

COMMENT LETTER

July 11, 2017

ICI Files Letters With SEC Requesting an Extension of Continued Listing Standards Implementation Date (pdf)

July 11, 2017 Mr. Brent J. Fields Secretary Securities and Exchange Commission 100 F Street, NE Washington, D.C. 20549 Re: Request for Extension of Continued Listing Standards Implementation Date File No. SR-NASDAQ-2016-135 File No. SR-BatsBZX-2016-80 File No. SR-NYSEArca-2017-01 Dear Mr. Fields: The Investment Company Institute¹ is writing to express concerns regarding the approaching October 1, 2017 implementation date for new exchange rules that will affect certain funds listed on the Nasdaq Stock Market LLC, Bats BZX Exchange, Inc., and NYSE Arca, Inc. The rules would impose for the first time continued listing standards on certain exchange-traded funds that are identical to their initial listing standards. Our members, including some of the world's largest ETF sponsors, have worked and continue to work diligently toward meeting the impending deadline but are experiencing substantial challenges obtaining clarification on how the standards must be applied. This, in turn, is significantly delaying the necessary work to ensure that fund systems will be able to monitor compliance adequately and take appropriate actions within the short implementation timeframe. As adopted, the rules do not provide sufficient details to our members about how the exchanges will implement compliance and plans of remediation, thereby making it more difficult for the members to complete the design and testing of their compliance systems. Indeed, in our comment letter on the 1 The Investment Company Institute (ICI) is the leading association representing regulated funds globally, 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\$19.9 trillion in the United States, serving more than 95 million US shareholders, and US\$5.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC. Mr. Brent J. Fields July 11, 2017 Page 2 of 3 proposed rules,² we explained that unaffiliated, third parties establish the methodologies and maintain the indexes upon which many ETFs are based, and it is unclear how those ETFs will be expected to ensure that an unaffiliated index complies with listing standards on an ongoing basis, how the plans of remediation will work, and what impact the rules could have on ETFs and individual investors.³ Several questions remain unanswered. For example, the rules do not define what is meant by "continuous" and, accordingly, members do not know the appropriate frequency of index testing. In this regard, we recommend testing be tied to index rebalance dates because certain indexes may become

compliant upon rebalance and more frequent monitoring may prove to be practically impossible. In addition, as we noted in our comment letter, an equity-indexed ETF, through no fault of its own, could see certain of the constituent securities of its index drop below the minimum monthly trading volume requirements set forth in certain listing standards. Notwithstanding the fact that the ETF may not hold any of those constituent securities in its own portfolio, under the exchanges' new rules, the ETF could be deemed to have fallen out of compliance with the continued listing standards. At that point, it is unclear whether the exchange will provide for some period of time (aka "cure period") for the ETF to take steps to come back into compliance or whether the exchange would immediately designate the security with a "below compliance" indicator and engage in proceedings to delist the ETF.⁴ Further, members seek clarity as to whether specific Rule 19b-4 filings will be approved before the rules are implemented to allow already existing ETFs that cannot meet these newly imposed requirements to continue to operate under appropriate conditions. As we have discussed with the SEC staff, our members will need guidance from the exchanges on how the exchanges will interpret the rules before members can fully build out their systems to accommodate them. Shortly after the rules were amended, we held a series of joint calls with our members and the exchanges to relay several of these questions and seek responses. We followed those calls with written questions asking that the exchanges provide additional and, ideally, consistent guidance on how they will interpret and implement compliance and plans of remediation of the rules. We are hopeful that the exchanges will issue guidance shortly and, assuming that they do, our members will need additional time to source and track new data elements that will be necessary for their compliance monitoring systems. A delay also would provide firms with adequate time necessary to build out and test their systems and to develop consistent procedures. For these reasons, ICI urges the SEC to work with the exchanges to extend by nine months the rules' implementation date to July 1, 2018. The extension would allow ICI members time to work with

² See Letter from David W. Blass, General Counsel, Investment Company Institute, to Brent J. Fields, Secretary, Securities and Exchange Commission (January 12, 2017), available at <https://www.sec.gov/comments/sr-nysearca-2017-01/nysearca201701-1489582-130628.pdf>. ³ This concern also would apply to ETFs with affiliated index providers because regulatory requirements often require firewalls between advisory personnel of the ETF and the personnel of the affiliated index provider. ⁴ In addition to questions about cure periods, our members have identified an array of interpretive questions relating to how the new rules will apply to various asset classes. Mr. Brent J. Fields July 11, 2017 Page 3 of 3 the exchanges on guidance relating to compliance and plans of remediation that is necessary to ensure that ETF sponsors can meet the rules' new requirements. * * * * We look forward to working with the SEC as all parties implement these new rules. In the meantime, if you have any questions, please feel free to contact me directly at (202) 218-3563, Ken Fang at (202) 371-5430, assistant general counsel, or Jane Heinrichs, associate general counsel, at (202) 371-5410. Sincerely, /s/ Dorothy Donohue Dorothy Donohue Acting General Counsel cc: The Honorable Jay Clayton The Honorable Kara M. Stein The Honorable Michael S. Piwowar Heather Seidel, Acting Director, Division of Trading and Markets David Shillman, Associate Director, Division of Trading and Markets Elizabeth King, General Counsel and Corporate Secretary, NYSE Edward Knight, Executive Vice President and General Counsel, Nasdaq Laura V. Morrison, SVP, Global Head of Exchange Traded Products, Bats Global Markets