

May 24, 2019

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

Re: File Number SR-CboeBZX-2018-044

Dear Ms. Countryman:

The Asset Management Group (the “**AMG**”) of the Securities Industry and Financial Markets Association (“**SIFMA**”) appreciates the opportunity to submit this comment letter in opposition to the Order of Disapproval (the “**Disapproval**”)¹ issued by the Division of Trading and Markets (the “**Division**”) of the Securities and Exchange Commission (the “**Commission**”) of a proposed rule change submitted by the Cboe BZX Exchange, Inc. (the “**Exchange**”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (the “**1934 Act**”) and Rule 19b-4 thereunder, to amend BZX Rule 14.11(c) to permit either the portfolio holdings of a series of Index Fund Shares on the index underlying a series of Index Fund Shares to satisfy the listing standards under BZX Rules 14.11(c)(3), (4), and (5) (the “**Proposal**”).² Shortly after the Disapproval, the Commission agreed to review the Division’s decision, made pursuant to delegated authority, to disapprove the Proposal,³ and gave interested parties the opportunity to comment on the Disapproval.⁴ AMG agrees with the Exchange’s assertion in the Proposal that a series of Index Fund Shares⁵ should meet the quantitative requirements of Rules 14.11(c)(3), (4), and (5) where either the index or portfolio holdings underlying such fund meet the quantitative requirements of those Rules, and is submitting this comment letter in support of the Proposal and in opposition to the Disapproval.

Background

¹ Order Disapproving a Proposed Rule Change, Securities Exchange Act Release No. 34-85278; File No. SR-CboeBZX-2018-044 (March 8, 2019), available at <https://www.sec.gov/rules/sro/cboebzx/2019/34-85278.pdf>.

² Notice of Filing of a Proposed Rule Change to Amend BZX Rule 14.11(c), Index Fund Shares, Securities Exchange Act Release No. 34-83594; File No. SR-CboeBZX-2018-044 (July 5, 2018), available at <https://www.sec.gov/rules/sro/cboebzx/2018/34-83594.pdf>.

³ Notification Pursuant to Rule 431 of the Commission’s Rules of Practice of Commission Review of Decision Pursuant to Delegated Action (March 18, 2019), available at <https://www.sec.gov/rules/sro/cboebzx/2019/cboebzx-2018-044-acknowledgement-letter-031819.pdf>.

⁴ Order Scheduling Filing of Statements on Review, Securities Exchange Act Release No. 85682 (April 17, 2019), available at <https://www.sec.gov/rules/sro/cboebzx/2019/34-85682.pdf>.

⁵ Certain capitalized terms used herein have the meanings ascribed to them in Exchange Rule 14.11. See, https://cdn.cboe.com/resources/regulation/rule_book/BATS_Exchange_Rulebook.pdf, at 247, *et seq.*

The Proposal provides that a series of Index Fund Shares will be deemed to meet the Division's Generic Listing Standards 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.

In January 2018, the Exchange's continued listing standards for Index Fund Shares and Managed Fund Shares went into effect.⁶ Despite industry calls for the continued listing standards for Index Fund Shares to be applied at either the index or portfolio level (as set forth in the Proposal), as adopted, the continued listing standards are to be applied at the index level. Thereafter, the Exchange filed the Proposal, believing 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. AMG agrees with the Exchange's assertion.

Portfolio holdings are at least as accurate of a measure as the index constituents to evaluate whether a series of Index Fund Shares is operating 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. In AMG's view, the portfolio holdings arguably provide 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, 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.

⁶ Securities Exchange Act Release Nos. 80169 (March 7, 2017), 82 FR 13536 (March 13, 2017) (SR-BatsBZX-2016-80) (order approving the application of listing standards on a continuous basis) (<https://www.sec.gov/rules/sro/batsbzx/2017/34-80169.pdf>) (the "Adopting Order") and 81777 (September 29, 2017), 82 FR 46583 (October 5, 2017) (notice of filing and immediate effectiveness of proposed rule change to extend implementation to January 1, 2018) (<https://www.sec.gov/rules/sro/batsbzx/2017/34-81777.pdf>). For examples of the requirements of the continued listing standards, see Rule 14.11(c)(9)(B) (Index Fund Shares) and Rule 14.11(i)(4)(B) (Managed Fund Shares). See also, <https://cdn.cboe.com/resources/listings/FAQs-NewContListStandards.pdf>.

Further, every index is bound by its respective methodology. This process is often intentionally out of the control of the issuers. 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 (a) natural market movements, (b) an index rebalance, (c) a change to the index methodology, or (d) a change of index.

In AMG's view, 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. Where an index rebalance may bring a series of Index Fund Shares back into compliance with the Generic Listing Standards, it is not guaranteed to do so because index providers do not generally consider the Generic Listing Standards in constructing indexes. Moreover, an index rebalance may not occur within the time frame of the cure periods provided under Rule 14.12 since index rebalances generally occur quarterly or annually. Further, requesting 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. By providing that a series of Index Fund Shares meets the Generic Listing Standards where the portfolio holdings meet the Generic Listing Standards, the Commission will allow issuers with a greater degree of control over whether their products meet their ongoing listing obligations.⁷ Moreover, since only the portfolio's trades produce a market impact, regulating the portfolio is much more effective than regulating the index where there are concerns about potential manipulation of underlying securities and the efficiency of the arbitrage mechanism.

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.⁸ 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 1934 Act in the Active Generics Approval Order.⁹ AMG agrees with the Exchange that the same rationale underlying the Active Generics Approval Order 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.

⁷ ETF portfolio holdings will still be required to meet the requirements under the Investment Company Act of 1940 related to tracking the underlying index, as well as Rule 35d-1 thereunder. In addition, most index ETFs currently contain representations in the Commission exemptive orders that they will invest at least 80% or even 90% of their assets in index components.

⁸ Rule 14.11(i)(4)(B).

⁹ See Securities Exchange Act Release No. 78396 (July 22, 2016), 81 FR 49698 (July 28, 2016) (SR-BATS-2015-100) (<https://www.sec.gov/rules/sro/bats/2016/34-78396.pdf>) (the "Active Generics Approval Order").

Conclusion

In sum, AMG 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. Further, AMG believes that the Proposal is consistent with the 1934 Act, that the Exchange sufficiently justified and described all proposed changes to Rule 14.11(c) in the Proposal, that the Proposal would enhance competition among market participants, to the benefit of investors and the marketplace, and that the Commission should approve the Proposal and reverse the Division's Disapproval.

AMG sincerely appreciates the opportunity to comment on the Disapproval and your consideration of these views. We stand ready to provide any additional information or assistance that the Commission might find useful in evaluating the Proposal and denying the Disapproval. Please do not hesitate to contact either Timothy Cameron at 202-962-7447 (tcameron@sifma.org) or Lindsey Keljo at 202-962-7312 (lkeljo@sifma.org), or our outside counsel, Edward Baer, Ropes & Gray LLP, at 415-315-6328 (edward.baer@ropesgray.com), with any questions.

Sincerely,



Timothy W. Cameron, Esq.
Asset Management Group – Head
Securities Industry and Financial
Markets Association



Lindsey Weber Keljo, Esq.
Asset Management Group – Managing
Director and Associate General
Counsel
Securities Industry and Financial
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cc: Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission
Honorable Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
Honorable Robert J. Jackson, Jr., Commissioner, U.S. Securities and Exchange Commission
Honorable Elad L. Roisman, Commissioner, U.S. Securities and Exchange Commission
Mr. Brett Redfearn, Director, Division of Trading and Markets, U.S. Securities and Exchange Commission