



December 18, 2020

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Proposed Rule Changes to Amend Exchange Listing Rules Applicable to Exchange-Traded Funds that can Rely Upon 1940 Act Rule 6c-11 (**File Nos. SR-CboeBZX-2020-036, SR-NASDAQ-2020-017 and SR-NYSEArca-2020-56**)

Dear Ms. Countryman:

The ETF Forum (the “**Forum**”) of the Asset Management Group (the “**AMG**”) of the Securities Industry and Financial Markets Association (“**SIFMA**”)¹ appreciates the opportunity to provide comments to the United States Securities and Exchange Commission (the “**Commission**”) on several recent rule changes proposed by the national securities exchanges that list shares of exchange-traded funds (“**ETFs**”) that are able to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940, as amended (the “**Investment Company Act**” or the “**1940 Act**”).² The listing exchanges are Cboe BZX Exchange, Inc. (“**Cboe**”), The Nasdaq Stock Market, LLC (“**Nasdaq**”) and NYSE Arca, Inc. (“**NYSE Arca**”).³ AMG is generally very supportive of the rationale for each proposed rule change, which we expect will make the ETF continuous listing process more equitable for newly-created ETFs, especially those sponsored by smaller ETF sponsors, without adversely impacting the ETF arbitrage mechanism.

Summary of the Proposed Rule Changes

The Exchanges recently amended their rules to eliminate most of the quantitative listing requirements and their continued listing requirements.⁴ For ETFs that are eligible to rely upon the ETF Rule, the new listing rules eliminated the continuous listing standards and most of the former quantitative listing standards, including issuer diversification, minimum market capitalization and various other

¹ SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG’s members represent U.S. and global asset management firms whose combined assets under management exceed \$45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit <http://www.sifma.org/amg>.

² Exchange-Traded Funds, Release Nos. 33-10695; IC-33646 (September 25, 2019), available at <https://www.sec.gov/rules/final/2019/33-10695.pdf> (the “**ETF Rule**”).

³ Each of Cboe, Nasdaq and NYSE Arca is an “**Exchange**” and collectively they are the “**Exchanges**”.

⁴ See <https://www.sec.gov/rules/sro/cboebzx/2020/34-88566.pdf> (Cboe); <https://www.sec.gov/rules/sro/nasdaq/2020/34-88561.pdf> (Nasdaq); and <https://www.sec.gov/rules/sro/nysearca/2020/34-88625.pdf> (NYSE Arca).

requirements, and also dispensed with the requirement that ETFs publish an intraday indicative value (“**IIV**”). While most quantitative listings standards were removed from these rules, a significant exception is that the requirement for ETFs to have at least 50 shareholders after the first 12 months of operations was retained.

Following up on their original listing rule changes, each of the Exchanges has proposed further rule changes relating to the minimum number of beneficial holders.⁵ Where the current requirement is that an ETF have at least 50 beneficial holders after the first 12 months of operation, the proposals would: (i) in the case of Nasdaq and NYSE Arca, change the requirement to require that the ETF have at least one creation unit outstanding after 12 months; and (ii) in the case of Cboe, change the requirement to give ETFs 3 years (not 12 months) to reach the 50 beneficial holder threshold. The specifics of each Exchange’s proposed rule change are set forth below.

Cboe

On April 29, 2020, Cboe filed with the Commission, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“**1934 Act**”) and Rule 19b-4 thereunder, a proposed rule change to amend one of the continued listing requirements relating to certain ETPs under BZX Rule 14.11. The proposed rule change was published for comment in the Federal Register on May 7, 2020.⁶ Cboe proposes to make several changes to Rule 14.11 in order to amend the continued listing standards applicable to ETFs listed on the Exchange. Specifically, Cboe is proposing to amend its rules such that they would provide additional time for an ETF to meet the applicable “beneficial holders”⁷ standards in the Exchange’s listing rules.

Currently, Cboe’s continued listing standards for ETFs require that, following the initial 12-month period after commencement of trading on the Exchange, the Exchange may suspend trading in and commence delisting proceedings for an ETF for which there are fewer than 50 beneficial holders for 30 or more consecutive trading days. Cboe is proposing to change the date at which an ETF would need to have at least 50 beneficial holders from 12 months after commencement of trading to 36 months after commencement of trading on the Exchange.

Nasdaq

On July 23, 2020, Nasdaq filed with the Commission, pursuant to Section 19(b)(1) of the 1934 Act and Rule 19b-4 thereunder, a proposed rule change to amend certain listing requirements relating to maintaining a minimum number of beneficial holders and minimum number of shares outstanding. The proposed rule change was published for comment in the Federal Register on August 7, 2020.⁸ Nasdaq

⁵ See <https://www.sec.gov/rules/sro/cboebzx/2020/34-88795.pdf> (Cboe); <https://www.sec.gov/rules/sro/nasdaq/2020/34-89464.pdf> (Nasdaq); <https://www.sec.gov/rules/sro/nysearca/2020/34-89197.pdf> (NYSE Arca).

⁶ On June 16, 2020, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change. On August 4, 2020, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change. On October 28, 2020, Cboe published a Notice of Designation of a Longer Period for Commission Action on Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend Rule 14.11, Other Securities.

⁷ Under the proposed rule change, “beneficial holders” means beneficial holders and, where applicable in a particular continued listing standard, record holders.

⁸ On September 10, 2020, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change. On November 5, 2020, the Commission issued an order to institute proceedings to determine whether to approve or disapprove the proposed rule change.

proposes to amend Nasdaq Rule 5704 to: (1) remove the requirement that, twelve months after the commencement of trading on the Exchange, an ETF must have 50 or more beneficial holders; and (2) replace its existing minimum number of shares requirement with a requirement that each ETF have a sufficient number of shares outstanding at the commencement of trading to facilitate the formation of at least one creation unit. Currently, Nasdaq rules require that an ETF have a minimum of 100,000 shares outstanding upon initial listing, and 50,000 shares outstanding to maintain a continuous listing.

NYSE Arca

On June 18, 2020, NYSE Arca filed with the Commission, pursuant to Section 19(b)(1) of the 1934 Act and Rule 19b-4 thereunder, a proposed rule change to amend certain listing requirements relating to maintaining a minimum number of beneficial holders and minimum number of shares outstanding. The proposed rule change was published for comment in the Federal Register on July 7, 2020.⁹ NYSE Arca proposes to amend the rules applicable to ETFs to (1) remove the listing requirement that, following the initial twelve-month period after commencement of trading of an ETF's shares on the Exchange, such ETF have at least 50 beneficial holders, and (2) replace the existing minimum number of shares requirements with a requirement that an ETF have at least one creation unit outstanding on an initial and continued listing basis. The NYSE Arca proposal is essentially the same as the Nasdaq proposal.

AMG's View of the Proposed Rule Changes

AMG agrees with the Exchanges that the requirement that ETF shares listed on the Exchange must have at least 50 beneficial holders does not provide any insight into the liquidity of an ETF's shares. The requirement therefore does not appear to provide any meaningful investor-protection benefits. There is a loose connection, at best, between the number of shareholders and the liquidity of an ETF's shares. While an ETF's average daily trading volume ("ADTV") may be at least in part a function of the number of the ETF's shareholders, the relationship between ADTV and the ETF's liquidity is very different from the liquidity of a stock with a fixed number of outstanding shares. The ETF's liquidity is primarily a function of the liquidity of the ETF's underlying securities, and ADTV provides only an incomplete measure of the ETF's liquidity due to the ETF's open-ended structure. ETF shares can be created and redeemed based on investor demand, and the creation and redemption and arbitrage processes tap into the liquidity of an ETF's underlying securities, which mitigates potential price manipulation concerns. As a result, investors can readily trade ETF shares in amounts that exceed an ETF's ADTV without significantly affecting the ETF's share price.

Further, even if the 50 beneficial holder requirement at one time served a purpose, AMG believes the requirement is no longer necessary in light of the provisions of the ETF Rule. Specifically, AMG believes that the ETF creation and redemption process, when coupled with the ability of ETF shareholders to trade ETF shares on an Exchange in the secondary market and the enhanced disclosures mandated by the ETF Rule, mitigates the potential price manipulation and lack of liquidity that we understand the 50 beneficial holder requirement was intended to address.

In AMG's view, the enhanced disclosure requirements of the ETF Rule will help facilitate effective arbitrage by providing investors with transparency into the ETF's portfolio holdings that will help ensure that the market price of the ETF's shares remains in line with the ETF's net asset value per share ("NAV"). Further, we note that section (c)(1)(vi) of the ETF Rule requires additional disclosure if an

⁹ On August 17, 2020, pursuant to Section 19(b)(2) of the Act, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change. On October 2, 2020, the Commission issued an order to institute proceedings to determine whether to approve or disapprove the proposed rule change.

ETF's premium or discount exceeds 2% for more than seven consecutive days, which will provide investors with additional insight into the effectiveness of an ETF's arbitrage mechanism.

If the Commission disagrees that the 50 beneficial holder requirement should be eliminated in its entirety, AMG recommends that the Commission adopt the approach suggested by Cboe – that it would be more appropriate to measure the number of beneficial holders after 36 months rather than 12 months. AMG agrees with Cboe that it is appropriate to increase the period of time for an ETF to comply with the applicable beneficial holders requirement from 12 months to 36 months because it would bring Cboe's rules more in line with the time it often takes for an ETF to reach scale. In many cases, it may take an ETF several years for an ETF to gain significant market acceptance and to gather assets. This is in part due to the fact that many investment platforms require a three-year track record before making investment products available to their clients. Further, product sponsors often offer complementary products as part of a “family” of ETFs where different ETFs are designed to take advantage of different market conditions. Requiring ETFs to have a minimum number of shareholders one year after launch does not account for the lifecycle of these ETFs and potentially limits investor choice while providing few, if any, benefits to investors. Finally, requiring an ETF to have a minimum of 50 beneficial holders after only 12 months puts newer and smaller ETF sponsors at an unnecessary disadvantage to larger sponsors having the enterprise-wide scale and distribution reach to gather assets in the months after launch. In these ways, the 50 beneficial holder requirement potentially limits innovation and investor choice, without providing appreciable investor protection benefits.

One potentially counter-productive effect of the current regulatory regime is that ETFs that do not meet the 50 beneficial holder minimum are required to post an indicator adjacent to their ticker symbol noting that they are not in compliance (i.e., a “below compliance” or “bc” indicator). This indicator may serve as a deterrent very early in the life cycle of a product to attracting additional investors. Eliminating or delaying the 50 beneficial holder requirement will give ETF sponsors, especially smaller ETF sponsors, breathing room to gather additional assets and shareholders.

To gain a better understanding of ETF issuers' practices regarding the lifecycle of funds and when the decision to delist and terminate an ETF is typically made, the Forum conducted a survey of its members. The survey sought information on (i) level of assets, (ii) number of beneficial holders, and (iii) various trading measures of newly-listed ETFs over 12- and 36-month periods following initial listing. What the survey revealed is that ETF sponsors often make decisions about whether to delist and terminate funds with low levels of assets after approximately 3 years. In addition, the survey showed that the level of assets and number of shareholders was often improved after three years, in some cases significantly. Further, traditional trading measures such as ADTVs tended to be improved by the end of three years relative to those after one year.¹⁰ The economic and competitive structures in place in the ETF ecosystem incentivize issuers to liquidate products rather than continuing to list products that do not garner investor interest or fit into their overall fund lineups. Because the number of shareholders in an ETF does not appear to be a significant consideration in an ETF sponsor's decision to delist and terminate an ETF, and because this requirement does not appear to offer investor protection benefits, AMG believes that the Exchanges should not be required to suspend or delist ETFs that do not have 50 or more beneficial holders after 12 months.

¹⁰ Data from one large ETF sponsor shows that liquidity tends to build between 12 and 36 months after launch.

In addition, their data shows:

- The median shareholder count increased over ten-fold between 12 and 36 months after launch.
- Secondary market liquidity, a key benefit of ETFs, saw a similar growth trajectory between 12 and 36 months after launch.
- Median spreads tightened by 3 bps between 12 and 36 months after launch.

* * * * *

Conclusion

Since an ETF's prices are linked to its underlying investments, ETF shares are not subject to the same type of price manipulation concerns present with other stocks. The ability of market participants to engage in arbitrage activities provides a means to bring an ETF's share price in line with intrinsic value. Having a limited number of beneficial holders should not impact the effectiveness of the arbitrage mechanism, and does not offer any investor protection benefits. AMG believes that the Commission should approve Exchange listing rules that either eliminate the 50 beneficial holder requirement or make the 50 beneficial holder requirement applicable 36 months after initial listing rather than 12 months after listing. Further, the Forum believes that the elimination or delay in the application of the 50 beneficial holder requirement will primarily benefit smaller ETF sponsors that do not have the scale or widespread distribution capabilities to ensure a successful ETF launch in only 12 months.

AMG appreciates the efforts of the Exchanges and the Commission to update and simplify listing rules in light of the adoption of the ETF Rule, and believes that modifying or eliminating the 50 beneficial holder requirement is consistent with the way ETF issuers evaluate the viability of their products. We would be pleased to discuss these comments at your convenience. Please do not hesitate to contact either Timothy Cameron at [REDACTED] or Lindsey Keljo at [REDACTED], or our outside counsel, Edward Baer, Ropes & Gray LLP, at [REDACTED], with any questions.

Sincerely,



Timothy W. Cameron, Esq.
Asset Management Group – Head
SIFMA AMG



Lindsey Weber Keljo, Esq.
Asset Management Group – Managing
Director and Associate General Counsel
SIFMA AMG

cc: Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission
Honorable Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
Honorable Elad L. Roisman, Commissioner, U.S. Securities and Exchange Commission
Honorable Allison Herren Lee, Commissioner, U.S. Securities and Exchange Commission
Honorable Caroline A. Crenshaw, Commissioner, U.S. Securities and Exchange Commission
Mr. Brett Redfearn, Director, Division of Trading & Markets, U.S. Securities and Exchange Commission
Ms. Dalia Blass, Director, Division of Investment Management, U.S. Securities and Exchange Commission