Morgan Lewis

ETF ROUNDUP

Issue 1 – December 2016

Welcome to the first issue of *ETF Roundup*, our guide to the latest legal and regulatory developments affecting the exchange-traded fund (ETF) industry. We hope you find this newsletter useful. If you have any questions about the issues discussed here, please email us at etfroundup@morganlewis.com or contact any of the Morgan Lewis lawyers listed beginning on page 17.

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SEC ADOPTS NEW LIQUIDITY RULES

The US Securities and Exchange Commission (SEC) adopted Rule 22e-4 (the Rule) on October 13 under the Investment Company Act of 1940 (1940 Act), requiring open-end management investment companies, including ETFs, to adopt and implement written liquidity risk management programs designed to assess and manage liquidity risk.[1] The SEC also adopted new liquidity-related reporting requirements, including amendments to Form N-1A and new Rule 30b1-10 to require the filing of Form N-LIQUID under certain circumstances. Below, we provide an overview of the Rule and its ETF-specific requirements.

Liquidity Risk Management Program

Under the Rule, ETFs will be required to adopt and implement a written liquidity risk management program with the following elements:

Assessment, management, and periodic review of a fund's liquidity risk. Each ETF will be required to assess, manage, and periodically (at least annually) review its liquidity risk, defined as the risk that an ETF could not meet requests to redeem its shares without significant dilution of remaining investors' interests in the ETF. In doing so, the ETF must consider, as applicable, the following factors:[2]

- The ETF's investment strategy and the liquidity of its investments during both normal and reasonably foreseeable stressed conditions, including whether the investment strategy is appropriate for an open-end fund, the extent to which the strategy involves a relatively concentrated portfolio or large positions in particular issuers, and the use of borrowings for investment purposes and derivatives;

- Short-term and long-term cash flow projections during both normal and reasonably foreseeable stressed conditions; and

- Holdings of cash and cash equivalents, as well as borrowing arrangements and other funding sources.

[1] For a discussion of the Rule as it was proposed, see our LawFlash.

[2] An ETF may, but is not required to, incorporate other considerations in evaluating its liquidity risk.

The Rule also requires ETFs to consider the following ETF-specific factors:

- The relationship between the ETF's portfolio liquidity and the way in which, and the prices and spreads at which, ETF shares trade, including the efficiency of the arbitrage function and the level of active participation by market participants (including authorized participants);[3] and

- The effect of the composition of baskets on the overall liquidity of the ETF's portfolio.[4]

Classification of the liquidity of fund portfolio investments. An ETF, other than an "In-Kind ETF" (discussed below), will be required to classify each of its portfolio investments into one of four liquidity categories (compared to the six categories in the proposal) based on the number of days in which the fund reasonably expects that the investment would be convertible to cash (or sold or disposed of, as applicable) in current market conditions without significantly changing the market value of the investment. This classification must take into account the market depth of the investment. Specifically, an ETF must determine whether trading varying portions of a position in a particular investment, in sizes that the ETF would reasonably anticipate trading, is reasonably expected to significantly affect the liquidity of that investment. ETFs will also be permitted to classify investments by asset class, unless market, trading, or investment-specific considerations with respect to a particular investment are expected to significantly affect the liquidity characteristics of that investment compared to the ETF's other portfolio holdings within that asset class.

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[3] The SEC noted the importance of the arbitrage function in keeping the market price of an ETF's shares at or close to the ETF's NAV per share and expressed its concern that if an ETF has "a significant amount of illiquid securities in its portfolio, market participants may find it more difficult to evaluate opportunities and ultimately participate in the arbitrage process (because of challenges in pricing, trading, and hedging their exposure to the ETF). If the arbitrage function fails to operate efficiently, investors could buy and sell the ETF shares at prices that are not at or close to the NAV per share of the ETF, which may raise concerns relating to Section 22(d) of and Rule 22c-1 under the 1940 Act regarding whether all fund shareholders (authorized participants and retail investors) are being treated equitably." Interestingly, this statement by the SEC fails to acknowledge that every ETF has received exemptive relief from Section 22(d) of and Rule 22c-1 under the 1940 Act that specifically permits an ETF's shares to trade at market prices that differ from NAV.

[4] The SEC noted that "the composition of the basket can affect the liquidity of the ETF's portfolio. For example, an ETF whose basket does not reflect a pro rata share of the fund's portfolio may alter the liquidity profile of the ETF's portfolio and may adversely affect the fund's future ability to meet cash redemptions or mitigate shareholder dilution."

The four liquidity categories are as follows:

- Highly liquid investments (i.e., cash and any investment reasonably expected to be convertible into cash in three business days or less);
- Moderately liquid investments (i.e., any investment reasonably expected to be convertible into cash in more than three calendar days but in seven calendar days or less);
- Less liquid investments (i.e., any investment reasonably expected to be sold or disposed of in seven calendar days or less, but where the sale or disposition is reasonably expected to settle in more than seven calendar days); and
- Illiquid investments (i.e., any investment that may not reasonably be expected to be sold or disposed of in seven calendar days without significantly changing the market value of the investment).

"In-Kind ETFs," which are ETFs that (1) meet redemptions through in-kind transfers of securities, positions, and assets other than a "de minimis" amount of cash and (2) publish their portfolio holdings daily, are excluded from classifying each of their portfolio investments.[5] The Rule, however, does not specify what constitutes a de minimis amount of cash. In the Adopting Release, the SEC notes that while ETFs that use cash to make up any difference between the net asset value attributable to a creation unit and the aggregate market value of the creation basket exchanged for the creation unit, commonly referred to as a balancing amount," would be using a de minimis amount of cash. As to what is not de minimis, the Adopting Release stated that "by way of example, an ETF that normally redeems in-kind, but delivers all cash to a single authorized participant that elects to receive cash, would not be an ETF that uses a de minimis amount of cash."[6] In excluding In-Kind ETFs, the SEC noted that it views this information as "less necessary … because, unlike for mutual funds, the daily identity and weightings of ETF portfolio holdings are well known to authorized participants and other ETF liquidity providers, and would be required to be disclosed daily under our final rules to qualify for the exemption from the classification requirement."

Determination of a highly liquid investment minimum. Each ETF (excluding In-Kind ETFs) will be required to determine a minimum percentage of its net assets that must be invested in highly liquid investments.

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[5] In order to take advantage of this exclusion, those passively managed ETFs that are not currently required to disclose their entire portfolio holdings would be required to make such daily disclosures. Currently, most passively managed ETFs are not required to disclose their portfolio holdings daily, but rather are required to only disclose their creation and redemption baskets.

[6] The Adopting Release suggests that even one cash redemption in the course of a year, or possibly years, would not be a de minimis amount.

The Rule does not provide a method of calculating the minimum, but the determination must be made based on a consideration of the factors the ETF also has to consider in assessing its liquidity risk.[7]

An ETF that is below its minimum may continue to purchase non-highly liquid investments, provided it does so in accordance with "shortfall" policies and procedures, which must include board reporting. An ETF must report to its board, no later than the board's next regularly scheduled meeting, any drop in the ETF's highly liquid investments below its minimum. An ETF is required to report to its board within one business day, and submit a non-public report to the SEC on Form N-LIQUID (discussed below), if its highly liquid investment minimum shortfall lasts more than seven consecutive calendar days. The board is not normally required to specifically approve the highly liquid investment minimum, although during the time of a shortfall, the minimum can be changed only with board approval.

Limitation on illiquid investments. An ETF will not be permitted to purchase any illiquid investments if, immediately after the acquisition, the ETF would have invested more than 15 percent of its net assets in illiquid investments. This requirement codifies longstanding SEC guidelines on fund holdings in illiquid assets.

If an ETF's illiquid investments exceed 15 percent of its net assets, it will be required to report the incident to its board within one business day, along with an explanation of the extent and causes of the occurrence, and how the ETF plans to bring its illiquid investments back within the limit in a reasonable period of time. The ETF will also be required to notify the SEC on a confidential basis on Form N-LIQUID (discussed below) within one business day after its level of illiquid assets exceeds 15 percent of its net assets. If the ETF remains in breach 30 days from the occurrence (and at each consecutive 30-day period thereafter), the board must assess whether the plan presented to it for bringing this percentage back into compliance continues to be in the best interest of the ETF.

Board oversight of the program. An ETF's board, including a majority of the independent directors, will be required to initially approve the ETF's liquidity risk management program and the designation of persons to administer the program, which may not be solely portfolio managers.

The board also will be required to review, at least annually, a written report that addresses the operation of the program and assesses its adequacy and the effectiveness of its implementation, including the operation of the highly liquid investment minimum (if applicable) and any material changes to the program.

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[7] For an ETF organized as a unit investment trust (UIT), the UIT's principal underwriter or depositor must determine, on or before the initial deposit of portfolio securities into the UIT, that the portion of the illiquid investments that the UIT holds or will hold at the date of deposit is consistent with the redeemable nature of the securities it issues.

As with comparable board requirements, directors will be allowed to initially approve the liquidity risk management program by reviewing summaries prepared by the ETF's investment adviser, officers administering the program, legal counsel, or other persons familiar with the program. In a change from the proposed rule, boards will not have to approve material changes.

Liquidity-Related Reporting Requirements

In adopting the Rule, the SEC also adopted amendments to Form N-1A and new Forms N-PORT, N-LIQUID, and N-CEN.

- **Amendments to Form N-1A** will require an ETF to describe its procedures for redeeming its shares, the number of days in which the fund typically expects to pay redemption proceeds, and the methods for meeting redemption requests.

- **Form N-LIQUID**, which ETFs must file pursuant to new Rule 30b1-10, requires an ETF to notify the SEC within one business day after its level of illiquid assets exceeds 15 percent of its net assets, or once its highly liquid investments have been below its minimum for more than seven consecutive calendar days. Form N-LIQUID will be non-public.

- **Form N-PORT** (discussed in more detail below) will require an ETF to report the aggregated percentage of its portfolio representing each of the four classification categories. An ETF also will be required to report position-level liquidity classification information and information regarding its highly liquid investment minimum to the SEC on Form N-PORT, but the SEC will not make such information public.

- **Form N-CEN** (discussed in more detail below) will require funds to disclose information regarding the use of lines of credit, interfund lending, and inter-fund borrowing. In addition, ETFs that qualify as In-Kind ETFs must identify themselves as such on Form N-CEN.

Compliance Dates

ETFs that are part of a "group of related investment companies"[8] with $1 billion or more in net assets will be required to comply with the liquidity risk management program requirements on December 1, 2018. ETFs that are part of a "group of related investment companies" with less than $1 billion in net assets will have until June 1, 2019.

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[8] As defined in Rule 0-10 under the 1940 Act, a "group of related investment companies" means two or more investment companies that (i) hold themselves out to investors as related companies for purposes of investment and investor services (ii) either: (A) have a common investment adviser or have investment advisers that are affiliated persons of each other; or (B) have a common administrator.

The compliance dates for the additional liquidity-related reporting requirements within Form N-PORT and Form N-CEN also depend on the size of the fund complex. For ETFs that are part of a "group of related investment companies" with net assets of $1 billion or more, the compliance date is December 1, 2018, compared to June 1, 2019, for ETFs that are part of a "group of related investment companies" with less than $1 billion in net assets. The compliance date for the amendments to Form N-1A is June 1, 2017, regardless of the size of the fund complex.

SEC ADOPTS NEW REPORTING REQUIREMENTS

Also on October 13, the SEC adopted new rules to enhance the information that registered investment companies are required to report to the SEC.[9]

The rules also amend Regulation S-X to require funds to provide, among other things, enhanced and standardized derivatives disclosure in fund financial statements, and amend Form N-1A to require disclosures about securities lending activities. The rules, adopted largely as proposed, require that information be reported in a structured data format, which will allow the SEC and the public to analyze the information more easily and link it to other sources.

Form N-PORT

Form N-PORT, which will have to be filed monthly, will replace Form N-Q, which is currently filed quarterly. In addition to information regarding an ETF's schedule of portfolio investments, Form N-PORT will require information regarding the ETF's assets and liabilities, risk metric calculations that measure the ETF's exposure and sensitivity to changing market conditions (such as changes in asset prices, interest rates, or credit spreads), use of securities lending, and use of derivative instruments, including the terms of such instruments.

Form N-PORT must be filed no later than 30 days after the end of the month, and every third report will be publicly available 60 days after the end of the fund's fiscal quarter.

Form N-CEN

Form N-CEN will require ETFs to provide census information similar to the data currently reported on Form N-SAR, including information on service providers, new disclosures on matters submitted to shareholders, and detailed information on securities lending arrangements.

[9] For a discussion of the rules as proposed, see our LawFlash.

Each ETF will also be required to complete Part E, which is specific to ETFs and requires disclosure of the following information:

- The exchange on which the ETF's shares are listed and the ETF's ticker symbol;

- The ETF's authorized participants, the dollar value of the ETF shares that each authorized participant purchased and redeemed from the ETF during the reporting period, and whether the ETF required that an authorized participant post collateral to the ETF or any of its designated service providers in the purchase or redemption of ETF shares during the reporting period;

- Each creation unit purchased or redeemed by authorized participants during the reporting period, including the average percentage of the purchase or redemption composed of cash, the standard deviation of the percentage of the purchase or redemption composed of cash; the average percentage of the purchase or redemption composed of non-cash assets and other positions exchanged on an in-kind basis; and the standard deviation of the percentage of the purchase or redemption composed of non-cash assets and other positions exchanged in-kind;

- As to creation units purchased by authorized participants during the reporting period, ETFs must disclose the average transaction fee (i) charged in dollars per creation unit, (ii) charged for one or more creation units on the same business day, and (iii) charged as a percentage of the value of the creation unit (and parallel information for the redemption of creation units by authorized participants);

- As to creation units purchased by authorized participants that were fully or partially composed of cash, ETFs will also be required to report the average transaction fee (i) charged in dollars per creation unit, (ii) charged for one or more creation units on the same business day, and (iii) charged as a percentage of the value of the cash in the creation unit (and parallel information for the redemption of creation units by authorized participants);

- The number of ETF shares required to form a creation unit as of the last business day of the reporting period; and

- With respect to ETFs that are unit investment trusts, information on whether the index whose performance the fund tracks is constructed by an affiliated person of the fund and/or exclusively constructed for the fund and information regarding tracking difference and tracking error.

Form N-CEN will have to be filed annually rather than semi-annually as is currently required for Form N-SAR. ETFs will be required to file Form N-CEN within 75 days of their fiscal year end.

Amendments to Regulation S-X and Form N-1A

The SEC also adopted certain modifications to Regulation S-X that will require enhanced and standardized disclosures in financial statements, including schedules of derivative holdings as well as other derivatives information that historically has been disclosed in the notes to the financial statements. Amendments to Form N-1A will also require that registration statements contain disclosure on ETFs' securities lending activities, including income and fees from securities lending and payments made to lending agents for the previous fiscal year.

Delay of Potential Rulemaking in Rule 30e-3

As proposed, Rule 30e-3 under the 1940 Act would have allowed ETFs to provide shareholder reports electronically rather than delivering them to shareholders on paper via US mail, subject to certain conditions. The SEC did not to take action on this proposal at this time. SEC Chair Mary Jo White said her agency continues to study the proposal, noting that "among other considerations, the staff is exploring ways to better protect investors who prefer to receive printed shareholder reports in the mail and the processing fees that funds, and ultimately their investors, must pay to broker-dealer intermediaries."

Compliance Dates

The changes to Regulation S-X and Form N-1A will take effect on August 1, 2017, but the compliance dates for Forms N-PORT and N-CEN are not until much later. All ETFs will be required to file reports on Form N-CEN after June 1, 2018. ETFs that are part of a "group of related investment companies" with $1 billion or more in net assets will be required to file reports on Form N-PORT after June 1, 2018.
ETFs that are part of a "group of related investment companies" with less than $1 billion in net assets will be required to file reports on Form N-PORT after June 1, 2019.

THE INDUSTRY IN BRIEF

SEC Chair to Step Down

SEC Chair Mary Jo White announced on November 14 that she will step down from her position at the end of President Barack Obama's term in January 2017. Ms. White said she does not expect the SEC to engage in any "last-minute rushes" to adopt new rules before the end of the current administration.

Derivatives Rule Proposal Delayed

At a recent conference, SEC Commissioner Michael Piwowar said he does not expect a vote on the proposed rule regarding funds' use of derivatives before President Obama's departure from office.[10] Adopting the rule was one of Ms. White's regulatory priorities for 2016, but the approval process appears to have been slowed by industry opposition. Mr. Piwowar, who voted against releasing the rule proposal in December 2015, said that he still has questions about how hard caps on derivatives use would affect leveraged funds and the ability of funds to hedge risk.

Generic Listing Standards for Active ETFs Approved

The SEC recently issued orders approving proposals by Bats BZX Exchange, Inc., NYSE Arca, Inc., and NASDAQ Stock Market LLC (Nasdaq) to adopt generic listing standards for shares of actively managed ETFs (active ETFs). The orders, which are substantively similar, are expected to ease the regulatory burden and decrease the time needed to bring active ETFs to market. For a summary of the listing standards, see our LawFlash.

Nasdaq Proposes Additional Continued Listing Standards

On October 11, Nasdaq filed a proposed rule change with the SEC to amend the continued listing requirements for exchange-traded products (ETPs). If adopted, the amended rule would clarify that most of the initial listing standards that an ETP must be able to meet, as well as certain representations required to be made in Rule 19b-4 filings, are also considered to be "continued" listing standards. Specifically, if the proposed rule change is adopted:

- ETPs listed without a Rule 19b-4 filing (i.e., ETPs that rely on generic listing standards) would be required to maintain initial index or reference asset criteria on a continued basis;[11]

[10] For a discussion of the proposed derivatives rule, see our White Paper. On November 1, the SEC released a new economic analysis regarding the proposed rule.

[11] For example, in the case of a domestic equity index, these criteria generally include: (a) stocks with 90% of the weight of the index must have a minimum market value of at least $75 million; (b) stocks with 70% of the weight of the index must have a minimum monthly trading volume of at least 250,000 shares; (c) the most heavily weighted component cannot exceed 30% of the weight of the index, and the five most heavily weighted stocks cannot exceed 65%; (d) there must be at least 13 stocks in the index; and (e) all securities in the index must be listed in the United States. There are similar criteria for international indexes, fixed-income indexes, and indexes with a combination of components.

- ETPs listed under a Rule 19b-4 filing would be required to comply on a continuing basis with any statements or representations in the applicable filing, including: (a) the description of the portfolio; (b) limitations on portfolio holdings or reference assets; and (c) the applicability of Nasdaq rules and surveillance procedures; and

- ETPs would be required to notify Nasdaq regarding instances of non-compliance and, in cases where Nasdaq staff has notified an ETP that it is deficient under one or more listing standards, the ETP will be allowed a period of 45 calendar days to submit a plan to regain compliance.

The proposed rule was published in the Federal Register on October 17, and the SEC has 45 days from that date (or a longer period of up to 90 days) to approve or disapprove the proposed change or institute proceedings to determine whether the proposal should be disapproved.

SEC Staff Issues No-Acton Letter on Auditor Independence

On June 20, the SEC staff issued a no-action letter on auditor independence requirements under Rule 2-01(c)(1)(ii)(A) of Regulation S-X, commonly known as the Loan Rule.[12] The letter permits registered investment companies, including ETFs, to use the audit services of a public accounting firm that has relationships that would otherwise cause non-compliance with the Loan Rule.

These include instances where an ETF's auditor has a lending relationship with an institution that acts as an authorized participant or market maker and, therefore, holds of record or beneficially more than 10% of the shares of the ETF, subject to certain conditions.

Specifically, the no-action letter provides that the staff would not recommend enforcement action against an ETF if it uses an auditor that is not in compliance with the Loan Rule, so long as: (i) the auditor has provided, at least annually, the client's audit committee with written disclosure regarding relationships between the auditor and the client that may bear on the auditor's independence, and discussed with the audit committee the potential impact of those relationships on the auditor's independence; (ii) the auditor's noncompliance is with respect to the lending relationships discussed in the letter; and (iii) notwithstanding such noncompliance, the auditor has concluded that it is objective and impartial with respect to the issues within its engagement.

Update on Section 36(b) Litigation

Following a 25-day bench trial in January, the US District Court for the District of New Jersey ruled against a group of plaintiff shareholders who claimed that AXA Equitable Funds Management Group "charged exorbitant fees for mutual fund investment and administrative duties, and then delegated those same duties to sub-advisers and sub-administrators for nominal fees."

[12] Subsequently, the Investment Company Institute issued a series of frequently asked questions and answers relating to certain issues addressed in the letter.

The court concluded that the plaintiffs had failed to meet their burden in demonstrating a violation of Section 36(b) of the 1940 Act and also failed to prove any actual damages. The resolution of the case maintains the industry's perfect record at trial. For a full discussion of the court's decision, see our LawFlash.

Meanwhile, on August 23, the US District Court for the District of Maryland denied Prudential's motion to dismiss a Section 36(b) suit alleging that it charged excessive advisory fees to six sub-advised funds. A trial in the Section 36(b) case against Hartford Investment Financial Services, also involving the differences in advisory and sub-advisory fees, began on November 9.

Proposed IRS Rules on CFCs

ETFs have increasingly turned to the use of "controlled foreign corporations" (CFCs) to obtain exposure to the commodity markets. In dozens of private letter rulings, the Internal Revenue Service held that amounts included in a regulated investment company's (RIC's) income under Section 951(a)(1)(A)(i) or 1293(a) of the Internal Revenue Code of 1986, as amended, in respect of the RIC's investment in a CFC (income inclusions) a RIC was deemed to receive from a CFC subsidiary would generate qualifying income for purposes of the income test, regardless of whether the CFC made distributions in respect of the income inclusions. On September 27, the IRS and the US Department of the Treasury proposed regulations providing that income inclusions will only be treated as qualifying income for purposes of the income test applicable to RICs if the applicable CFC makes a distribution attributable to the income inclusions. Concurrently, in Revenue Procedure 2016-50, the IRS stated that it will no longer rule on RIC-related issues that require it to determine whether a financial instrument or position is a security under the 1940 Act. For a full discussion of these issues, see our LawFlash.

Enforcement Action on Sub-Advisory Arrangements

The SEC announced on August 25 that it had settled an enforcement action against an investment adviser for failing to disclose in an application for "manager of managers" exemptive relief the existence of a side agreement with the sub-adviser waiving the adviser's ability to terminate, or recommend the termination of, the sub-adviser. The SEC determined that the adviser had willfully violated Section 34(b) of the 1940 Act, which makes it unlawful for a person to make any untrue or misleading statement of a material fact in a document filed with the SEC. The law also makes it unlawful to make factual omissions in such documents that would render statements materially misleading. The SEC censured the adviser, imposed a civil penalty of $75,000 and, notably, rescinded the adviser's exemptive order.

SEC Proposes to Shorten Settlement Times

The SEC proposed a rule amendment on September 28 to shorten settlement times for most broker-dealer transactions from three business days after the trade date (T+3) to two business days (T+2).

The rationale is to reduce the risk (specifically credit, liquidity, and market risk) that US market participants face from the value and number of unsettled securities transactions in the market at any given time. The proposed rule change would prohibit a broker-dealer from entering into a contract for the purchase or sale of securities if payment and delivery takes longer than two business days after the trade date, unless expressly agreed otherwise by the parties at the time of the transaction. The SEC believes the proposed change to Rule 15c6-1(a) of the Securities Exchange Act of 1934 will enhance the resilience and efficiency of the US clearance and settlement system, and ultimately enhance investor protection. The SEC will seek public comment until December 5 and will then determine whether the proposed amendment should be adopted.

First ETF to Feature Fulcrum Fee Structure Launches

The first US ETF to feature a fulcrum fee expense structure recently began operations. Unlike traditional advisory fee structures under which an adviser receives a fee as a percentage of a fund's net assets, the fulcrum fee has two components: the base fee and the performance fee adjustment. The base fee is the pre-determined rate at which the ETF's adviser is paid when the ETF's net performance is in line with the ETF's pre-determined performance benchmark. The base fee is subject to an upward or downward adjustment by the performance fee. If the ETF outperforms the benchmark, the adviser may receive an upward fee adjustment. If the ETF underperforms the benchmark, the adviser may receive a downward fee adjustment.

A fulcrum fee arrangement is intended to align the interests of the adviser with those of the shareholders. Because the performance adjustment is based on the performance of the ETF relative to that of the benchmark index, one would only expect to see a fulcrum fee expense structure in active ETFs, rather than passive ETFs designed to track the performance of a benchmark index.

TRENDING SEC STAFF COMMENTS

In preparing and updating registration statements for new and existing ETFs, we routinely receive and respond to comments from the SEC staff. Following are some that appear to be trending among the staff.

Intraday Indicative Value (IIV)

IIV represents the most recent trading value of the assets of a creation unit and is typically disseminated every 15 seconds throughout the trading day. The staff is requesting that the disclosure on the IIV in a registration statement specifically address (a) how the IIV is calculated, i.e., whether the IIV is based on the index, on the portfolio, or on the basket; (b) what the calculation includes and does not include (e.g., operating fees or other accruals); and (c) what types of values are used for underlying holdings (e.g., in the case of international ETFs, stale prices from closed foreign markets updated only for currency changes). The staff also is requesting that ETFs disclose whether they may use stale values under certain circumstances or some other element that might adversely affect the use of IIV as an indicator of current market value of ETF shares and, if so, the staff is requesting that ETFs consider noting that potential as a principal risk.

Authorized Participant (AP) and Market Maker Risk Disclosure

The staff is requesting risk disclosure stating that (i) there is no assurance that an active trading market for an ETF will be maintained by market makers or APs; (ii) there is no obligation for market makers to make a market for ETF shares or for APs to submit redemption or purchase orders of creation units; and (iii) decisions by market makers and APs to reduce their role or step away from these activities in times of market stress could inhibit effectiveness of arbitrage process in maintaining a relationship between the underlying value of an ETF's portfolio securities and the ETF's market price.

Foreign Securities Risk Disclosure

The staff is requesting that ETFs consider revising their description of foreign investment risk to state that because some foreign securities trade in markets that are closed when the ETF market is open, there may be valuation differences that could lead to disparities between the ETF's NAV and the market value of underlying shares.

NEW PRODUCT REGISTRATIONS

The following ETFs filed a Form 8-A between August 1 and October 31. Form 8-A is filed to register a class of securities under Section 12(b) or 12(g) of the Securities Exchange Act of 1934 and is often filed in close proximity to an ETF's commencement of operations.

- Oppenheimer ESG Revenue ETF (ESGL)
- Elkhorn Fundamental Commodity Strategy ETF (RCOM)
- JPMorgan Disciplined High Yield ETF (JPHY)
- Oppenheimer Global ESG Revenue ETF (ESGF)
- First Trust Nasdaq Transportation ETF (FTXR)
- Guggenheim BulletShares 2026 Corporate Bond ETF (BSCQ)
- Premise Capital Frontier Advantage Diversified Tactical ETF (TCTL)
- First Trust Nasdaq Food & Beverage ETF (FTXG)
- Guggenheim BulletShares 2024 High Yield Corporate Bond ETF (BSJO)
- Natixis Seeyond International Minimum Volatility ETF (MVIN)
- Natixis Seeyond International Minimum Volatility ETF (MVIN)
- JPMorgan Diversified Alternatives ETF (JPHF)
- Natixis Seeyond International Minimum Volatility ETF (MVIN)
- First Trust Nasdaq Pharmaceuticals ETF (FTXH)
- JPMorgan Diversified Alternatives ETF (JPHF)
- Deutsche X-trackers Barclays International Corporate Bond Hedged ETF (IFIX)
- First Trust Nasdaq Semiconductor ETF (FTXL)
- Global X FinTech Thematic ETF (FINX)
- Deutsche X-trackers Barclays International Treasury Bond Hedged ETF (IGVT)
- First Trust Nasdaq Oil & Gas ETF (FTXN)
- Global X Internet of Things Thematic ETF (SNSR)
- SPDR MSCI Emerging Markets Fossil Fuel Reserves Free ETF (EEMX)
- First Trust Nasdaq Bank ETF (FTXO)
- Global X Robotics & Artificial Intelligence Thematic ETF (BOTZ)
- SPDR MSCI EAFE Fossil Fuel Reserves Free ETF (EFAX)
- First Trust Nasdaq Transportation ETF (FTXR)
- iShares Edge MSCI Min Vol USA Small-Cap ETF (SMMV)
- Elkhorn Lunt Low Vol/High Beta Tactical ETF (LVHB)
- Amplify YieldShares Prime 5 Dividend ETF (PFV)
- Goldman Sachs TreasuryAccess 0-1 Year ETF (GBIL)
- Spirited Funds/ETFMG Whiskey & Spirits ETF (WSKY)
- Elkhorn Commodity Rotation Strategy ETF (DWAC)
- Direxion Daily Silver Miners Index Bear 2X Shares (DULL)
- Franklin Liberty Investment Grade Corporate ETF (FLCO)
- VanEck Vectors AMT-Free 6-8 Year Municipal Index ETF (ITMS)
- Direxion Daily Silver Miners Index Bull 2X Shares (SHNY)
- VanEck Vectors AMT-Free 12-17 Year Municipal Index ETF (ITML)

- PureFunds Solactive FinTech ETF (FINQ)
- AdvisorShares KIM Korea Equity ETF (KOR)
- Recon Capital USA Managed Risk ETF (USMR)
- PureFunds ETFx HealthTech ETF (IMED)
- First Trust CEF Income Opportunity ETF (FCEF)
- NuShares Enhanced Yield U.S. Aggregate Bond ETF (NUAG)
- First Trust Horizon Managed Volatility Developed International ETF (HDMV)
- First Trust Municipal CEF Income Opportunity ETF (MCEF)
- iShares iBonds Dec 2026 Term Corporate ETF (IBDR)
- First Trust Horizon Managed Volatility Domestic ETF (HUSV)
- TrimTabs Float Shrink ETF (TTAC)
- Fidelity Core Dividend ETF (FDVV)
- ProShares K-1 Free Crude Oil Strategy ETF (OILK)
- Fidelity Dividend ETF for Rising Rates ETF (FDRR)
- Franklin Liberty U.S. Low Volatility ETF (FLLV)
- Fidelity Low Volatility Factor ETF (FDLO)
- iSectors Post-MPT Growth ETF (PMPT)
- Fidelity Momentum Factor ETF (FDMO)
- Direxion Daily European Financials Bear 1X Shares (EUFS)
- PowerShares Variable Rate Investment Grade Portfolio (VRIG)
- Fidelity Quality Factor ETF (FQAL)
- Summit Water Infrastructure Multifactor ETF (WTRX)
- AdvisorShares Focused Equity ETF (CWS)
- iShares Core 5-10 Year USD Bond ETF (IMTB)
- WisdomTree Dynamic Currency Hedged International Quality Dividend Growth Fund (DHDG)
- Amplify YieldShares CWP Dividend & Option Income ETF (DIVO)
- Deutsche X-trackers iBoxx Emerging Markets Quality Weighted Bond ETF (EMBQ)
- Deutsche X-trackers USD High Yield Corporate Bond ETF (HYLB)
- American Customer Satisfaction Core Alpha ETF (ACSI)
- Direxion Daily CSI China Internet Index Bull 2X Shares (CWEB)
- Ivy Focused Growth NextShares (IVFGC)
- Ivy Focused Value NextShares (IVFVC)
- Ivy Energy NextShares (IVENC)
- Deutsche X-trackers Barclays International High Yield Bond Hedged ETF (IHIY)
- First Trust ZyFin India Quality and Governance ETF (FTIN)
- First Trust Nasdaq Retail ETF (FTXD)
- Goldman Sachs Hedge Industry VIP ETF (GVIP)
- Fidelity Value Factor ETF (FVAL)

PRIMARY CONTACTS

Morgan Lewis offers a deep bench of ETF lawyers who provide clients with insights into the legal, operational, and regulatory challenges facing the ETF industry. Our team draws on its understanding of US federal securities laws, derivatives, tax, and other disciplines to collaborate with clients and develop practical solutions and sophisticated products.

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