INVESTMENT COMPANY INSTITUTE

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January 12, 2017

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

Re: Comments on Continued Listing Standards for Exchange-Traded Products
File No. SR-NASDAQ-2016-135
File No. SR-BatsBZX-2016-80
File No. SR-NYSEArca-2017-01

Dear Mr. Fields:

The Investment Company Institute[1] appreciates the opportunity to comment on the above-listed rule filings submitted by The Nasdaq Stock Market LLC, Bats BZX Exchange, Inc., and NYSE Arca, Inc. The proposed rules would impose for the first time continued listing standards on certain ETFs that would be identical to their initial listing standards. While ICI generally is supportive of continued listing standards for ETFs, we have significant concerns about the proposed rules. We strongly urge the exchanges to withdraw the rule filings for further consideration and, if the exchanges do not, we believe the SEC must disapprove the filings because it has no basis to approve them.

First, none of the rule filings provides even minimally sufficient detail to understand how an ETF can comply with the proposed rules and how the exchanges would enforce it.

For example, ETFs quite frequently use indexes established and maintained by unaffiliated third parties. The rules appear to anticipate that the ETF can ensure that the unaffiliated index complies with initial listing standards on an ongoing basis, but that is an unrealistic assumption. Under the proposed rules,

[1] The Investment Company Institute ("ICI") is a leading global association of regulated funds, including mutual funds, exchange-traded funds ("ETFs"), closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$18.4 trillion in the United States, serving more than 95 million US shareholders, and US$1.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

an equity-indexed ETF, through no fault of its own, could see certain of the constituent securities of the unaffiliated index drop below the minimum monthly trading volume requirements set forth in an initial listing standard. Even if the ETF does not hold any of those constituent securities in its own portfolio, under the proposed rules, the ETF could be deemed to have fallen out of compliance with the continued listing standards. The proposed rules do not explain adequately the process by which an exchange would immediately designate the ETF with a "below compliance" indicator and engage in delisting proceedings. ETF investors will be the ones that suffer under these consequences.

Second, the proposed rules would result in differential treatment of ETFs as compared to other securities, with no explanation for why that is appropriate. There is a long history of different initial and continued listing standards on US exchanges, and continued listing standards for equity securities generally differ from initial listing standards to reflect the need for a customized approach for trading after the initial listing.[2] None of the rule filings explains why it is appropriate to have customized ongoing listing standards for other equity securities, but identical initial and continued listing standards for ETFs. In fact, there is no explanation for this treatment of ETFs. As such, the proposed rules, if approved, will result in unfair discrimination among issuers in a way that is inconsistent with Section 6(a)(5) of the Securities Exchange Act of 1934.

Third, the rule filing asserts a concern about potential manipulation of ETFs, but the filings provide no evidence, or even explanation, for what this concern might be. The filings further do not explain how the proposed continued listing standards address whatever concern about manipulation might exist. There simply is no explanation of a nexus between the stated concern and the proposed rules. None of the rule filings explain how the rule changes would reduce the potential for manipulation, particularly when such a requirement has not been applied to other securities.

ETFs have been listed on exchanges for more than 25 years.[3] Although we recognize that in certain instances, rule filings for specific ETFs have required that the ETF continue to meet initial listing standards, we are not aware of any Commission or exchange guidance to indicate that the initial and continued listing standards are the same. To the contrary, we note that the Commission issued an extensive request for comment on exchange-traded products in 2015,[4] seeking comment on 53 subjects. Item 31 stated as follows:

> Exchange listing standards for ETP Securities often contain both initial listing criteria and continuing listing criteria. The initial listing criteria include requirements that must be met when ETP Securities are initially listed on an exchange. The continuing listing criteria include requirements that must be met on an ongoing basis. Should

[2] *See, e.g.*, Nasdaq Rules 5315 and 5450; Bats Rule 14.8; and NYSE Arca Rules 5.2(c) and 5.5(b).

[3] NYSE Arca Rule 5.5(l).

[4] Request for Comment on Exchange-Traded Products, Rel. No. 34-751-65; File No. S7-11-15 (Jun. 12, 2015).

> exchange listing standards always contain both initial and continuing listing criteria? Should initial and continuing listing standards for ETP Securities be substantially identical?

ICI's review of the 40 comments that the SEC received indicates that only two commenters addressed the question, and neither provided reasoned support for identical listing standards. That the Commission publicly asked this question makes clear the inaccuracy of the statement in the rule filings that they simply are codifying long-standing guidance or a clarification of existing rules. Moreover, the SEC's questions do not point to any nexus with potential manipulation.

Finally, the potential for ETFs, through no action of their own, to be delisted raises very serious economic consequences for investors and the ETFs themselves.

There simply is no adequate statutory or policy basis for the SEC to approve the proposed rules in their current form. We acknowledge the desire of the SEC staff to work with the exchanges to implement ongoing listing standards. We stand ready to assist in those efforts, with a goal of customized ongoing standards that do not create unavoidable compliance traps. We respectfully urge these filings to be withdrawn or disapproved to provide another opportunity to get the standards right.

We look forward to working with the SEC as it continues to examine these critical issues. In the meantime, if you have any questions, please feel free to contact me directly at [redacted], Jane G. Heinrichs, Associate General Counsel, at ([redacted] or Kenneth C. Fang, Assistant General Counsel, at ([redacted].

Sincerely,

/s/ David W. Blass

General Counsel

cc: The Honorable Mary Jo White
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar

Stephen I. Luparello, Director, Division of Trading and Markets
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