and APs (who already monitor them) for benchmarking the trading of ETF shares at a high level and particularly with respect to large trading, the utility of bid-ask spreads nearly disappears when considered at the individual investor level and, instead, may be deceptive. As a general matter, an investor's trading experience is governed by a multitude of factors outside of bid-ask spread, and such other factors have at least as much, if not more, impact on the ultimate execution an investor (particularly a retail investor) is able to receive. Broker services, order type and current market conditions have significant impact on a trade at the time it is placed, and such variables may not be reflected in historical bid-ask spreads recorded for an ETF. For example, if an investor opts to trade through a broker that promises a certain speed of execution, it is likely such execution comes at a price that "crosses the spread" to offer at, or even above, the current bid. In such an instance, the historical bid-ask spread information about the trading of an ETF's shares will have low correlation to the actual trading experience, and an investor's knowledge of such historical information prior to making the trade may potentially create a false expectation. Given these concerns about bid-ask disclosure being potentially misleading, Invesco has great reservations about including it on its website. Even more so, we would have major reservations about including the information in the Prospectus for the ETFs given the potential liability ETFs and the signatories to their registration statements might have under Section 11 of the Securities Act of 1933. Section 11 provides for a strict liability cause of action in instances in which an effective registration statement "contains an untrue statement of material fact" or omits "to state a material fact...necessary to make the statements therein not misleading...." As noted below, bid-ask spreads are inherently out of the control of ETFs or their sponsors. Consequently, a risk exists that ETFs, and the signatories to the registration statements, might be strictly liable for any factual errors that might exist due to incorrect underlying data on the bid-ask spreads that are outside of the control of the ETFs or their sponsor. Furthermore, because the new proposed disclosure will be contained in the summary portion of the prospectus, ETFs will be limited to providing only the disclosure "required or permitted" by the proposed revisions. As a result, the ETFs would be prohibited by the terms of Form N-1A from including the significant amount of additional disclosure necessary to address the concerns cited above, which creates a potential risk of Section 11 liability. We note that even if the proposed disclosures were to be amended to add all of the information necessary to make the current proposed information complete, the resulting disclosure would be overly complex, and not particularly helpful to investors for the reasons discussed in this Comment Letter.

Also, another potential challenge associated with bid-ask spreads being inherently beyond the control of ETF sponsors is that any disclosure about this metric would require analysis and commentary on specific secondary market transactions. Accordingly, Invesco believes that if the Commission feels that information regarding bid-ask spreads is important to the efficiency of the markets and the promotion of knowledgeable investing, the proper entities to disseminate such information are the listing exchanges or the Commission



itself and not ETF sponsors. Because exchanges have far better visibility into trading behavior, and can regulate members and the trading environment to drive better investing outcomes, the duty to promulgate, and liability for, bid-ask spread data best resides with them. For all of these reasons, Invesco advocates for the removal of bid-ask spread disclosure from the Proposed Rule.

The Proposed Rule expands website disclosure in its proposed revisions to Form N-1A and requires ETF sponsors to maintain an interactive calculator giving investors a tool to customize hypothetical investing experiences based on certain variables.⁶⁶ As bid-ask spread is a key component to such calculator, for the reasons described above Invesco urges the Commission to remove this requirement. Invesco further believes that any such tool would exacerbate some of the general concerns noted about bid-ask spread disclosure generally. Specifically, an attempt to project a cost of ownership model that incorporates some applicable market trading factors (e.g., historical bid-ask spread) but not the factors that may have the greatest impact (e.g., broker execution, trade type and current volatility) would ultimately yield information that likely will have little correlation to actual trading experience. Although Invesco strongly believes in the importance of providing adequate and useful information to shareholders, we believe creating a disclosure regime where sponsors must provide information on factors that are outside of their control and extremely difficult to monitor (like trading experience) is highly problematic. These considerations, in addition to the complexity, cost⁶⁷ and potential inconsistent implementation across the industry, prompt Invesco to respectfully disagree with the inclusion of an interactive calculator in any final rule.

VIII. Effect of the Proposed Rule on Prior Orders

Once again, Invesco applauds the Commission's efforts in seeking to modernize the regulatory framework for ETFs and to ensure that the new and enhanced regulatory framework supports product innovation and codifies sound and effective market practices. However, we note that Invesco has designed its offerings around the flexibility (including basket flexibility) afforded in its original exemptive orders. Should the final rule include limits to a sponsor's ability to use Flexible Baskets, Invesco would strongly advocate against the revocation of prior orders.

⁶⁶ Proposal Release at pg. 164.

⁶⁷ Although Invesco has a robust website and dedicated technology teams tasked with servicing our proprietary systems, we believe that the financial burden of creating and maintaining the calculator would pose significant issues for ETF sponsors industry-wide, particularly those that are smaller. Such costs would likely lead to inconsistent and unreliable functionality throughout the industry, undermining the ability for an investor to easily obtain comparative information. Moreover, given the great strides the Proposed Rule makes in lowering the barriers to entry of the ETF industry (most notably cost of the exemptive relief process), it would be unfortunate if the Proposed Rule erected even more significant barriers to entry at the same time.

Conclusion

Thank you for the opportunity to submit this Comment Letter and for your consideration of these comments. Questions regarding these comments may be directed to the undersigned.

Sincerely,

Invesco Ltd.

A handwritten signature in black ink, appearing to read "Anna Paglia".

By:

Anna Paglia
Head of Legal, US ETFs

CC: The Honorable Jay Clayton
The Honorable Kara M. Stein
The Honorable Robert J. Jackson Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman

Ms. Dalia Blass, Director, Division of Investment Management