ABA BUSINESS LAW SECTION

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October 11, 2018

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

Re: Exchange-Traded Funds: Proposed Rule: File No. S7-15-18

Dear Mr. Fields:

This letter is submitted on behalf of the Subcommittee on Investment Companies and Investment Advisers of the Committee on Federal Regulation of Securities ("Subcommittee") of the Section of Business Law of the American Bar Association ("ABA"), in response to a request for comment by the Securities and Exchange Commission ("Commission") on proposed rule 6c-11 (the "Proposed Rule") under the Investment Company Act of 1940, as amended ("Act"), and related amendments to certain forms, for exchange-traded funds.[1] The comments expressed in this letter represent the views of the Subcommittee only and have not been approved by the ABA's House of Delegates or Board of Governors and should not be construed as representing the policy of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Subcommittee.

The Subcommittee appreciates the opportunity to comment on the Proposed Rule and commends the Commission for its proposal. Plainly, the Commission's considered approach reflects its more than two decades of experience with the structure of ETFs and the attendant regulatory issues. For that reason, among others, we agree that exemptive relief for such investment products should be codified, as implicitly recognized by the Proposed Rule. We further agree that the adoption of Proposed Rule 6c-11 would "modernize the regulatory framework" for existing ETFs and allow many future ETFs to commence operation "without the expense and delay of obtaining an exemptive order from the Commission under the Act."[2]

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[1] Investment Company Act Release No. 33140 (June 28, 2018) [83 FR 37332 (July 31, 2018)] ("Proposing Release") (proposing for public comment new rule 6c-11 under the Act, amendments to Form N-1A under the Act and the Securities of 1933, as amended ("Securities Act"), and amendments to Forms N-8B-2 and N-CEN under the Act).

[2] *Id.* at 37333.

The Proposing Release poses many questions of a technical, economic or highly specific nature that are better addressed by those with more business, economic, operational or marketing expertise. Accordingly, the Subcommittee has limited its comments to issues within our expertise that relate to the Proposed Rule and its implementation. All terms used in this letter which are not specifically defined herein are as defined in the Proposing Release, including the terms "exchange-traded fund" and "ETF."

Rescission of Existing Exemptive Relief

The Proposed Rule is "designed to create a consistent, transparent, and efficient regulatory framework for ETFs and to facilitate greater competition and innovation among ETFs."[3] In light of these regulatory goals, the Commission proposes to rescind the exemptive orders of existing ETFs "that would be permitted to rely on" or "that could rely on" the Proposed Rule in connection with its adoption.[4] As the Commission acknowledges, variations in ETF exemptive relief granted over time have helped to create an uneven playing field for existing and new ETF companies, with early ETF relief recipients benefitting from flexible language that has been narrowed for subsequent relief recipients. By rescinding a broad swath of exemptive orders following adoption of the Proposed Rule and a reasonable transition period of one year, the Commission could eliminate most such competitive disparities in favor of a more flexible, principles-based exemptive framework that would be applicable to all ETFs under the Proposed Rule. Such rescissions would also likely simplify the work of the Commission's examination staff assigned to examine ETFs. Whereas, currently, the regulatory requirements applicable to two ETFs being examined simultaneously may vary dramatically, the adoption of the Proposed Rule and a rescission of past orders would make such a scenario less likely. As a result, the examination process for both the staff and registrants could be streamlined.

Redeemable Securities

The Proposed Rule classifies a share of any ETF that relies on the rule as a "redeemable security."[5] As noted in the Proposing Release, the Proposed Rule's approach is different than that taken in exemptive orders issued to date in which ETFs have been exempted from the definition of "redeemable security" in the Act. The Proposed Rule's approach is beneficial for several reasons. First, it positions ETFs to meet the definition of "open-end company," as defined by section 5(a)(1) of the Act, and thus clarifies that ETFs are subject to those provisions of the Act that apply to open-end companies. Second, it enables ETFs to avail themselves of certain exemptions provided under various federal securities laws for registered open-end investment companies, such as rules 101(c)(4) and 102(d)(4) of Regulation M, rule 10b-17 and rule 11d1-2, each as promulgated by the Commission under the Securities Exchange Act of 1934 ("Exchange Act"). If an ETF fails to qualify for exemptive relief under such rules – as an ETF that is not deemed to issue redeemable securities would -- it either must determine that it is eligible to rely on one of the numerous "class" no-action, exemptive and/or interpretive letters

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[3] *Id.*

[4] *Id.* at 37368.

[5] The Act defines "redeemable security" to mean any security that allows the holder to receive his or her proportionate share of the issuer's current net assets upon presentation to the issuer. 15 U.S.C. § 80a-2(a)(32).

previously issued by the SEC staff[6] or request bespoke relief based on its individual facts and circumstances, which can be a time- and resource-consuming process.[7] We urge the Commission to extend this definitional relief to all ETFs, whether or not they operate in reliance on the Proposed Rule.

In support of the definitional relief described, the Proposing Release notes that, while ETFs have features that distinguish them from both traditional open-end and closed-end funds, their shares can be redeemed in creation unit aggregations (like the individual shares of open-end funds) and their market prices are generally the same as or close to net asset value ("NAV"). If these features – namely, creation unit redeemability and an effective arbitrage mechanism -- are the bases upon which the Commission believes it is appropriate to classify an ETF's shares as redeemable securities, then we believe that the shares of all ETFs should be defined as redeemable securities, as these are features of the shares of all ETFs, whether they rely on the Proposed Rule or on extant exemptive orders. Further, we do not see a rationale for treating the shares of ETFs that rely on the Proposed Rule differently from those of ETFs that rely on extant exemptive orders. Indeed, such differing treatment would partially defeat the goals of the Proposed Rule in that it would institute another unlevel competitive playing field and perpetuate a less efficient regulatory framework for ETF sponsors and the Commission's examination staff, each of whom would have to consider different regulatory treatments on an ETF-by-ETF basis. For these reasons, we encourage the Commission to consider defining shares of all ETFs, including those structured as unit investment trusts, as redeemable securities under the Act.

Harmonization of Exchange Act Relief

As touched on above, in order for its shares to trade in the secondary market, each ETF relies on certain no-action, exemptive and interpretive relief granted under the Exchange Act ("Exchange Act Relief"), either to ETFs as a class or to the individual ETF.[8] Further, an ETF's shares must be listed and traded on a national securities exchange that has obtained approval from the Commission pursuant to Section 19(b) of the Exchange Act of rules covering the ETF's shares, either generally applicable rules or rules specific to that ETF. In most cases, the rules impose conditions, some of which do not match Proposed Rule 6c-11. The conditions necessary to comply with the Exchange Act Relief include:

- A minimum size of creation units (*i.e.,* 50,000 shares and at least $1 million at the time of issuance);
- Continuous availability of an intraday indicative value; and

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[6] *See, e.g.,* Division of Market Regulation: Staff Legal Bulletin No. 9, as revised September 10, 2010; Class Relief for Exchange Traded Index Funds (pub. avail. October 24, 2006) ("Exchange Traded Index Fund Class Relief Letter"); Class Relief for Fixed Income Exchange-Traded Funds (pub. avail. April 9, 2007); Combination Exchange-Traded Funds (pub. avail. June 27, 2007).

[7] *See, e.g.,* PIMCO Total Return Exchange-Traded Fund (pub. avail. March 1, 2012); Invesco Capital Management LLC (pub. avail. September 20, 2018).

[8] Relief is normally granted from rules 101(c)(4) and 102(d)(4) of Regulation M, rules 10b-10, 10b-17, 15c1-5, 15c1-6 and 14e-5, as well as from section 11(d)(1) and rule 11d1-2 under the Exchange Act.

- Maintenance of firewalls for affiliated index providers and affiliated broker-dealers.[9]

We urge the Commission to integrate and harmonize the regulatory requirements imposed on ETFs under each of the Act and the Exchange Act in order to ensure that the goals of the Proposed Rule are not undermined by another regulatory regime.

Creation Unit Size. The Exchange Act Relief generally requires ETFs to issue and redeem creation units of no less than 50,000 shares.[10] However, in the Proposing Release, the Commission stated that it does "not believe that it is necessary to mandate a particular maximum or minimum creation unit size for all types of ETFs" and cited the comments to the 2008 Release (as defined below) in favor of removing this requirement. We agree that there is no compelling legal reason to maintain a particular minimum creation unit size and that an ETF would not have an incentive to establish creation unit sizes that are too large or too small to facilitate effective arbitrage. Thus, imposing a minimum basket size no longer serves a regulatory purpose. There is much more diversity of number of shares in creation baskets than at one time. We believe that the ETFs can adequately monitor and craft appropriate creation unit sizes, and in fact often modify the size of baskets based on a number of factors, including the effectiveness of the arbitrage mechanism. Therefore, we urge the Commission to remove this requirement from the applicable Exchange Act Relief and to work with the exchanges to harmonize their rules.

Intraday Indicative Value ("IIV"). The Commission requested comment on whether relief should be provided under the Exchange Act with respect to existing IIV dissemination requirements. We do not have a view as to whether the IIV remains valuable to arbitrageurs or investors in ETF shares. To the extent that the Commission determines that neither the arbitrage nor the investing community uses the IIV, however, and that the Proposed Rule will not require the publication by ETFs of an IIV, we note that ETFs still would be required to procure an IIV. The IIV requirement is imbedded in the generic listing requirements for ETFs, as well as in certain listing standards approved pursuant to rule 19b-4 under the Exchange Act. If the Proposed Rule, as adopted, does not include an IIV requirement, the Commission should work with the exchanges to harmonize their generic listing standards and any affected rule 19b-4 orders that they have obtained.

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[9] Certain disclosures are also required by listing standards adopted under Exchange Act Rule 19b-4. We urge the Commission to consider harmonizing these requirements with those imposed under any amended Form N-1A and/or the Proposed Rule.

[10] *E.g.,* Exchange Traded Index Fund Class Relief Letter. The Proposing Release does not explicitly mention rule 14e-5. For relief from rule 14e-5, the primary no-action letter on which ETFs rely is the Exchange Traded Index Fund Class Relief Letter. The Exchange Traded Index Fund Class Relief Letter requires that index ETF shares "are to be issued and redeemed in [c]reation [u]nit aggregations of 50,000 shares or such other amount where the value of a [c]reation [u]nit is at least $1 million at the time of such issuance." Subsequent rule 14e-5 letters for ETFs refer to the conditions of the Exchange Traded Index Fund Class Relief Letter. In addition, basket size is imbedded in the rules of the national securities exchanges and individual exceptions to those rules.

Firewalls. Listing standards[11] require the establishment of a "firewall" between an actively managed ETF's investment adviser and any affiliated broker-dealer and, with respect to "self-indexing" ETFs,[12] the ETF's investment adviser and any affiliated index maintenance personnel. This is a different standard than the Proposed Rule applies to self-indexing ETFs. This also is a different standard than that currently applied to applicants for self-indexing ETF exemptive relief.[13] While we obviously agree that compliance with the federal securities laws is critical, firewalls are just one approach for achieving such compliance, and the Proposed Rule seems to recognize this inasmuch as it does not include a firewall requirement for either actively managed or self-indexing ETFs.

We do not believe that relieving ETFs of such a requirement in the Proposed Rule, only to have it imposed by the exchanges, would achieve any regulatory purpose, however. Accordingly, the Commission should work with the relevant exchanges to harmonize their rules.

T-1 Window

In order to rely on the Proposed Rule, an ETF would be required to publish on its website its full portfolio holdings and creation basket before accepting orders based on such holdings and basket. We are concerned that this requirement may detract from the efficiency of the arbitrage mechanism for ETFs that invest in foreign securities ("foreign ETFs"). This is because this requirement will effectively prohibit such ETFs from receiving orders from arbitrageurs between the time that they calculate NAV (typically, as of 4:00 p.m. Eastern time) and the time that they update their websites with portfolio holdings and basket information (approximately 7:30 p.m. Eastern time) for the next business day, even though such timeframe is arbitrageurs' preferred window for the submission of orders with respect to foreign ETFs and it is such ETFs' preferred window for the receipt of orders.[14] It is important to understand that this is the preferred time for arbitrageurs to submit orders because it allows them to enter orders to be executed at the next day's NAV, which is a value that they are able to hedge through their foreign trading desks. Further, it is such ETFs' preferred timeframe for the receipt of orders by authorized participants because they can equitize any cash received in connection with such orders in local market transactions when such markets open (overnight Eastern time) and avoid cash drag. In short,

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[11] *E.g.*, NYSE ARCA Equities Rule 5.2-E(j)(6).

[12] Index ETFs that track indices that are created, compiled, sponsored or maintained by an affiliate are commonly referred to as "self-indexing ETFs." We use the same terminology here.

[13] Recent exemptive orders in this area indicate that the requirement is purely the adoption of procedures to prevent violations of the federal securities laws. *See, e.g.*, Index IQ ETF Trust, *et al.*, Investment Company Act Release No. 33200 (August 14, 2018). The Proposed Rule would not explicitly impose either safeguard on self-indexing ETFs, although, as registered investment companies, self-indexing ETFs almost certainly would adopt policies and procedures designed to prevent violations of the federal securities laws; and depending on the organizational structure of the self-indexing ETF's sponsor, firewalls may be established.

[14] Currently, most registered open-end investment companies, including ETFs, calculate their NAV as of the close of regular trading on the New York Stock Exchange (*i.e.*, 4:00 p.m. ET). At this time, all Asian and European markets are closed. Accordingly, any cash orders placed with ETFs before 4:00 p.m. ET must be executed the following business day in the local market at the then-current local market price, which is likely to deviate from the price as of the previous day's local market close and the price at which such security is reflected in the ETF's NAV.

this creation and redemption window (which is commonly referred to as the "T-1 Window") facilitates arbitrage to the benefit of all such ETFs' shareholders and is in such shareholders' best interest.

The Subcommittee does not believe that the T-1 Window effectively allows for the operation of non-transparent ETFs. Currently, with few exceptions, most ETFs disclose their portfolio holdings daily (either directly or by publishing creation baskets that represent *pro rata* slices of their portfolios). Further, under the Proposed Rule, all ETFs that operate in reliance on it will explicitly disclose each business day their full portfolio holdings. In each case, such disclosures are required to be made by ETFs prior to the start of trading on their listing exchange. They are not required to be updated intraday, but are required to be updated each day. As a practical matter, an ETF's ability to make undisclosed portfolio changes is inherently limited by this daily disclosure requirement. Further, the vast majority of ETFs are index-based products. With respect to such products, it is not uncommon for arbitrageurs and investors to know the contents of the index. Further, regardless of what the ETF holds in terms of portfolio securities, its investment objective is to track the index, and arbitrageurs can hedge their exposure to the ETF by knowing the contents of the index *or* the contents of the ETF's portfolio. In this regard, arbitrageurs have sufficient insight into ETF portfolio holdings that an ETF cannot reasonably be described as operating in a non-transparent manner or in a manner that does not facilitate arbitrage. Accordingly, we do not believe that characterizing the T-1 Window as resulting in the operation of a non-transparent ETF is accurate or a basis for adopting the Proposed Rule with disclosure requirements that would hamper the arbitrage mechanism, result in wider bid-ask spreads, and operate to the detriment of retail shareholders.

Custom Baskets

We strongly agree with the Commission's determination to provide flexibility to ETFs in constructing and accepting in-kind baskets in exchange for creation units of their shares. In fact, when finalizing the Proposed Rule, we recommend that the Commission build additional custom basket flexibility into the Proposed Rule. In this regard, we have the following specific comments.

We believe that the definition of "custom basket" is too broad. In particular, we do not agree that, as stated in the Proposing Release, "if an ETF substitutes cash in lieu of a portion of basket assets for a single authorized participant, that basket would be a custom basket."[15] We recognize the Commission's concerns that

> an authorized participant holding less liquid or less desirable securities potentially could pressure an ETF into accepting those securities in its basket in exchange for liquid ETF shares (*i.e.,* dumping). An authorized participant also could pressure the ETF into including in its basket certain desirable securities in exchange for ETF shares tendered for redemption (*i.e.,* cherry-picking). In either case, the ETF's other investors would be

[15] Proposing Release at 37356.

disadvantaged and would be left holding shares of an ETF with a less liquid or less desirable portfolio of securities.[16]

However, those concerns presume that, in either case, the ETF is being induced to transact in securities that are more or less desirable.[17] We do not believe that these concerns are present when an ETF substitutes, at its own or an authorized participant's behest, cash for a security in a creation or redemption basket. Accordingly, we recommend that the Commission clarify that such cash in lieu substitutions – whether effected by an authorized participant at the behest of an ETF, or at the behest of an authorized participant once the ETF has determined that such substitutions are in the best interest of the ETF– are not required to be subject to the ETF's custom basket policies and procedures as outlined in the Proposed Rule.

We also note that the Commission stated in the Proposing Release that "[a]n ETF may want to consider whether employees outside of portfolio management should review the components of custom baskets before approving a creation or redemption."[18] We believe that custom baskets should be treated like other portfolio transactions, wherein portfolio managers typically are required to attest that portfolio trades are being effected in compliance with the ETF's applicable regulatory requirements, and afterwards compliance personnel determine in the course of their compliance review whether those trades did in fact comply with applicable requirements (and whether proper processes were followed). Pre-trade compliance review is not generally required by rule or regulatory guidance. Further, requiring this type of pre-trade compliance review here would add extra steps to the custom basket negotiation process. This could have the unintended consequence of hampering an ETF's ability to complete a custom basket trade on any given day, regardless of its utility to the ETF and shareholders, and detract from the flexibility that led the Commission to propose the broader use of custom baskets in the Proposed Rule.

Ultimately, we endorse an approach that affords ETF sponsors flexibility in their processes governing the use of custom baskets. We understand that certain ETF sponsors may use quantitative screens to determine when to use a custom basket, while others may use multiple pre-trade portfolio manager approvals based on individual order circumstances. We believe either approach, or other combinations or alternatives thereof, should be acceptable as long as they are consistent with the best interests of the ETF and its investors. ETF sponsors – large and small – are sufficiently equipped to develop processes governing the use of custom baskets for both actively- and passively-managed funds. Accordingly, we do not believe that further guidance from the Commission regarding the content of custom basket policies and procedures, beyond the principles-based approach already set forth in the Proposing Release, should be necessary for ETFs to implement appropriate policies and procedures.

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[16] Proposing Release at 37355-56.

[17] Any execution costs incurred by the ETF in connection with a cash substitution are designed to be covered by the creation or redemption transaction fee, thus putting the ETF in a substantively equivalent position to its position had the substituted-for security had been exchanged in-kind.

[18] Proposing Release at 37357.

Sunset of Section 22(e) Relief

The Proposed Rule provides relief to permit ETFs that invest in foreign securities and deliver redemption proceeds in kind additional time to do so in light of different foreign market holidays and cycles. The Proposed Rule, however, would provide such relief for ETFs for only ten years from its effective date.[19] The Subcommittee does not believe that the rule should include a sunset provision. Most importantly, we note that the rule explicitly requires the settlement of foreign investment transactions to occur "as quickly as practicable." As a result, it would not enable a manager to unnecessarily delay settlement: notwithstanding the proposed exemption from section 22(e), if a foreign investment could settle in fewer than 15 days, an ETF would be required to settle in such lesser amount of time. Thus, there should be no concern that permanently retaining settlement flexibility in the rule could be abused by the ETF industry. Further, although settlement cycles continue to shorten globally, one or more foreign markets may unforeseeably "move backward" and render such section 22(e) relief necessary again. If such backwards movement were to occur after the proposed ten-year sunset period, ETFs would once again be required to seek individual exemptive relief. We believe this would place an avoidable and unnecessary burden on the Commission's resources, particularly given that the Commission has previously determined that the relief meets the standards required by section 6(c).

Form N-1A Amendments

In connection with the Proposed Rule, the Commission proposes to amend Form N-1A, the registration form for open-end investment companies, to add certain disclosure requirements for ETFs. More specifically, the Commission proposes to add six questions and answers ("Q&As") regarding bid-ask spreads to every ETF's summary prospectus disclosure. We agree with the Commission's determination that an ETF's summary prospectus should include some disclosure as to what bid-ask spreads are and as to how such spreads can affect an investment in an ETF. In this regard, we support the Commission moving forward with requiring the type of qualitative disclosure proposed in Q&A 1. However, we believe that the disclosures proposed in Q&As 2 and 6 are redundant of disclosure currently provided by ETFs, including in the paragraph preceding the fee table. Further, we have substantive concerns regarding the quantitative disclosure proposed by Q&As 3 through 5. Most importantly, we are concerned that the proposed quantitative disclosures would quickly become stale, given the fast-moving nature of the U.S. trading markets. As a result, the disclosure could cause investors to expect a better – or worse – trading experience than the current market would actually provide. In addition, we would expect an investor's experience to depend materially on the investor's own trading strategy and broker, including the quality of execution provided by such broker. For both of these reasons, exposing registrants to liability under section 11 of the Securities Act seems unjustified. Accordingly, we encourage the Commission to focus its efforts with respect to Form N-1A on adopting amendments that provide investors with qualitative information on bid-ask spreads and avoid amendments that require quantitative disclosures, which may be misleading with respect to any given investor.

[19] Proposing Release at 37405.

Status of Authorized Participants as Principal Underwriters

We ask that the Commission confirm when adopting the Proposed Rule that authorized participants who buy and sell ETF shares in "creation units" from ETFs, for that reason alone, are not considered "principal underwriters" for purposes of the Act. Under a typical structure of an ETF, the principal underwriter of the ETF enters into an agreement with one or more authorized participants who are broker-dealers authorized to purchase and redeem "creation units." Typically, these agreements provide that the authorized participant acknowledge that some activities on its part, depending on the circumstances, may result in it being deemed a participant in a distribution in a manner which could render it a statutory underwriter and subject it to the prospectus delivery and liability provisions of the Securities Act. We believe that while these authorized participants may be considered to be statutory underwriters for purposes of the Securities Act, they should not be considered principal underwriters for purposes of the Act. If they were considered to be principal underwriters for this purpose, then other unintended consequences would follow. For example, a trustee of an ETF who owns shares of the authorized participant that is considered to be principal underwriter of the ETF would become an "interested person" of the principal underwriter under the section 2(a)(19)(B) of the Act and thus would be an interested person of the ETF.

We believe that the status of an authorized participant by itself does not give rise to status as a principal underwriter for purposes of the Act. Section 2(a)(29) of the Act provides that a "principal underwriter" of or for any investment company (other than a closed-end company), or of any security issued by such company, means any underwriter who as principal purchases from such company, or pursuant to contract has the right (whether absolute or conditional) from time to time to purchase from such company, any such security for distribution, or who as agent for such company sells or has the right to sell any such security to a dealer or to the public or both, but does not include a dealer who purchases from such company through a principal underwriter acting as agent for such company. We believe that authorized participants who contract to purchase or sell creation units from the ETF's statutory underwriter are not principal underwriters of the ETF. The statutory underwriter, not the authorized participant, is the one who acts as agent for the ETF and has the right to sell the creation units. Moreover, the plain language of section 2(a)(29) excludes from the definition of principal underwriter "a dealer who purchases from such company through a principal underwriter acting as agent" for the ETF.

While on its face this definition seems clear, we are not aware of any regulation or regulatory guidance that confirms this interpretation. Accordingly, we ask that the Commission confirm this interpretation, including addressing the risk of a court potentially reaching a contrary conclusion, which could have significant, adverse and unintended consequences.

Funds of Funds

We urge the Commission to consider the adoption of a companion rule under sections 6(c) and 12(d)(1)(J) of the Act or the issuance of a no-action letter to permit registered funds to purchase shares of ETFs in excess of the limits established by section 12(d)(1)(A) and to permit ETFs, their principal underwriters and broker-dealers to sell the shares of ETFs in excess of the limits

established by section 12(d)(1)(B) of the Act ("fund-of-funds relief").[20] In our experience, most (if not all) ETFs operating in the marketplace today have obtained fund-of-funds relief in connection with obtaining ETF relief, and they routinely rely on it. Accordingly, we agree with the Commission's determination not to rescind such relief in connection with any rescission of existing exemptive orders.[21] However, the Proposed Rule would not provide the same fund-of-funds relief for future ETFs that operate in reliance on the rule. As a result, such ETFs would need to obtain such relief from the Commission through the exemptive applications process. There are two important disadvantages to forcing such ETFs into the exemptive applications queue. First, until they were able to obtain such relief, they would operate at a competitive disadvantage relative to existing ETFs. Second, an important public benefit of the Proposed Rule is its potential to allow the exemptive applications staff in the Division of Investment Management ("Division") to turn their attention away from routine exemptive requests, such as for fund-of-funds relief, and to more novel and innovative matters confronting the Division. To the extent that the Commission does not believe that the time is right for a companion fund-of-funds rule for the Proposed Rule, including due to the potential for broader section 12(d)(1) reforms,[22] we recommend that the Commission direct its staff to issue a no-action letter providing ETFs that operate in reliance on the Proposed Rule with the same fund-of-funds relief, subject to the same terms and conditions, that existing ETFs have pursuant to exemptive order.[23]

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[20] When the Commission originally proposed rule 6c-11 in 2008, it also proposed rule 12d1-4 as a companion rule. Rule 12d1-4, as then proposed, would have provided a type of fund-of-funds relief. *See* 2008 Release.

[21] The Proposing Release states that, other than the master-feeder relief granted to ETFs that do not currently rely on the master-feeder relief, the Commission is not proposing to rescind the section 12(d)(1) relief granted in those prior orders.

[22] Agency Rule List - Spring 2018, Securities and Exchange Commission (May 9, 2018).

[23] *E.g.,* Motley Fool Asset Management, LLC, Investment Company Act Release Nos. 33141 (June 28, 2018) (notice) and 33167 (July 24, 2018) (order).

The Committee and Subcommittee appreciate the opportunity to comment on the Proposed Rule and respectfully request that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the Staff, and to respond to any questions.

Very truly yours,

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Chair of the Federal Regulation of Securities Committee

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