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October 10, 2018

VIA E-MAIL AND FEDEX

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Exchange-Traded Funds [Release Nos. 33-10515; IC-33140; File No. S7-15-18]

Dear Mr. Fields:

NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) appreciates the opportunity to comment on the U.S. Securities and Exchange Commission’s (“SEC” or “Commission”) proposed rule 6c-11 under the Investment Company Act of 1940 (“1940 Act”) regarding Exchange-Traded Funds (“ETFs”).¹

NYSE Arca has a long history of supporting the innovation of new ETFs, and takes seriously its responsibilities as a listing venue and self-regulatory organization for the development, application and oversight of listing standards for ETFs. NYSE Arca is proud to have supported the innovation in the ETF issuer community that now has more than \$3.7 trillion of ETF assets under management in the United States.

NYSE Arca is the premier listing and trading venue for ETFs in the U.S., representing the largest single pool of liquidity for ETFs, with trading volume in exchange-traded products more than twice that of the next largest exchange. NYSE Arca has over 1,500 ETF listings, representing approximately 80% of ETF assets under management. Our strategy remains consistent—to provide issuers and market professionals with the most compelling and innovative marketplace for launching and trading ETFs.

NYSE Arca strongly supports this Commission’s efforts to reduce many of the burdens imposed on ETF issuers by the current exemptive order process for introducing new ETFs to the market. We believe proposed rule 6c-11 would lead to significant cost savings for issuers and dramatically reduce the time frame for product launch. Reducing the cost of entry would lead to greater competition among existing ETF issuers and encourage new entrants into the continually expanding ETF market. In addition, the Proposal would eliminate existing regulatory disparities resulting from ETF issuers receiving different 1940 Act exemptive relief over time that has disadvantaged some issuers competitively. In particular, the Proposal would allow all, rather than a few, issuers to utilize custom baskets with the same requirements.

¹ Exchange-Traded Funds, Release No. IC-33140 (June 28, 2018), 83 FR 37332 (July 31, 2018), *available at* <https://www.sec.gov/rules/proposed/2018/33-10515.pdf> (“Proposal.”)

The Exchange has the following specific comments on the Proposal:

Creation Unit Sizes

The Exchange agrees with the Commission's conclusion, as stated in the Proposal, that mandating a specific minimum or maximum creation unit size for ETFs is unnecessary.² Creation unit sizes for index-based and actively managed ETFs have generally ranged from 10,000 to 100,000 shares. Index-based ETF issuers also have established creation unit sizes in view of numerical criteria set forth in applicable class relief letters or orders issued by the Staff of the Division of Trading and Markets relating to Regulation M and other rules under the Securities Exchange Act of 1934 (1934 Act).³ We note that, in a recent order granting limited exemptions under the 1934 Act for index-based ETFs, the Staff eliminated creation unit size as a condition for 1934 Act relief as long as other conditions of the Equity Class Relief Letter are met.⁴

Creation unit sizes for a fund are most appropriately established by ETF issuers based on their assessment of what is in the best interest of shareholders. The Proposal would provide ETF issuers with flexibility to establish a creation unit size that facilitates creation and redemption of shares with an efficient arbitrage mechanism in view of a fund's investment objective and anticipated holdings. ETF issuers may determine that smaller creation unit sizes would better allow market makers to manage inventory and minimize costs, which would enhance the arbitrage mechanism and reduce the costs of trading (*i.e.*, the bid-ask spread), particularly for many smaller, thinly traded ETFs.

Custom Baskets

The Exchange supports permitting ETFs to utilize custom baskets in complying with proposed Rule 6c-11. Because only a few ETF issuers currently are permitted to use custom baskets under the terms of their 1940 Act exemptive relief, removing the condition imposed on the large majority of ETF issuers that the basket should represent a *pro rata* slice of the fund's portfolio would establish uniform competitive conditions among issuers and allow all ETFs and their shareholders to benefit from the operational and cost savings that use of custom baskets can

² See Proposal *supra* note 1, at note 175 and accompanying text.

³ See, *e.g.*, Class Relief for Exchange Traded Index Funds (File No. TP 07-07) (October 24, 2006) ("Equity Class Relief Letter").

⁴ See Exchange Act Release No. 82234, December 7, 2017 (File No. TP 18-04) (Order Granting Limited Exemptions from Exchange Act Rule 10b-17 and Rules 101 and 102 of Regulation M to Certain Index-Based ETFs). In this Order, the Staff confirmed that "consistent with the treatment of actively managed ETFs, so long as shares of an index-based ETF are continuously redeemed at the NAV in creation unit size aggregations, the specific size and/or dollar value of such creation unit will not disqualify the fund's reliance, with respect to Exchange Act Rule 10b-17 and Regulation M, on the Equity Class Relief Letter, provided that all of the other conditions set forth in the Equity Class Relief Letter are met."

provide. The use of custom baskets also would allow all ETF issuers to increase the tax efficiency of their funds, while reducing the overall costs of creation/redemption activity. Reducing the primary market costs of an ETF, while also increasing the efficiency of a portfolio manager's ability to adjust the fund's investment exposures, should benefit ETF investors by minimizing the costs associated with buying and selling ETFs in the secondary markets.

We believe the Proposal's requirements that an ETF adopt written policies and procedures regarding the use and acceptance of custom baskets, and provide website disclosure regarding the policies and procedures in place that address governance, surveillance and evaluation of custom baskets would address potential misuse of custom baskets by market participants, as described in the Proposal.

Application to Index-Based and Actively Managed ETFs

The Exchange supports the application of the proposed exemptions in rule 6c-11 to both index-based and actively-managed ETFs. We agree that there is no reason to treat the two types of ETFs differently in view of their functional and operational similarities.⁵ We also believe that if rule 6c-11 does not distinguish between these ETF types, then Exchanges should be permitted to harmonize their exchange listing rules for index-based and actively-managed ETFs, and in particular rules permitting listing of ETFs meeting specified "generic" listing criteria.⁶ The goal should be to eliminate differences in criteria applied to like assets--for example, U.S. equities, foreign equities, or fixed income securities--held by an index-based or actively-managed ETF.

Intraday Indicative Values

The Exchange believes Intraday Indicative Values ("IIVs") for ETFs (as well as for other non-1940 Act exchange-traded products), which are widely disseminated by market data vendors and available at no cost to retail investors, continue to be a useful source of price information for retail investors. A number of NYSE Arca listing rules for ETFs, as well as for other exchange-traded products, require updated IIV dissemination.⁷ In addition, several Exchange rules require

⁵ The Proposal states: "We believe that index-based and actively managed ETFs that comply with the proposed rule's conditions function similarly with respect to operational matters, despite different investment objectives or strategies, and do not present significantly different concerns under the provisions of the Act from which the proposed rule grants relief." See Proposal *supra* note 1, at 37338.

⁶ NYSE Arca Rules 5.2-E(j)(3) and 8.600-E set forth generic listing criteria applicable to index-based and actively-managed ETFs, respectively.

⁷ The following Exchange rules require dissemination of an intraday indicative value for specified exchange-traded products: Rule 5.2-E(j)(3) (Investment Company Units); Rule 5.2-E(j)(6) (Index-Linked Securities); Rule 8.100-E (Portfolio Depositary Receipts); Rule 8.200-E (Trust Issued Receipts); Rule 8.201-E (Commodity-Based Trust Shares); Rule 8.202-E (Currency Trust Shares); Rule 8.203-E (Commodity Index Trust Shares); Rule 8.204-E (Commodity Futures Trust Shares); Rule 8.300-E (Partnership Units); Rule 8.600-E (Managed Fund Shares); and Rule 8.700-E (Managed Trust Securities). These rules use different terms to denote the intraday indicative value: Intraday Indicative Value

the Exchange to halt trading in certain circumstances if an IIV is not being calculated or made available.⁸ These rules reflect the significance the Exchange has afforded to IIV dissemination. In addition, the Staff of the Division of Trading and Markets has conditioned the grant of exemptive relief to ETFs from rules under the Exchange Act, including Regulation M, on the dissemination of an IIV.⁹

The current requirement of IIV dissemination reflects the importance of public transparency for retail investors. While a retail investor may be able to access publicly available information sources other than IIVs (such as updated index values, if available) to assess whether an ETF's current trading price reflects what a fund tracks, we believe those sources are not available for all products and are more difficult to identify than an IIV. Thus, the Exchange believes that, even with a 15 second dissemination delay, an IIV can help investors make sounder trading and investment decisions, particularly for investments in actively-managed ETFs, ETFs holding foreign securities, and ETFs with significant holdings in futures, options and swaps.

The Exchange acknowledges certain shortcomings with current IIVs, such as the requirement in NYSE Arca's (and other exchanges') rules requiring that IIVs be widely disseminated every 15 seconds (or every 60 seconds for international ETFs) during regular trading hours, a frequency not generally useful to market professionals. Market data vendors have been working to improve IIV methodologies for valuing ETF assets; for example, ICE Data Services has made significant progress in intraday valuation of securities whose markets are closed during U.S. trading hours. We believe that, rather than the Commission eliminating the IIV requirement, investors would be better served by market participants working to improve deficiencies in current IIV procedures. In this regard, the Exchange supports standardizing the IIV calculation methodology. By continuing to require IIV dissemination, the Commission would provide a significant incentive to market data providers to continue to refine publicly available IIV calculation methodologies, especially in the fixed income, foreign securities and derivatives areas of the marketplace.

Bid/Ask Spread Disclosure

The Proposal includes amendments to Form N-1A that would require an ETF to disclose on its website and in its prospectus the median bid-ask spread for the ETF's most recent fiscal year.

(Rules 5.2-E (j)(3), 8.100-E and 8.700-E); Indicative Value (Rule 8.200-E); Indicative Trust Value (Rules 8.201-E; 8.202-E and 8.203-E); Indicative Partnership Value (Rule 8.300-E); and Portfolio Indicative Value (Rule 8.600-E).

⁸ See, e.g., NYSE Arca Rule 5.5-E(g)(2), which provides the following: "If the Intraday Indicative Value (as defined in Commentary .01 to Rule 5.2-E(j)(3)) or the official index value applicable to that series of Units is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value or the official index value occurs. If the interruption to the dissemination of the Intraday Indicative Value or the official index value persists past the trading day in which it occurred, the Exchange will halt trading." See also, NYSE Arca Rule 7.34-E(d)(7), NYSE Arca Rule 7.18-E.

⁹ See, e.g., Class Relief Letter; Division of Market Regulation Staff Legal Bulletin 9 -- Frequently Asked Questions About Regulation M.

We believe this is an unnecessary requirement in view of the additional information that an ETF would be required to disclose under proposed rule 6c-11(c). We do not agree that median bid-ask data, in itself, would help investors better understand trading costs, as the Proposal suggests. Transaction costs reflect a number of variables, some of which (like brokerage commissions, order size, executing market) are not under the ETF's control. Median bid-ask spread does not reflect variable trading costs among ETFs and may mislead investors as to actual trading costs. We view the proposed website disclosure requirements in proposed rule 6c-11(c) as sufficient to address Commission concerns about investors' better understanding trading costs. Accordingly, the proposed requirement would add to an ETF's costs, while not providing additional useful information for investors.

Website Disclosure of Basket Information

The Proposal would require an ETF to prominently disclose on its website, before the opening of regular trading on the primary listing exchange and before the ETF starts accepting orders for purchase or redemption of creation units, the portfolio holdings that would form the basis for the next calculation of net asset value, and the basket applicable to purchase or sell creation units.¹⁰ This rule would disallow the now common practice of ETFs accepting purchase and redemption orders prior to the dissemination of the applicable basket or portfolio. Particularly for foreign equity index ETFs, Authorized Participants may find it operationally more efficient to place purchase or redemption orders on a T-1 basis, and are fully able to assess and hedge market risk associated with transacting in underlying foreign securities prior to regular trading in U.S. equity markets. Accordingly, the Exchange believes that this proposed requirement is unnecessary and would impose additional costs on ETF market participants. We suggest that the Commission require only that portfolio and basket information be disclosed before the opening of regular trading on the primary listing exchange.

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We thank the Commission for the opportunity to comment on the Proposal.

Respectfully submitted,



Douglas Yones

cc: The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson, Jr., Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Kara M. Stein, Commissioner
Dalia Blass, Director, Division of Investment Management

¹⁰ See proposed rule 6c-11(c)(1)(i)(A) and (B).