Understanding the Regulation of Exchange-Traded Funds Under the Securities Exchange Act of 1934

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Introduction

Exchange-traded funds (ETFs) have been one of the most successful financial innovations in recent years. Since their US introduction in 1993, demand for ETFs has grown markedly in the United States, as both institutional and retail investors increasingly have found their features appealing. It is estimated that about 5.9 million households (about 5 percent of US households) own ETFs. As of December 2016, there were 1,716 ETFs listed on US exchanges. In the past decade alone, total net assets of US ETFs have increased nearly sixfold, from $423 billion at year-end 2006 to $2.5 trillion as of December 2016.

ETFs have been a part of US markets for more than 20 years, and they remain some of the most highly regulated products, subject to multiple and sometimes overlapping statutory schemes. The purpose of this paper is to explain one major area of regulation: how the Securities and Exchange Commission (SEC) and national securities exchanges regulate the listing of ETFs under the Securities Exchange Act of 1934. This paper describes the background of ETFs, the history of their regulation under the Securities Exchange Act, current listing rules and processes, and the requirements for SEC relief under the Securities Exchange Act.[1]

Background

What Is an ETF?

An ETF is a pooled investment vehicle with shares that can be bought or sold throughout the day on an exchange at a market-determined price. Like a mutual fund, an ETF offers investors a proportionate share in a pool of stocks, bonds, and other assets. The SEC regulates ETFs under the Investment Company Act of 1940 generally under the same regulatory requirements as mutual funds and unit investment trusts (UITs).[2] Most investors buy and sell ETF shares through broker-dealers at market-determined prices, much like publicly traded stocks.

Comparison to Mutual Funds and Closed-End Funds

In contrast, mutual fund shares are bought and sold at a single price, which is the fund's net asset value (NAV). The NAV is computed and published at the end of each business day. Mutual funds are not listed or traded on exchanges; rather, mutual fund transactions occur through a variety of other channels, including financial advisers, broker-dealers, or directly from fund companies.[3]

Closed-end funds generally issue a fixed number of shares that are listed on a stock exchange or that trade in the over-the-counter market. Like other types of funds, the assets of a closed-end fund are professionally managed in accordance with the fund's investment objectives and policies, and may be invested in stocks, bonds, and other assets. The market price of closed-end fund shares fluctuates like that of other publicly traded securities and is determined by supply and demand in the marketplace.

Attractive Features of ETFs

ETFs have a number of features that retail and institutional investors are attracted to. First, intraday tradability offers liquidity and quick access to different asset classes. Second, ETFs offer price transparency, as the price at which an ETF trades in the market is usually a close approximation to the market value of the underlying securities it holds. Third, ETFs provide tax efficiency because only a small percentage of them distribute capital gains and many ETFs acquire and dispose of their underlying investments through tax-efficient, in-kind transactions. Fourth, ETFs offer a means to gain exposure to specific markets or asset classes that otherwise could be difficult or impossible to attain. Fifth, investor demand for index-linked investments has been strong for the past several years. Finally, more financial advisers are using ETFs in third-party asset allocation models to manage their clients' assets.

ETF Mechanics: How an ETF and Its Shares Are Created

An ETF originates with a sponsor that chooses the investment objective of the ETF. The sponsor of an index-based ETF chooses both an index and a method of tracking it. The sponsor of an actively managed ETF determines the investment objective of the fund and investment strategies it can employ at its discretion to meet the investment objective, much like an actively managed mutual fund. For example, the sponsor may try to achieve an investment objective by outperforming a segment of the market or investing in a particular sector through a portfolio of stocks, bonds, or other assets.

Each business day, ETFs must make available a portfolio composition file that describes the makeup of the creation and redemption baskets for the next trading day. The creation and redemption baskets are specific lists of names and quantities of securities, cash, and/or other assets that the fund will accept or pay out in exchange for ETF shares. Often, baskets track the ETF's portfolio through either a pro rata slice or a representative sample of the assets the ETF holds, but, at times, baskets may be restricted to an even more limited subset of the ETF's portfolio. Often, these baskets also contain a cash component. Typically, the compositions of an ETF's daily creation and redemption baskets mirror one another. Actively managed ETFs and most index-based ETFs publish their complete portfolio holdings daily, in addition to their creation and redemption baskets.

The ETF creation and redemption mechanism allows the number of outstanding ETF shares to expand or contract based on demand. The ETF's creation and redemption process is categorized as primary market activity (activity on the market that deals with issuing new securities) because it involves transactions directly with the ETF.

ETF shares are created when an authorized participant (AP), typically a large financial institution, submits an order for one or more "creation units." A creation unit consists of a specified number of ETF shares that generally ranges from 25,000 to 200,000 shares. The ETF delivers its shares to the AP when the AP transfers the specified creation basket to the ETF. The ETF may permit or require an AP to substitute cash for some or all of the assets in the creation basket, particularly when an instrument in the creation basket is difficult to obtain or transfer, is a restricted position for the particular AP, or otherwise may not be held by certain types of investors. The ETF also may charge the AP a cash adjustment or a transaction fee or both to offset any transaction expenses that the fund incurs. The total value of the creation basket and any cash adjustment equals the value of the creation unit based on the ETF's NAV at the end of the day on which the transaction was initiated.[4] The AP can either keep the ETF shares that make up the creation unit or sell all or part of them to its clients or on an exchange.

The redemption process is simply the reverse. An ETF redeems a creation unit when an AP acquires, has the right to acquire, or otherwise has access to (e.g., in its inventory, through third-party purchases or exchanges, principal transactions, or private transactions) the number of ETF shares specified in the ETF's creation unit and returns the creation unit to the ETF. In return, the AP receives the daily redemption basket of securities, cash, or other assets. The total value of the redemption basket equals the value of the creation unit based on the ETF's NAV at the end of the day on which the transaction was initiated.

Roles of APs and Market Makers

APs play a key role in the primary market for ETF shares because they are the only investors allowed to transact directly with the fund.[5] APs generally do not receive compensation from an ETF or its sponsor and have no legal obligation to create or redeem the ETF's shares. APs typically derive their compensation from commissions and fees that clients (such as registered investment advisers and various liquidity providers,[6] including market makers, hedge funds, and proprietary trading firms) pay for creating and redeeming ETF shares on their behalf and from any profits the AP earns while engaging in arbitrage between the ETF's NAV and its market price.

Generally, ETF sponsors structure AP contracts as one overarching agreement that authorizes an entity to create and redeem shares in any of the ETFs that the fund sponsor offers. Sponsors also may choose to structure the agreements by series or trust (e.g., all of a sponsor's equity ETFs are in one trust and all of its fixed-income ETFs are in another trust—each trust has its own AP agreement) or for a specific ETF (e.g., there are restrictions on holding or transacting in the underlying securities and only certain entities would qualify). Some entities may enter into an AP agreement with a fund distributor without knowing if they initially will be regular active participants.

The number of active APs on any given day is directly related to the demand for their services—APs create and redeem ETF shares in response to supply and demand and the needs of participants on the secondary market (the market where previously issued securities are bought and sold). On most trading days, the vast majority of ETFs do not have any primary market activity—that is, they do not create or redeem shares.[7] Some larger ETFs have creations and redemptions on a daily basis, and these ETFs typically have more active APs.

ETF investors make greater use of the secondary market (trading shares on an exchange) than the primary market (creations and redemptions transacted through an AP). On average, 89 percent of the daily activity in all ETF shares occurs on the secondary market, where the creation and redemption services of an AP are not needed because only the ETF shares are trading hands.[8] Even for narrower asset classes—such as emerging market equity, domestic high-yield bond, and emerging market bond—the bulk of the activity is in the secondary market. When the secondary market cannot meet the market supply or demand for the ETF shares, the AP can create or redeem shares to help trading in the secondary markets remain fluid. This creation and redemption process helps keep the ETF prices in the secondary market aligned with their intrinsic values.

Some AP firms also act as registered market makers for ETF shares in the secondary market. That is, they assume obligations to provide continuous two-sided (buy and sell) quotes for particular ETF shares on certain stock exchanges. ETFs with more assets under management tend to have more APs that are registered market makers than ETFs with fewer assets under management—larger ETF families may have as many as 40 different APs (many of which also are market makers). Domestic equity ETFs tend to have the most APs that are registered market makers.

In the United States, ETF issuers and promoters may not pay for market making.[9] Since 2013, the SEC has permitted exchanges to establish pilot programs that allow issuers to voluntarily pay increased listing fees to exchanges, which in turn use the revenue to fund programs that encourage firms to act as market makers in smaller ETFs with limited liquidity and that meet certain market quality standards.[10]

History of ETF Listing Process and Standards

ETFs have been available as an investment product in the United States for more than 20 years. The first US ETF—a broad-based domestic equity fund tracking the S&P 500 index—was listed and began trading in 1993. Because it was an innovative product, it did not fit completely within any of the existing statutory schemes for securities or investment companies or within any existing listing standards. As such, before it could list and trade on an exchange, the fund's sponsor had to obtain SEC exemptive relief from numerous statutory provisions, including provisions of the Securities Exchange Act, as described on page 10. Section 19(b) of the Securities Exchange Act also required the listing exchange to obtain individual SEC approval for the listing and trading of the ETF through a rule filing because it did not fall within an existing listing standard.[11]

In 1998, the SEC adopted amendments to its rules to permit exchanges to list and trade new index-based ETF shares that met certain minimum or "generic" listing requirements without requiring the exchanges to seek approval to list the products through individual rule filings.[12] The generic listing standards, discussed in more detail below, typically pertain to individual and collective components underlying an ETF's index, including provisions relating to minimum market value, minimum trading volume, minimum diversification, and the minimum number of index components. The 1998 amendments helped to reduce, although not eliminate, the need for exchanges to submit individual rule filings for each new ETF, particularly for index-based or other passively managed ETFs.

In 2016, the SEC approved generic listing standards for actively managed ETFs.[13] Until then, each exchange had to submit an individual rule filing to the SEC for approval to list an actively managed ETF. Like the generic listing standards for index-based ETFs, the new generic listing criteria for actively managed ETFs typically include provisions relating to minimum market value, minimum trading volume, minimum diversification, and the minimum number of index components. Actively managed ETFs also must have a stated investment objective that the ETF adheres to in normal market conditions.

In the first quarter of 2017, the SEC approved new exchange rules that establish continued listing standards for all ETFs that mirror initial listing standards.[14] Although unaffiliated third parties typically establish the methodologies and maintain the indexes upon which certain ETFs are based, under the new rules—scheduled to become effective in October 2017—ETFs will be expected to ensure that the index complies with continued listing standards on an ongoing basis.[15]

Exchange Listing Standards

Today, many new ETFs will meet the generic listing standards. If class relief also is available (as discussed on page 10), then the ETF sponsor can apply to the exchange for listing, and no further SEC approval or relief under the Securities Exchange Act is required to initiate listing and trading of the new product.

Listing standards are similar, if not identical, across exchanges, and generally require the following for index-based[16] and actively managed ETFs:[17]

- For ETFs with US component stocks:
  - the component stocks that account for at least 90 percent of the index or portfolio must each have a minimum market value of $75 million;
  - the component stocks that account for 70 percent (or in some cases 90 percent) of the index or portfolio must have a minimum monthly trading volume of at least 250,000 shares in the past six months, or minimum notional volume traded per month of $25 million averaged over the last six months;
  - the most heavily weighted component cannot exceed 25 percent (or 30 percent) of the equity weight of the index or portfolio, and the five most heavily weighted components cannot exceed 65 percent of the equity weight of the index or portfolio;
  - there must be at least 13 component stocks;
  - all component stocks must be listed on an exchange; and
  - American depositary receipts are excluded (or in the case of actively managed ETFs, limited to no more than 10 percent of the equity weight of a portfolio).
- For ETFs with non-US component stocks:
  - at least 90 percent of non-US component stocks must have a minimum market value of $100 million;
  - at least 70 percent of non-US component stocks must have a minimum global monthly trading volume of 250,000 shares or minimum global notional volume traded per month of $25 million averaged over the last six months;
  - the most heavily weighted stock may not exceed 25 percent of the equity weight of the index or portfolio, and the five most heavily weighted stocks may not exceed 60 percent;
  - there must be at least 20 component stocks;
  - each non-US component stock must be listed on an exchange; and
  - a comprehensive surveillance sharing agreement with foreign exchanges is sometimes required.

- For ETFs with fixed-income securities:
  - the index or portfolio must consist of fixed-income securities;
  - components that in aggregate account for at least 75 percent of the weight of the index or portfolio must each have a minimum original principal amount of $100 million or more;
  - convertible securities may be included; however, once the convertible security component converts to the underlying equity security, the component is removed from the index or portfolio;
  - no component (excluding certain US government securities) may represent more than 30 percent of the fixed-income weight of the index or portfolio, and the five most heavily weighted fixed-income components may not account for more than 65 percent of the fixed-income weight of the index or portfolio;
  - there must be at least 13 non-affiliated issuers; and
  - component securities accounting for 90 percent of the weight of the fixed-income index or portfolio generally must be from (1) public reporting issuers; (2) issuers each of which has a worldwide market value of $700 million or more; (3) issuers each of which has $1 billion in outstanding indebtedness; or (4) government issuers.

According to the SEC, these criteria are designed to provide a minimum degree of liquidity and diversification, thereby mitigating the potential for manipulation and other trading abuses and maintaining fair and orderly markets.[18] The SEC, however, has not articulated in the rule adoption process the rationale for the specific figures or percentages selected or provided an explanation of how those limits would mitigate against potential manipulation or trading abuses.

If a new ETF cannot meet an exchange's generic listing standards, even in an immaterial manner, then the exchange must submit an individual proposed rule change to the SEC under Rule 19b-4 to obtain approval to list and trade that product. The exchanges have no discretion to offer issuers any waiver from the initial listing standards. The process for submitting and obtaining approval of a proposed rule change can take more than one year.

The key steps in the process are as follows:

First, the exchange must submit a detailed rule proposal that includes:

- a description of the ETF;
- identification of any listing standard not met;
- a description of the strategy and components of the ETF;
- a description of the creation and redemption of shares and the calculation of NAV;
- a description of how information about the ETF and its components will be available to investors;
- a description of trading rules and trading halts that may apply; and
- information that will be available to investors.

An ETF sponsor has no ability to initiate the SEC review process directly. Importantly, the exchange must describe in detail the statutory basis for the SEC to grant approval, including how the proposed rule change is designed to promote just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and a national market system, does not unfairly discriminate among issuers, and protects investors and the public interest.[19]

Second, the SEC is required to publish notice of the proposed rule change within 15 days of the exchange's posting the proposal on its website. The comment period is typically 21 days.

Third, the SEC must act on the proposal within 45 days after *Federal Register* publication by doing one of three things: (1) approving or disapproving the proposal, (2) extending the time for action by an additional 90 days, or (3) instituting proceedings to determine whether to approve or disapprove the proposal, which extends the period for action to 180 days after *Federal Register* publication. The final deadline for SEC action is 240 days after the *Federal Register* publication date.

Requirement to Obtain Exemptive or No-Action Relief Under Securities Exchange Act Before Listing

In addition to meeting listing requirements, ETFs must obtain exemptive or no-action relief from the SEC from various Securities Exchange Act provisions and rules governing, among other things, certain activities of broker-dealers related to the distribution of ETF shares. The relief must be granted before trading on the exchange may commence. The relief relates to:

- credit on ETF shares,
- customer confirmation disclosures,
- advance notices of corporate actions,
- certain tender offer provisions,
- broker relationship disclosures, and
- anti-manipulation provisions of Regulation M.

Absent this relief, ETFs would be inhibited unnecessarily from operating as designed or subject to requirements that were intended to deter manipulation of individual securities rather than funds.

Since 2001, the SEC has made available class relief for most types of ETFs that meet certain conditions, which obviates the need for each new fund falling within the class from obtaining individual exemptive or no-action relief. For example, for index ETFs, the SEC has issued class relief for items related to credit, broker confirmations, tender offers, disclosure of broker relationships, and Regulation M.[20] Similarly, the SEC has indicated that certain ETFs that are not tied to an index no longer need to submit requests for relief with respect to credit, broker confirmations, and disclosure of broker relationships.[21] If class relief is unavailable, then an ETF sponsor must seek relief under each of the following provisions before its fund can be listed and traded on an exchange.

Relief to Extend Credit on ETF Shares

The Securities Exchange Act generally prohibits a broker-dealer that participates in distributing a new issue of a security from extending credit (also called margin) to customers in connection with the new issue within 30 days of the distribution.[22] The SEC generally views ETFs as being distributed in a continuous manner, and thus broker-dealers selling these securities are participating in a continuous distribution. Nearly all ETFs have received relief or are able to rely on class relief to permit APs and broker-dealers to extend credit on ETF shares beginning 30 days after an ETF is launched, provided the APs and broker-dealers do not receive any payment, compensation, or other economic incentive from the ETF to promote or sell the ETF's shares.[23]

Relief to Exclude Certain Information from Customer Confirmations

Rule 10b-10 requires a broker-dealer effecting a transaction in a security for a customer to give or send written notification to the customer disclosing, among other things, the remuneration the broker-dealer pays or receives for the security. Strict compliance with Rule 10b-10 would be very burdensome because it would require broker-dealers to provide detailed information about each of the securities (potentially hundreds or thousands) composing the creation or redemption basket. ETFs, therefore, have sought and obtained relief from the rule's requirements to allow broker-dealers to exclude certain information from the confirmations about the creation or redemption of shares in creation units, as long as all information that the rule requires is furnished upon request in a timely manner.[24]

Relief from Requirement to Provide Advance Notice of Corporate Actions

Rule 10b-17 requires an issuer of a class of publicly traded securities to give notice of certain specified corporate actions (e.g., dividend distributions, stock splits, or rights offerings) relating to the class of securities. The requirement does not apply to redeemable securities that mutual funds or UITs issue. Because ETFs only redeem securities from APs in creation units rather than individual shares, it is not clear if the exemption for mutual funds or UITs is applicable. As a result, ETFs have sought, and the SEC has granted, relief from this requirement.[25]

Relief from Certain Tender Offer Provisions

Rule 14e-5 prohibits a person from directly or indirectly purchasing, or arranging to purchase, securities of a cash tender offer or exchange offer except as part of that offer. Without relief, one could read the rule as restricting the ability of a dealer-manager of a tender offer for a particular security included in an ETF's portfolio from purchasing and redeeming ETF shares directly with the ETF or in secondary market transactions during the tender offer period. Accordingly, ETFs have sought, and the SEC has granted, relief from this requirement.[26]

Relief from Disclosure of Broker Relationships

Rule 15c1-5 requires a broker-dealer to disclose to its customers any control relationship between the broker-dealer and the issuer of the security being purchased or sold. Similarly, Rule 15c1-6 requires a broker-dealer effecting a transaction with a customer in connection with a distribution in which the broker-dealer is interested to disclose the existence of such an interest to its customer. ETFs require and have obtained relief to confirm that these rules do not require disclosure of a broker-dealer's relationship with any issuer of a security held in the ETF's portfolio.[27]

Regulation M Anti-Manipulation Considerations

Regulation M is an anti-manipulation rule that is intended to prohibit the manipulation of stock prices during the course of a distribution of a security. Redeemable securities that mutual funds and UITs issue are exempt from Regulation M. Because ETFs only redeem securities from APs in creation units, they require relief confirming that persons that may be deemed to be participating in a distribution of ETF shares may purchase ETF shares during their participation in such distribution. Relief also is needed to permit ETFs to redeem shares during the continuous offering of their shares. The SEC has provided relief from these requirements.[28]

Conclusion

The ETF market has grown substantially since the first US ETF was listed and began trading in 1993. Over those years, the regulation of ETFs has evolved more slowly, and the listing of new ETFs remains subject to substantial government oversight. This paper addresses the regulatory requirements of the Securities Exchange Act that apply to listing ETFs on US exchanges. Although many ETFs may list their shares without prior individual government approval,[29] some ETFs continue to require individual SEC approval for listing or specific relief or both under the Securities Exchange Act, either of which can significantly extend the time for new and innovative ETFs to begin listing and trading.

Additional Reading

ICI Research Papers

- **The Role and Activities of Authorized Participants of Exchange-Traded Funds**
  www.ici.org/pdf/ppr_15_aps_etfs.pdf
- **Understanding Exchange-Traded Funds: How ETFs Work**
  www.ici.org/pdf/per20-05.pdf

ICI Viewpoints

- **Average Expense Ratios for Index ETFs Have Declined**
  www.ici.org/viewpoints/view_17_trends_02
- **Mutual Funds and ETFs' Share of the Corporate Bond Market: What's the Right Answer?**
  www.ici.org/viewpoints/view_17_corp_bond_etf
- **ETFs Boost Liquidity in Times of Financial Stress**
  www.ici.org/pressroom/opinions/opinions/16_pss_in_etfs
- **The Liquidity Provided by ETFs Is No Mirage**
  www.ici.org/viewpoints/view_16_mirage_response
- **High-Yield Bond ETFs: A Source of Liquidity**
  www.ici.org/viewpoints/view_15_hybf_etf
- **Traders, Start Your Engines: After August 24, Exchanges Need to Coordinate**
  www.ici.org/viewpoints/view_15_trading_luld
- **US Bond ETFs Resilient on August 24**
  www.ici.org/viewpoints/view_15_aug24_bond_etfs
- **More Unfounded Speculation on Bond ETFs and Financial Stability**
  www.ici.org/viewpoints/view_15_ft_etfs
- **Does Liquidity in ETFs Depend Solely on Authorized Participants?**
  www.ici.org/viewpoints/view_15_aps_etfs
- **Plenty of Players Provide Liquidity for ETFs**
  www.ici.org/viewpoints/view_14_ft_etf_liquidity
- **A Look Inside ETFs and ETF Trading**
  www.ici.org/viewpoints/view_14_etf_paper_01
- **Sizing Up Mutual Fund and ETF Investment in Emerging Markets**
  www.ici.org/viewpoints/view_14_sizing_funds_em
- **ETFs Don't Move the Market—Information Does**
  www.ici.org/viewpoints/view_14_bond_etfs
- **Key Data Undercut Critics' Arguments on ETFs and Intraday Volatility**
  www.ici.org/viewpoints/view_12_etfs_intraday
- **The (Dis)Connection Between ETFs and Market Volatility**
  www.ici.org/viewpoints/view_12_etf_vol
- **ETF Basics: The Creation and Redemption Process and Why It Matters**
  www.ici.org/viewpoints/view_12_etfbasics_creation

Other Resources

- **Exchange-Traded Funds Resource Center**
  www.ici.org/etf_resources

Notes

[1] For a description of exemptions needed from the Investment Company Act of 1940, see *ICI Research Perspective*, "Understanding Exchange-Traded Funds: How ETFs Work" (September 2014) at 11-12, available at www.ici.org/pdf/per20-05.pdf ("ICI Understanding ETFs Perspective").

[2] For a comprehensive overview of the regulatory regime for US investment companies, see ICI's *2017 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry*, 57th ed. at 254–263, available at www.icifactbook.org.

[3] As of December 2016, there were 530 closed-end funds with total assets of $262 billion.

[4] Like mutual funds, an ETF's NAV is computed just once per business day.

[5] The information in this section, along with additional details and statistics, is available in ICI's publication titled *The Role and Activities of Authorized Participants of Exchange-Traded Funds* (March 2015), available at www.ici.org/pdf/ppr_15_aps_etfs.pdf ("ICI Role of APs Paper").

[6] For a description of the various types of entities that provide liquidity to ETFs in the secondary market, see "Meet the Market Makers: Your Guide to the ETF Trading Ecosystem," *BlackRock Blog*, September 11, 2012, available at www.blackrockblog.com/2012/09/11/meet-the-market-makers-your-guide-to-the-etf-trading-ecosystem.

[7] ICI research has shown that on most trading days across different types of ETFs—including emerging market equity, domestic high-yield bond, and emerging market bond—many funds do not have any primary market activity. ICI Understanding ETFs Perspective at 28–30.

[8] *2017 Investment Company Fact Book* at 65.

[9] See FINRA Rule 5250.

[10] See e.g., Nasdaq Rules 5950 and 7014(f) and description of Nasdaq Designated Liquidity Provider Program, available at http://business.nasdaq.com/media/ETPDLPhighlights_tcm5044-33497.pdf; NYSE Arca Equities Rule 8.800 and description of NYSE Arca ETP Incentive Program, available at https://www.nyse.com/products/etp-incentive-program; and Bats BZX Rule 11.8 and description of Bats Competitive Liquidity Provider Program, available at www.bats.com/us/equities/etfmarketplace/trade_on_bats/clp/. FINRA Rule 5250 was amended in 2013 to provide an exception to the prohibition on payments for market making for any payment permitted under an exchange rule that the SEC approved. See Securities Exchange Act Release No. 69398 (April 13, 2013), 78 FR 24261 (April 24, 2013) (SR-FINRA-2013-020).

[11] See Exchange Act Rel. No. 31591, 57 Fed. Reg. 60253 (December 11, 1992) (SR-AMEX-92-18).

[12] See Securities Exchange Act Release 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998).

[13] See, e.g., Securities Exchange Act Rel. Nos. 78397 (July 22, 2016), 81 Fed. Reg. 49320 (July 27, 2016) (SR-NYSEArca-2015-110); 78396 (July 22, 2016), 81 Fed. Reg. 49698 (July 28, 2016) (SR-BATS-2015-100); 78918 (September 23, 2016), 81 Fed. Reg. 67033 (September 29, 2016).

[14] See, e.g., Nasdaq Rules 5315 and 5450; Bats Rule 14.8; NYSE Arca Rules 5.2(c), 5.5(b), and 5.5(l); and Chicago Board Options Exchange Rule 24.2. In contrast, continued listing standards for equity securities and index options are generally lower than, rather than identical to, their initial listing standards; no rationale was provided as to why ETFs had to continue to meet initial listing standards when other equity securities did not have to do so.

[14] See Securities Exchange Act Rel. Nos. 79784 (January 12, 2017), 82 Fed. Reg. 6664 (January 19, 2017) (SR-NASDAQ-2016-135); 80169 (March 7, 2017), 82 Fed. Reg. 13536 (March 13, 2017) (SR-BatsBZX-2016-80); 80189 (March 9, 2017), 82 Fed. Reg. 13889 (March 15, 2017).

[15] See, e.g., NYSE Arca Equities Rule 5.2(j)(3), Nasdaq Rule 5705, and Bats BZX Rule 14.11(b).

[16] See, e.g., NYSE Arca Equities Rule 8.600, Nasdaq Rule 5735, and Bats Rule BZX Rule 14.11(i).

[17] See Request for Comment on Exchange-Traded Products, Release No. 34-75165 (June 12, 2015), 80 Fed. Reg. 34729, 34737 (June 17, 2015).

[18] See Section 6(b)(5) of the Securities Exchange Act.

[19] See, e.g., the American Stock Exchange, SEC No-Action Letter (August 17, 2001) and Class Relief for Exchange-Traded Index Funds, SEC No-Action Letter (October 24, 2006) (expanded class relief for index-based ETFs that cannot meet one or more of the conditions in the 2001 class letter); Class Relief for Fixed-Income Exchange-Traded Funds, SEC No-Action Letter (April 9, 2007) (expanded class relief for index-based fixed-income ETFs); Combination Exchange-Traded Funds, SEC No-Action Letter (June 27, 2007) (expanded class relief to ETFs that hold both equity and fixed-income securities).

[20] See, e.g., Wisdom Tree Trust, SEC No-Action Letter (May 9, 2008); see also AdvisorShares Trust, SEC No-Action Letter (June 16, 2011) (class relief for ETFs of ETFs).

[21] See Section 11(d)(1) of the Securities Exchange Act.

[22] See, e.g., The American Stock Exchange, SEC No-Action Letter (August 17, 2001); Securities Industry Association, No-Action Letter (November 21, 2005).

[23] See The American Stock Exchange, SEC No-Action Letter (August 17, 2001)

[24] See, e.g., The American Stock Exchange, SEC No-Action Letter (August 17, 2001) and Class Relief for Exchange-Traded Index Funds, SEC No-Action Letter (October 24, 2006) (expanded class relief for index-based ETFs that cannot meet one or more of the conditions in the 2001 class letter).

[25] Id.

[26] See, e.g., The American Stock Exchange, SEC No-Action Letter (August 17, 2001)

[27] See, e.g., The American Stock Exchange, SEC No-Action Letter (August 17, 2001) and Class Relief for Exchange-Traded Index Funds, SEC No-Action Letter (October 24, 2006) (expanded class relief for index-based ETFs that cannot meet one or more of the conditions in the 2001 class letter).

[28] Even if an ETF can meet generic listing standards, ETFs registered under the Investment Company Act must first receive exemptive relief from certain provisions of the Investment Company Act before they can commence operations. For a description of this relief, see ICI Understanding ETFs Perspective at 9–13.

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