Cboe Global Markets

November 16, 2018

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File Number SR-CboeBZX-2018-044 (the "Proposal")

Dear Mr. Fields:

Cboe Global Markets, Inc. ("Cboe") appreciates the opportunity to submit this comment letter in response to the request for comments in the Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposal[1] and express its belief that the Securities and Exchange Commission (the "Commission") should approve the Proposal make clear that a series of Index Fund Shares meets the quantitative requirements of Rules 14.11(c)(3), (4), and (5) where either the index or portfolio holdings underlying such fund meets the quantitative requirements.

Cboe operates four registered national securities exchanges in the U.S. for the trading of equity securities, one of which, Cboe BZX Exchange, Inc., (the "Exchange") is a listing venue that currently lists 279 exchange-traded products ("ETPs") from 52 sponsors. Cboe is a leading exchange operator for the trading of ETPs, with its four equity exchanges accounting for 20.4% of the daily trading volume in ETPs.[2]

As noted above, Cboe is submitting this comment letter in support of the Proposal and to respond to the Commission's request for comments.

---

1 See Securities Exchange Act Release No. 84378 (October 5, 2018), 83 FR 51745 (October 12, 2018) (Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Amend BZX Rule 14.11(c)(Index Fund Shares)) (the "Order").

2 Based on data from September, 2018.

Background

The Exchange submitted the Proposal in order to make clear that any instance of the phrase "index or portfolio" or "portfolio or index" in Rule 14.11(c), shall be interpreted as referring to the constituents of the underlying index or the portfolio holdings of the series of Index Fund Shares. Practically, the Proposal provides that a series of Index Fund Shares will be deemed to meet the Generic Listing Standards[3] on a continuous basis where the underlying index meets the Generic Listing Standards or the fund's portfolio holdings meet the Generic Listing Standards. The Generic Listing Standards were designed to allow certain series of Index Fund Shares to be listed on the Exchange that, by virtue of meeting certain quantitative standards, are deemed as not being susceptible to manipulation and for which the creation and redemption process and arbitrage mechanism will operate efficiently. Historically, Rule 14.11(c) provided that the Generic Listing Standards did not apply on an ongoing basis and meeting such requirements was required only prior to the series of Index Fund Shares being listed on the Exchange. Because such determination occurred prior to listing on the Exchange, the index constituents constituted a better means for determining whether a series of Index Fund Shares would be susceptible to manipulation and whether the creation and redemption process and arbitrage mechanism would operate efficiently because the underlying index constituents are much more fully developed and less theoretical than both the portfolio holdings of a yet to be launched fund or a sample portfolio, respectively. However, the Exchange believes that both the plain language of the rule text and common sense dictates that after a series of Index Fund Shares is listed on the Exchange, both the index constituents and the portfolio holdings are equally viable for evaluating whether the shares are susceptible to manipulation and the efficiency of the creation and redemption process and the arbitrage mechanism.

The Order

In the Order, the Commission specifically requested commenters' views on the sufficiency of the Exchange's statements in support of the proposal and, in particular, regarding whether the proposal would result in the listing and trading of Index Fund Shares that are susceptible to manipulation because they overlie indexes that do not meet the listing standards under BZX Rule 14.11(c). The Commission also requested comment regarding whether the 80% Rule or any other safeguard would help assure that, as long as the portfolio holdings meet the listing standards under BZX Rules 14.11(c)(3), (4), and (5), the Index Fund Shares would not be

---

[3] Rule 14.11(c) excluding Rule 14.11(c)(3)(A)(iii), 14.11(c)(8), 14.11(c)(9)(B)(i)(b), and 14.11(c)(10) shall generally be referred to as the "Generic Listing Standards."

susceptible to manipulation. The Commission also requested comment regarding whether the proposal sufficiently addressed manipulation risk by merely applying, without change, the current listing standards under BZX Rules 14.11(c)(3), (4), and (5) that are applicable to the underlying index to the portfolio holdings of a series of Index Fund Shares. Moreover, the Commission requested comment regarding whether the Exchange has sufficiently justified the flexibility it seeks under the proposal, which would allow the Exchange to choose to apply the listing standards under BZX Rules 14.11(c)(3), (4), and (5) to either the portfolio holdings or the underlying index, both at the time of initial listing and at any time thereafter. Finally, the Commission requested comment regarding the sufficiency of the Exchange's statements in support of the deletion of certain references to the term "portfolio" in BZX Rules 14.11(c)(1)(C), 14.11(c)(8), and 14.11(c)(9)(B)(i)(b).

As noted above and throughout, the Exchange believes that the Proposal is consistent with the Act, that the Exchange sufficiently justified and described all proposed changes to Rule 14.11(c), and that the Commission should approve the Proposal.

Policy Discussion

As noted in Amendment No. 1 to the Proposal, the Exchange understands that allowing the portfolio holdings of a series of Index Fund Shares to satisfy the Generic Listing Standards may raise concerns that a series of Index Fund Shares may potentially be based on an index that does not meet the Generic Listing Standards and therefore may be susceptible to manipulation. The Exchange, however, points out that such concerns fail to acknowledge the status quo – that a series of Index Fund Shares could be based on an index that meets the Generic Listing Standards, but have portfolio holdings that do not meet the Generic Listing Standards, meaning that the actual holdings of a fund could theoretically be susceptible to manipulation and/or the creation and redemption process and arbitrage mechanism would not operate efficiently. The Exchange believes that if such a scenario is consistent with the Act, then the inverse would also be consistent with the Act – where the portfolio holdings of a series of Index Fund Shares meet the Generic Listing Requirements and are therefore not susceptible to manipulation and will allow for an efficient arbitrage mechanism, but the underlying index may not meet the Generic Listing Standards and that there is no meaningful policy reason to distinguish between the two scenarios.

Further to this point, the Exchange also notes that any series of Index Fund Shares listed on the Exchange would also be required to meet all requirements applicable under the

Investment Company Act of 1940, including Rule 35d-1[4] requiring a series of Index Fund Shares to invest at least 80% of its assets in investments connoted by the applicable index (the "80% Rule").[5] Where an underlying index meets the Generic Listing Standards, the 80% Rule acts as a backstop that provides a general assurance that even if the portfolio holdings do not meet the Generic Listing Standards, they will have significant overlap with the index constituents that do meet the Generic Listing Standards. Similarly, if the portfolio holdings were used to comply with the Generic Listing Standards, the 80% Rule would provide assurances that the underlying index constituents would have significant overlap with the portfolio holdings that meet the Generic Listing Standards.

As such, the Exchange does not believe that allowing the portfolio holdings of a series of Index Fund Shares to satisfy the Generic Listing Standards will increase the susceptibility to manipulation of Index Fund Shares listed on the Exchange. The 80% Rule will act as a backstop in a manner similar to the way it does today by ensuring that there is significant overlap between the portfolio holdings of a series of Index Fund Shares that meets the Generic Listing Standards and the underlying index constituents.

The Exchange continues to believe that Portfolio holdings are at least as accurate of a measure as the index constituents to evaluate whether a series of Index Fund Shares is consistent with the policy goals after such fund is already listed and trading on the Exchange. When determining whether a series of Index Fund Shares is going to be susceptible to manipulation and how efficiently the creation and redemption process and the arbitrage mechanism will operate, the Generic Listing Standards require that the underlying assets associated with a series of Index Fund Shares are sufficiently liquid, diverse, unconcentrated, and large. The portfolio holdings are arguably a better means for making this determination than the index constituents because the portfolio holdings reflect the actual assets held by the series of Index Fund Shares while the index constituents are just the assets that the series is designed to track. As such, the Exchange is proposing that where either the portfolio holdings or the index constituents meet the Generic Listing Standards, the series of Index Fund Shares should be considered to meet the Generic Listing Standards and be able to continue to be listed on the Exchange.

Further, every index is bound by its respective methodology. This process is intentionally out of the control of the issuers, whose products are ultimately required to meet the Generic

4 17 CFR 270.35d-1.

5 See Investment Company Act Release No. 24828 (January 17, 2001), 66 FR 8509 (February 1, 2001) at 8511.

Listing Standards. While it makes sense to look to the index constituents for compliance with the Generic Listing Standards on an initial basis, it becomes problematic on an ongoing basis. Where the index constituents no longer meet the Generic Listing Standards, the only way that the constituents can get back into compliance is through natural market movements, an index rebalance, a change to the index methodology, or a change of index. It is not feasible for an issuer to rely on natural market movements to bring a series of Index Fund Shares back into compliance with the Generic Listing Standards. An index rebalance may bring a series of Index Fund Shares back into compliance with the Generic Listing Standards, but it isn't guaranteed (index providers do not generally consider the Generic Listing Standards in constructing indexes) and may not occur within the time frame of the cure periods provided under Rule 14.12 (rebalances generally occur quarterly or annually).[6] Changes to an index methodology or changing the underlying index would require significant effort and months of notice, again putting the timeline for implementation outside of the window for the cure periods in Rule 14.12. Providing that a series of Index Fund Shares meets the Generic Listing Standards where the portfolio holdings meet the Generic Listing Standards will allow issuers with a greater degree of control over whether their products meet their ongoing listing obligations. While such portfolio holdings will still be required to meet the requirements under the Investment Company Act of 1940 related to tracking the underlying index and the 80% Rule, as further discussed below, such flexibility will allow issuers to continue to meet the Generic Listing Standards even where an underlying index narrowly fails to meet them.

Additionally, the generic listing standards applicable to a series of Managed Fund Shares under Rule 14.11(i) look only to portfolio holdings to determine compliance with ongoing listing obligations.[7] While there are certain differences between the generic listing standards applicable to Index Fund Shares and Managed Fund Shares, the only substantive difference between the two product types is that Index Fund Shares are designed to track the returns of an underlying index and Managed Fund Shares employ an actively managed portfolio that is designed to accomplish an investment objective rather than tracking an index. The Commission determined that using the portfolio holdings to measure compliance with the generic listing standards for Managed Fund Shares was consistent with the Act in the Active Generics Approval Order. The Exchange believes that the same rationale underlying the

6 Rule 14.12 and, more specifically, Rule 14.12(f)(2)(B)(i) allow for an extension of up to 180 calendar days from initial notice of non-compliance with the Generic Listing Standards.

7 See Securities Exchange Act Release No. 78396 (July 22, 2016), 81 FR 49698 (July 28, 2016) (SR-BATS-2015-100) (the "Active Generics Approval Order").

Active Generics Approval should be extended to Index Fund Shares because the same concerns related to manipulation and the efficiency of the arbitrage mechanism exist for both Managed Fund Shares and Index Fund Shares, regardless of whether a fund is designed to track an underlying index or not. As such, the Exchange believes that it would be consistent with the Act for compliance with the Generic Listing Standards to be evaluated based on either the series of Index Fund Shares underlying index constituents or portfolio holdings.

Finally, the Exchange believes that the proposed changes to delete references to the term "or portfolio" are incidental to the interpretive changes proposed and are only intended to make clear that the language should be interpreted in a manner consistent to the way that the language is interpreted today. As such, the Exchange believes that its statements in support of the deletion of such references are sufficient.

In sum, the Exchange believes that by allowing a series of Index Fund Shares to comply with the Generic Listing Standards where either its portfolio holdings or index constituents meet the Generic Listing Standards, the proposal would provide issuers with significant additional regulatory certainty related to a fund's ability to continue to be listed and traded on the Exchange pursuant to the Rule 19b-4(e), while simultaneously continuing to accomplish the policy goals underlying the Generic Listing Standards.[8] The Exchange believes that this proposal would enhance competition among market participants, to the benefit of investors and the marketplace. In addition, the proposed changes would create greater investor confidence in exchange-traded products generally because there will be a greater degree of certainty that Index Fund Shares will not be subject to regulatory action or delisting.

*****

Cboe appreciates the opportunity to reply to the request for comments in the Order. As discussed above, Cboe believes that the Proposal is consistent with the Act and that it provides significant benefits to numerous parties without sacrificing any of the policy goals that the Generic Listing Standards are intended to address. As such, Cboe encourages the Commission to approve the Proposal. Cboe welcomes the opportunity to provide the Commission with any additional information that it might find useful or to further discuss any of the issues raised herein.

---

8 As noted in Amendment No. 1 to the Proposal, the Exchange does not believe that this proposal will result in any meaningful additional costs associated with regulatory review, however, to the extent that it does, the Exchange represents that it either already has or will dedicate sufficient additional resources to perform such reviews

Sincerely,

Kyle Murray
Assistant General Counsel