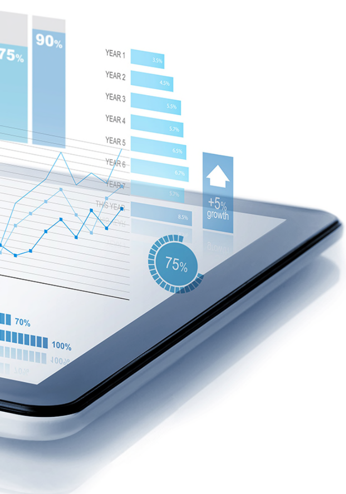
Morgan Lewis

ETF ROUNDUP

Issue 3 – November 2017

Welcome to the third 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 informative and useful. If you have any questions about the issues discussed here, or if there are any topics you would like us to address in future issues, please email us at etfroundup@morganlewis.com or contact any of the Morgan Lewis lawyers listed beginning on page 17.



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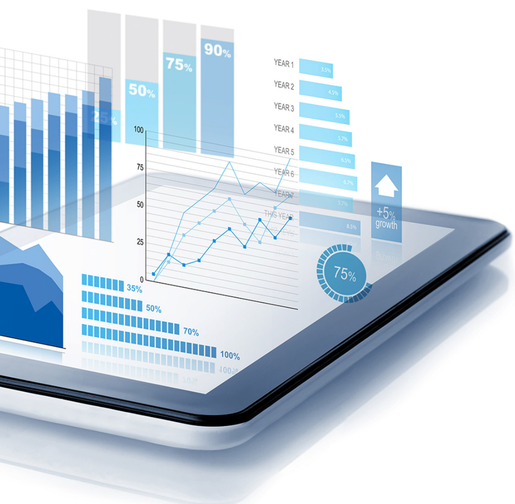
SEC EXTENDS COMPLIANCE DATE FOR CONTINUED LISTING STANDARDS



On September 29, the US Securities and Exchange Commission (SEC) approved proposed rule changes from Cboe BZX Exchange, Inc.[1] (BZX), NYSE Arca, Inc. (NYSE Arca), and The Nasdaq Stock Market LLC (Nasdaq[2]) delaying the implementation of the recently approved continued listing standards from October 1, 2017, to January 1, 2018.[3] The listing standards, which we discussed in a prior issue, will require ETFs listed under an exchange's generic listing standards to comply with such standards on a continuous basis and ETFs listed in reliance on a Rule 19b-4 order to comply with certain statements and representations made in the 19b-4 order on a continuous basis rather than only on an initial basis. The purpose of the delay is to give issuers of ETFs the time necessary to develop internal systems and coordinate with third-party service providers, such as index providers, to develop procedures by which they can obtain the data necessary to ensure continuous compliance with the standards.

BZX and Nasdaq have since each issued a series of FAQs, and BZX has released additional interpretive guidance regarding implementation of and compliance with the continued listing standards. Among other things, these materials address:

How the Exchanges Will Test for Compliance

BZX explained that it generally will rely on data provided by a third-party financial data vendor to assess ETFs' compliance with the listing standards, rather than requiring ETFs to routinely provide such data. However, BZX will request index data from index ETFs if it is unable to obtain such data from other sources.

Rather than relying on a third-party data vendor, Nasdaq will require index ETFs and active ETFs to provide an index component file or portfolio component file, respectively, to Nasdaq each fiscal quarter, which Nasdaq will then use to assess compliance.

Frequency of Compliance Testing and Certification

BZX stated that all ETFs will be required to test for compliance with the listing

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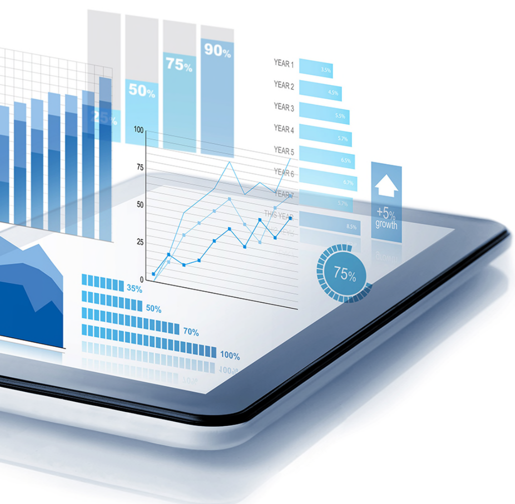
[1] In October, the parent company of BZX announced a rebranding initiative as a result of which "Bats BZX Exchange, Inc." was renamed "Cboe BZX Exchange, Inc."

[2] Also in October, Nasdaq filed a rule proposal with the SEC changing references to the exchange from "NASDAQ" to "Nasdaq."

[3] The exchanges had previously requested to delay implementation until July 1, 2018, but those requests were subsequently withdrawn. The Investment Company Institute (ICI) also previously requested that the SEC delay implementation until July 1, 2018, in separate letters to the SEC dated July 11, 2017, and September 1, 2017.

standards at least quarterly, which can be based on the ETF's fiscal or calendar quarter or any other quarterly schedule. Additionally, an index ETF will be required to test for compliance upon any rebalance, reconstitution, or other material change to its underlying index. An active ETF will be required to test for compliance upon any material change to its portfolio holdings. Each ETF will be required to annually affirm that such tests are being conducted and that it is not aware of any undisclosed instances of noncompliance.

As noted above, Nasdaq explained that all ETFs will be required to submit portfolio or index component data on a quarterly basis, at which time Nasdaq will assess compliance with the listing standards. Nasdaq also stated that an index ETF will be required to assess compliance upon any rebalance, reconstitution, or other material change to its underlying index. Although Nasdaq did not state a similar requirement for active ETFs, it likely would be a better practice for an active ETF to consider its compliance with the listing standards after any material change to its portfolio holdings. Nasdaq will require an annual compliance certification only from ETFs listed pursuant to a Rule 19b-4 order.



Cure Period for Noncompliance

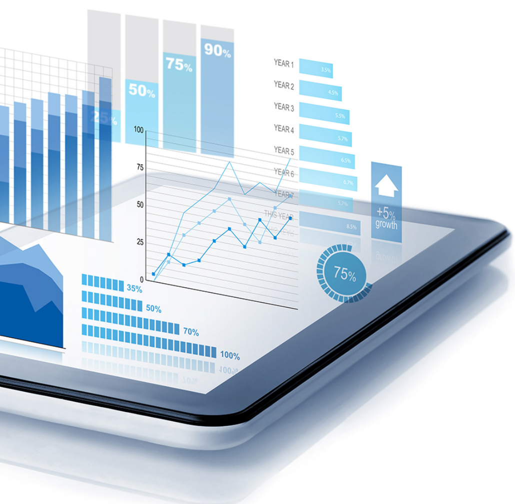
BZX and Nasdaq explained that if an ETF is noncompliant, it typically will have 45 days from the date that it receives a deficiency notice from the exchange to submit a plan to cure the deficiency. Based on this plan, BZX or Nasdaq may determine to grant an extension of up to 180 days from the date the ETF received the deficiency notice to allow the ETF to become compliant. BZX also may immediately delist an ETF that is noncompliant in an "egregious" manner, although BZX has not defined what constitutes egregious noncompliance.

SEC APPROVES RULES FOR CASH COMPONENT IN UNDERLYING INDICES

On May 25, the SEC approved NYSE Arca's proposal to amend its rules to provide for the inclusion of a cash component in a listed ETF's underlying index. Prior to the amendment, the NYSE Arca's generic listing standards permitted ETFs to overlie an index or portfolio of (i) US component stocks, (ii) non-US component stocks, (iii) US component stocks and non-US component stocks, and (iv) fixed income securities (each as defined by NYSE Arca Equities Rules) that meet certain criteria. While ETFs were previously able to hold cash, the NYSE Arca's generic listing standards did not contemplate the inclusion of a cash component in an ETF's underlying index.

NYSE Arca recognized, however, that many index providers have included, or intend to include, cash components in indices that also include equity or fixed-income securities components. For example, an index may allocate a certain percentage of its weight to cash or periodically change its allocation to cash based on the index methodology's assessment of market conditions, market risk, or other factors. Accordingly, NYSE Arca proposed to amend its rules to provide for the inclusion of such a cash component in an index.

The newly adopted rules carve out generic listing criteria that do not apply to the cash component of an underlying index, including certain weighting requirements and limitations that apply to other index components. Thus, for example, if 85% of the weight of an index consists of US component stocks and 15% of the index weight is cash, the requirement that component stocks accounting for 90% of the weight of the index or portfolio have a minimum market value of $75 million minimum would be applied only to the 85% portion consisting of US component stocks.



BZX and Nasdaq have since made substantively similar changes to their respective listing standards.

T+2 SETTLEMENT CYCLE IN EFFECT

On September 5, the amendment to Rule 15c6-1 under the Securities Exchange Act of 1934 (Exchange Act) became effective, shortening standard settlement times for most broker-dealer securities transactions to within two business days after the trade date (T+2), as discussed in a prior issue. As a result, as of September 5, most creation and redemption orders between an ETF and its authorized participant in the primary market, as well as purchases and sales of ETF shares on the applicable listing exchanges by investors in the secondary market, must settle on a T+2 basis. As written, however, the rule continues to permit an ETF distributor and an authorized participant to expressly agree to a settlement cycle other than T+2.

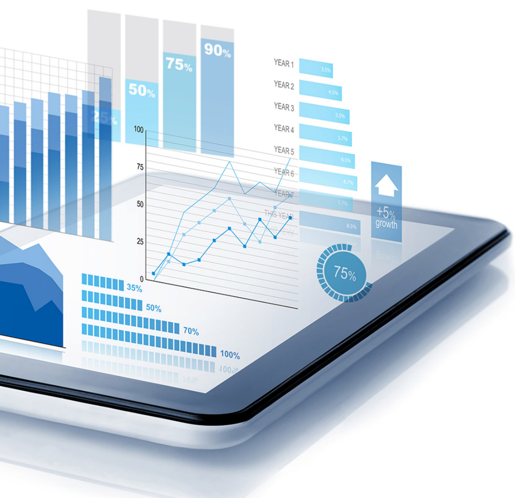
Prior to the rule change, most securities transactions with broker-dealers were required to settle within three business days after the trade date (T+3). The amended rule is designed to enhance efficiency, reduce risk, and ensure a coordinated and expeditious transition by market participants to a shortened standard settlement cycle.

SEC AND NYU HOST ETP DIALOGUE

On September 8, the SEC and New York University co-hosted a forum to discuss the current state of the exchange-traded product (ETP) market. The forum consisted of three panels featuring academics and practitioners discussing (i) the effect of ETPs on the efficiency and quality of the financial markets, (ii) the implications for investors in a developing market, and (iii) the future of the ETP market.

Commissioner Michael Piwowar delivered the opening remarks, during which he reviewed the history of ETPs since inception and the reasons for their rise in popularity. He also emphasized the SEC's role in thinking critically about ETPs and identifying emerging issues that will be relevant to investors and market participants. Mr. Piwowar highlighted the need for more "rigorous academic study" of the effects of ETPs on capital formation, market efficiency, and investor protection.

The first panel focused on the effects of ETPs on securities markets and potential issues facing market participants. The panel featured academics and tracked the evolution of ETPs and their effect on the market. The second panel analyzed the maturing ETF market and the implications for both retail and institutional investors. The panelists discussed the importance of investors understanding the different risks involved with different types of ETPs, including leveraged products, smart-beta products, and high-yield products. The final panel discussed the future of ETPs, including the possibility of a bitcoin-related ETP, and stressed the importance of clear disclosures for complex products.



Commissioner Kara Stein gave the closing remarks, during which she emphasized the need for increased academic study of ETP activity in order to guide the SEC on how to respond to new product ideas. Possibly indicating that the SEC is reconsidering its approach to regulating ETPs, Ms. Stein said the SEC must avoid viewing ETPs as a monolithic asset class, noting that "an ETP promising a highly leveraged return and an ETP tracking an established index are more different than they are alike." These differences, she said, "should be consistently reflected in how we talk about these products, to whom they are sold, and the rules that apply."

A recording of the dialogue is available on the SEC's website.

CALIFORNIA COURT APPLIES TRACING REQUIREMENT TO SHARES OF ETFs

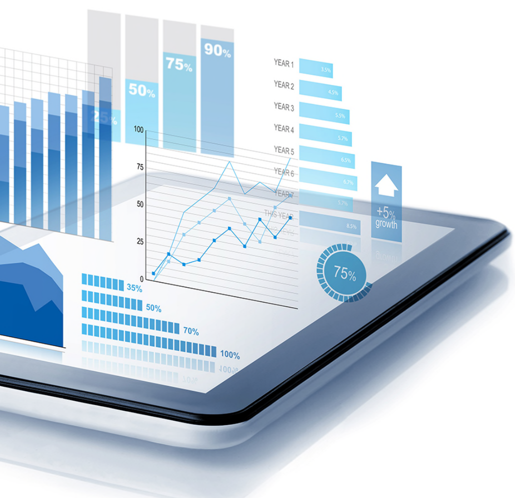
On September 18, a California state court held that ETF shareholders do not have standing to bring a claim under Section 11 of the Securities Act of 1933 (1933 Act) unless they are able to "trace" their ETF shares back to shares that were sold pursuant to a materially false or misleading registration statement.[4] The holding is notable in that, until now, the tracing requirement under Section 11 had not yet been applied with respect to shares of ETFs purchased on the secondary market.

The plaintiffs alleged the defendant ETFs' registration statements issued between August 2012 and August 2015 violated Section 11 of the 1933 Act because they failed to disclose, among other things, the purported risks of using stop-loss orders and market orders, especially during periods of rapid market decline. The plaintiffs

[4] *Jensen et al. v. iShares Trust et al.*, Superior Court of California, County of San Francisco, Case No. CGC-16-552567 (Sept. 18, 2017).

alleged that such risks had become evident as a result of the "flash crash" of May 6, 2010. The plaintiffs had purchased shares of the defendant ETFs and placed stop-loss orders on those shares before the flash crash of August 24, 2015. On that day, as the share prices of the defendant ETFs dropped and reached the stop price of the plaintiffs' stop-loss orders, those orders were converted into market orders, which were often executed at prices that were markedly lower than the stop price.

Section 11 provides a cause of action to any person who buys a security issued under a materially false or misleading registration statement. To have standing to bring a claim under Section 11, plaintiffs do not have to have purchased their shares in an initial public offering, but secondary market purchasers have standing only if they can trace the chain of title of their shares to the allegedly materially false or misleading registration statement at issue.



The plaintiffs acknowledged that, because they had purchased their shares on the secondary market, it would be difficult, if not impossible, to trace their shares to a particular registration statement in effect when the shares were first offered. Instead, the plaintiffs argued that the tracing requirement should be applied in light of Section 24(e) of the 1940 Act, which provides that, for purposes of Section 11, "the effective date of the latest amendment filed shall be deemed the effective date of the registration statement with respect to securities sold after such amendment shall become effective." The plaintiffs argued that this provision relaxes the tracing requirement for ETF shares by making every sale of an ETF share on the secondary market traceable, by law, to the most recent pre-sale amended registration statement.

The court declined to accept this argument, explaining that the focus of the 1933 Act is the initial public offering and noting the long-established view that aftermarket purchasers who can trace their shares to an allegedly misleading registration statement have standing to sue under Section 11. The court further explained that if there were no tracing requirement and any shareholder who bought shares in the secondary market were able to bring a Section 11 claim based on an allegedly misleading registration statement, then all shares of an ETF could be subject to a Section 11 claim, including shares sold "pursuant to a perfectly innocent registration statement." The plaintiffs are expected to appeal.

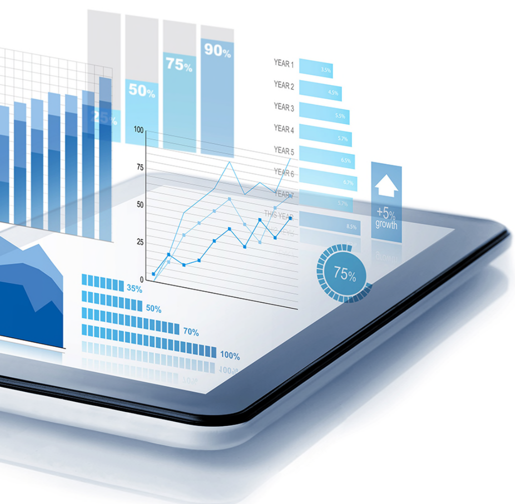
ICI RELEASES OVERVIEW OF ETF REGULATION UNDER THE EXCHANGE ACT

In August, the Investment Company Institute (ICI) released an overview addressing the regulatory requirements of the Exchange Act that apply to listing ETFs on US exchanges. The overview includes a description of ETFs, the history of their regulation under the Exchange Act, current listing standards and processes, and the requirements for SEC "class" relief from various Exchange Act provisions and rules governing, among other things, certain activities of broker-dealers, including authorized participants, related to the distribution of ETF shares.

THE INDUSTRY IN BRIEF

Dalia Blass Named New Director of Division of Investment Management

On August 31, the SEC announced that Dalia Blass had been named director of the Division of Investment Management. Ms. Blass, who is returning to the SEC, previously served in a number of leadership roles in the division, most recently as assistant chief counsel, in which capacity she oversaw the ETF exemptive application review process.



White House Nominates SEC Commissioners

The White House has nominated Hester Peirce and Robert Jackson to serve as commissioners of the SEC. Ms. Peirce, a senior research fellow and director of the Financial Markets Working Group at the Mercatus Center at George Mason University, served at the SEC from 2000 to 2008 as staff attorney in the Division of Investment Management and as counsel to Commissioner Paul Atkins. Mr. Jackson, a professor at Columbia Law School and director of its Program on Corporate Law and Policy, previously served as a senior advisor at the US Department of the Treasury during the financial crisis, assisting Kenneth Feinberg in his work as special master for TARP Executive Compensation.

If confirmed, Ms. Peirce would fill the remainder of former Commissioner Daniel Gallagher's term expiring June 5, 2020, and Mr. Jackson would fill the remainder of former Commissioner Luis Aguilar's term expiring June 5, 2019. Ms. Peirce and Mr. Jackson testified at a nomination hearing before the US Senate Committee on Banking, Housing, and Urban Affairs on October 24, and the committee approved their nominations on November 1. Their nominations now move to the full Senate for confirmation.

Treasury Publishes Report on Asset Management Industry

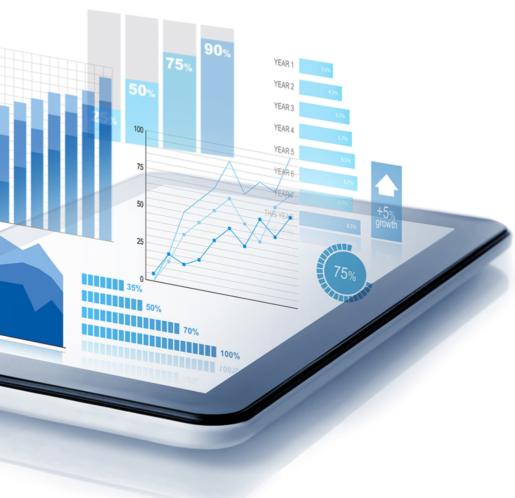
In October, the US Department of the Treasury issued a report examining the current regulatory framework for the asset management and insurance industries. The report, the third in a series Treasury has issued in the last year,[5] makes a number of recommendations to ensure the regulatory framework for these industries is aligned with the White House's Core Principles for financial regulation. It is likely

[5] To date, Treasury has issued reports regarding banks and credit unions and capital markets. Treasury expects to issue a fourth report regarding non-bank financial institutions, financial technology, and financial innovation.

that this report will inform the SEC's approach to rulemaking in the near term.

Treasury's notable recommendations related to the asset management industry include:

- *ETFs*. To streamline the process by which ETFs are launched, Treasury recommends that the SEC re-propose its 2008 rule or propose a new "plain vanilla" ETF rule that would allow entrants to access the market without the cost and delay of obtaining exemptive relief. We believe such a rule proposal is considered to be a top priority by many within the Division of Investment Management. To further streamline the ETF process and reduce inefficiency, Treasury also recommends that the SEC consider establishing a single process for ETF and related approvals rather than allowing SEC divisions to set multiple and sometimes conflicting requirements.



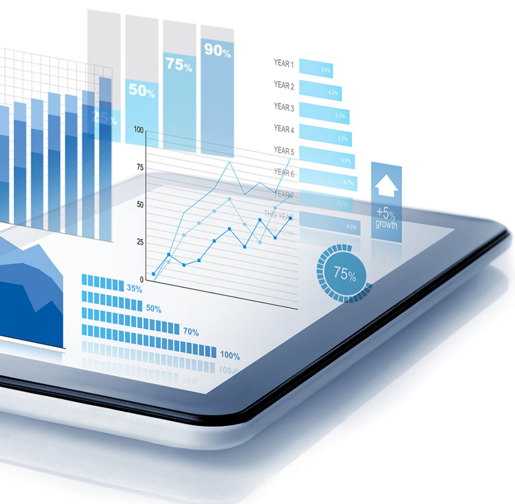
- *Systemic Risk*. The report notes that, to the extent systemic risks arise from the asset management industry, entity-based systemic risk evaluations of asset managers and funds are unlikely to be the most effective regulatory approach for mitigating such risks. This is because generally, asset managers and investment funds, in contrast to banks, are not highly leveraged and do not engage in maturity and liquidity transformation to the same degree that banks do through the use of bank deposits and other forms of credit. Instead, Treasury believes regulators should focus on potential systemic risks arising from asset management products and activities and recommends that the Financial Stability Oversight Council look to the SEC to address systemic risks through regulation within and across the asset management industry.

- *Stress Testing*. The report notes that Treasury supports legislative action to amend the Dodd-Frank Wall Street Reform and Consumer Protection Act to eliminate the stress testing requirement for investment advisers and investment companies. Instead, Treasury supports an alternative approach in which the stress testing provisions of Rule 2a-7 for money market mutual funds and Rule 22e-4 for liquidity risk management programs would satisfy the spirit of Dodd-Frank's stress testing requirements.

- *Liquidity Risk Management Programs*. Treasury supports the 15% limitation on illiquid assets imposed by Rule 22e-4 but rejected the rule's "bucketing" requirement as a "highly prescriptive" approach to liquidity risk management. Instead, Treasury recommends that the SEC adopt a principles-based approach to liquidity risk management and further recommends that the SEC postpone the implementation of the rule's bucketing requirement.

- *Swing Pricing*. Although Treasury acknowledges the possibility of a first-mover advantage for shareholders who redeem earlier than others, the report notes that empirical evidence demonstrating the inadequacy of existing liquidity management practices for mutual funds and other registered investment companies is unsubstantiated and therefore recommend further analysis of swing pricing.

- *Derivatives*. The report notes that while Treasury supports the SEC's goal of modernizing the regulation of derivatives for funds, it has concerns with certain aspects of the SEC's December 2015 proposal regarding funds' use of derivatives, including that (1) portfolio limits could unnecessarily restrict funds from using derivatives, even for hedging or other risk mitigating purposes; (2) the proposed rule's use of gross notional amount as a measure for derivatives exposure is problematic as it does not take into account the beneficial effects of using derivatives in portfolio management and a high gross notional exposure is not necessarily correlated with leverage or risk levels; and (3) restricting the types of assets that can be qualifying coverage assets may reduce fund returns. In recommending that the SEC reconsider these aspects of its proposed rule, Treasury also recommends that the rule include a derivatives risk management program and an asset segregation requirement.



- *Business Continuity and Transition Planning*. Noting the existing requirements for investment advisers and investment companies to maintain business continuity plans as part of their compliance programs, Treasury recommends that the SEC withdraw its [proposal to adopt Rule 206(4)-4 under the Advisers Act](), which would require registered investment advisers to adopt and implement written business continuity and transition plans "reasonably designed to address operational and other risks related to a significant disruption in the investment adviser's operations."

- *SEC-CFTC Dual Registrants*. Treasury recommends amending Commodity Futures Trading Commission (CFTC) rules so an investment company registered with the SEC and its adviser are exempt from dual registration and regulation by the CFTC as a commodity pool operator (CPO). The report adds that the CFTC and the SEC should work together to identify a single regulator for these entities. Treasury further recommends that the CFTC and SEC cooperate to share information provided by their respective regulated entities so disclosures made to one agency can address the information needs of the other to monitor the markets for securities and derivatives transactions. Treasury also recommends amendments to the CFTC rules that would exempt private funds and their advisers from registration as CPOs if the advisers are subject to regulatory oversight by the SEC and that the CFTC review and determine what, if any, exemptions should be made available for SEC-exempt reporting advisers.

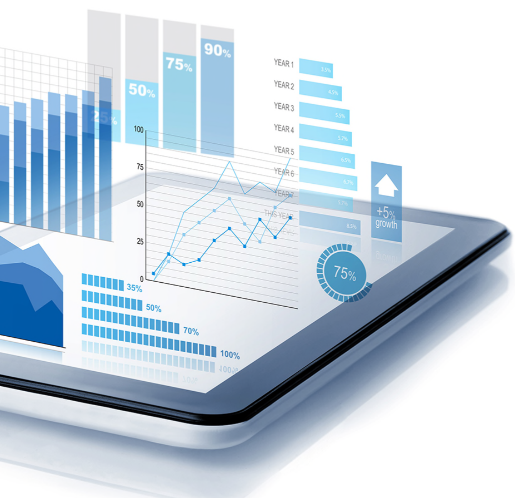
- *Electronic Delivery*. Treasury recommends that the SEC finalize its proposed rule to permit the use of implied consent for electronic disclosures.

- *Harmonizing Reporting Requirements*. Treasury recommends that the SEC, CFTC, self-regulatory organizations, and other regulators work together to rationalize and harmonize the reporting regimes. Where possible, duplicative forms should be combined and any unnecessary or inconsistent data collection should be eliminated.

SEC Staff Extends Auditor Independence No-Action Relief

In September, the SEC staff extended relief granted in a previously issued no-action letter permitting registered investment companies, including ETFs, to use the audit services of a public accounting firm that has relationships that would otherwise cause noncompliance with Rule 2-01(c)(1)(ii)(A) of Regulation S-X, commonly known as the Loan Rule. The relief, which we discussed in a prior issue, is notable for permitting ETFs, subject to certain conditions, to use the services of an auditor where the auditor has a lending relationship with an institution that acts as an authorized participant or market maker for the ETF and, therefore, holds of record or beneficially more than 10% of the shares of the ETF. The original no-action relief was temporary and would have expired in December 2017. The extension is not limited to a specific term but will be withdrawn if the Loan Rule is amended to address the staff's concerns.

OCIE Issues Cybersecurity Risk Alert



In August, the SEC's Office of Compliance Inspections and Examinations (OCIE) issued a risk alert summarizing observations from OCIE's recent examinations of registered broker-dealers, investment advisers, and investment companies, conducted pursuant to the cybersecurity examination initiative announced in September 2015.[6] The examinations, which focused on the firms' and funds' written cybersecurity policies and procedures, involved more validation and testing of procedures and controls surrounding cybersecurity preparedness than the staff has previously performed. The risk alert is notable for detailing not only areas where OCIE believes compliance and oversight could be improved, but also elements of what it viewed as "robust" cybersecurity policies and procedures. For a full overview of the risk alert and key takeaways, see our LawFlash.

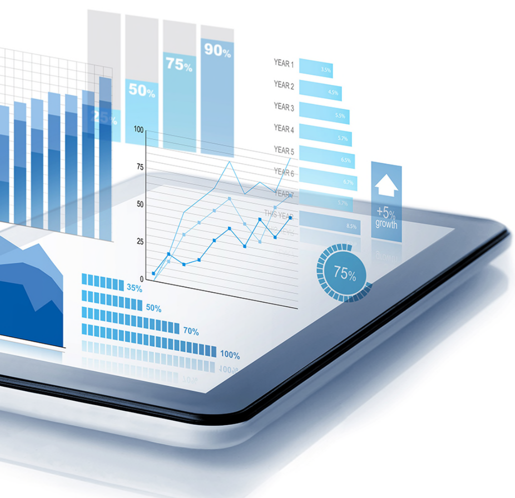
The SEC's FAQs re: Investment Company Reporting Modernization

On July 18, the SEC's Division of Investment Management released a series of FAQs relating to the investment company reporting modernization rules adopted in October 2016. The FAQs provide a number of clarifications to the new requirements, including:

- **Compliance dates and general filing obligations.** Generally, the staff clarified that compliance dates for new Forms N-PORT and N-CEN, the amendments to Regulation S-X, and the securities lending disclosures related amendments to Forms N-1A, N-3, and N-CSR should be based on the reporting period-end date. The staff also provided guidance regarding (i) whether assets of private funds should be included when determining

[6] *See* OCIE Examination Priorities for 2015 (January 13, 2015) and National Exam Program Risk Alert, OCIE's 2015 Cybersecurity Examination Initiative (September 15, 2015). The risk alert, which was preceded by another risk alert issued in May in response to the WannaCry ransomware attack, builds upon prior cybersecurity guidance and information previously provided by the staff. *See* IM Guidance Update: Cybersecurity Guidance (April 2015); National Exam Program Risk Alert, OCIE's 2014 Cybersecurity Initiative (April 15, 2014); National Exam Program Risk Alert, Cybersecurity Examination Sweep Summary (February 3, 2015); National Exam Program Risk Alert, OCIE's 2015 Cybersecurity Examination Initiative (September 15, 2015).

whether a fund is part of a "group of related investment companies" for Form N-PORT compliance date purposes; (ii) funds' filing obligations with respect to Forms N-Q and N-CSR once they are required to comply with Form N-PORT; and (iii) filing requirements for funds with fiscal years ending April 30 or May 31, 2018.



- **Form N-PORT.** The staff provided guidance regarding (i) the use of T+1 accounting to report portfolio holdings and T+0 to report portfolio- and security-level risk metrics; (ii) how funds should file Part F attachments (which include a fund's complete portfolio holdings); (iii) when Form N-PORT filings will be made public; and (iv) how information relating to certain types of investments, such as foreign forward currency contracts, shares of other funds, debt securities, and derivatives, should be reported.

- **Regulation S-X.** The staff clarified the amendments to Regulation S-X, including (i) the order in which information regarding derivatives contracts, other investments, and investments in affiliates should be presented; (ii) how information should be presented for derivatives where the underlying asset is an index or basket of investments; (iii) how to treat derivatives transactions that cannot be sold but that a fund would be able to exit through other means, such as through an offsetting transaction, for purposes of identifying restrictions applicable to a derivative; (iv) how investments in and advances to affiliates should be presented; and (v) how certain disclosures regarding arrangements with counterparties should be provided.

- **Form N-CEN.** The staff provided guidance regarding (i) how funds that have not adopted a plan pursuant to Rule 18f-3 should respond to certain items of Form N-CEN; (ii) whether funds are required to report information on intermediaries that provide "sub-transfer agent" or administrative services; and (iii) whether variable insurance products that no longer file post-effective amendments are still required to file reports on Form N-CEN.

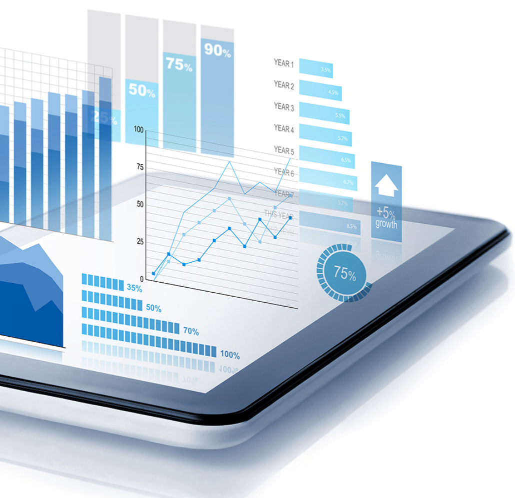
The staff expects to update the FAQs from time to time to include responses to additional questions. The FAQs represent only the views of the staff and have not been approved or disapproved by the SEC.

ICI Requests Delay of Liquidity Risk Management, Fund Reporting Rules

In a letter addressed to SEC Chairman Jay Clayton dated July 20, 2017, the ICI requested that the SEC delay the compliance dates and refine certain aspects of the recently adopted liquidity risk management program and investment company reporting modernization rules. In so doing, the ICI cited its uncertainty about the industry's ability to meet the applicable compliance deadlines given the complexity of the systems that will have to be implemented. The ICI also detailed its fundamental concerns about certain requirements of each rule.

Liquidity Risk Management Program. The ICI requested that the SEC (i) adjust the compliance schedule for the liquidity rule's asset classification and related requirements as soon as possible to provide the SEC with time to propose and finalize targeted rule amendments, explained below; or (ii) if the SEC determines not to pursue the ICI's recommended amendments to the rule, adjust the compliance schedule for the current liquidity rule and related reporting requirements by at least one year.

The ICI believes the rule's asset classification, or "bucketing," requirement, could have adverse marketwide effects in that the requirement risks creating more correlated portfolios and trades across funds if funds gravitate toward investments perceived to be more liquid than others, and that this herding behavior could increase dislocations and volatility in financial markets. The ICI recommended that the SEC amend the rule to require each fund to formulate its own policies and procedures to determine how to classify the liquidity of its investments, which approach would respect the diversity of practices that have emerged in the industry and their validity; focus funds' attention on comprehensive liquidity risk assessment, management, and review; and greatly reduce the cost and complexity of implementing and administering the rule.



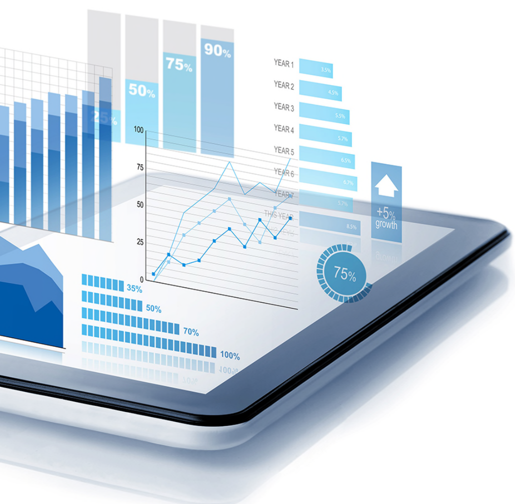
Reporting Modernization. The ICI requested that the SEC (i) require quarterly (instead of monthly) reporting of portfolio holdings on Form N-PORT until the SEC can address information security concerns adequately; or (ii) if the SEC determines to retain the monthly reporting requirement for portfolio holdings, delay the compliance dates for the Form N-PORT and Form N-CEN filing requirements for at least six months. The ICI cited concerns, detailed in reports by the SEC's inspector general and by the Governmental Accountability Office, about the SEC's ability to protect valuable and sensitive portfolio holdings information that funds will be required to report monthly. The ICI therefore requested that the SEC reduce the frequency with which firms are required to submit the information required by Form N-PORT until the SEC has implemented measures to address the weaknesses identified in these reports.

Update on Labor Department's Fiduciary Rule

On August 31, the US Department of Labor (DOL) proposed to delay the applicability of the fiduciary rule's Best Interest Contract (BIC) and Principal Transactions exemptions, and certain amendments to Prohibited Transaction Exemption 84-24 (regarding insurance contracts and annuities) (together, the PTEs) from January 1, 2018 to July 1, 2019. The proposal was subject to a 15-day notice and comment period that ended on September 15, 2017. The DOL also issued nonenforcement relief related to the PTEs' prohibitions against class action waivers and qualifications. For a discussion of the implications of this rule and its proposed delay, see our LawFlash.

The delay follows SEC Chairman Clayton's recently issued request for comment on standards of conduct for investment advisers and broker-dealers.

TRENDING SEC STAFF COMMENTS



Recently, we have found the following topics to be areas of focus for the SEC staff in their reviews of registration statements and other filings of ETFs and examinations of investment advisers to ETFs.

Creation and Redemption Transactions Disclosure

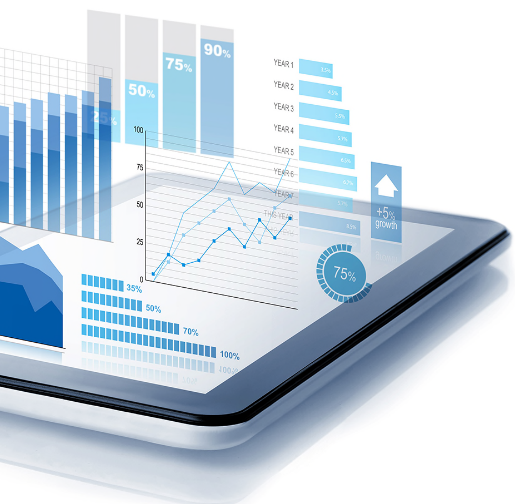
The staff continues to scrutinize registrants' disclosures regarding creation and redemption transactions (see the Trending SEC Staff Comments section of our last issue of ETF Roundup). Specifically, the staff is requesting that cut-off times for purchases and redemptions of creation units be disclosed with specificity rather than by reference to other documents, such as an authorized participant handbook. In addition, to the extent registrants reserve the right to require that orders be placed earlier than the normal cut-off time (i.e., one or more business days prior to the order placement date), the staff is requesting an explanation of the legal basis for requiring such earlier cut-off times, which the staff considers to be inconsistent with Rule 22c-1 under the 1940 Act and the exemptive relief obtained by ETFs. In comments, the staff has expressed the view that (i) cut-off times should not be more than 24 hours before the NAV calculation time for the creation unit purchase or redemption order; (ii) a fund must make basket information publicly available with sufficient time in advance of the cut-off time to allow authorized participants the opportunity to evaluate the basket and determine whether to submit a creation unit purchase or redemption order; and (iii) a creation unit purchase or redemption order may not be made prior to the basket information being made publicly available.

Short Sales of ETF Shares

The staff is requesting that registrants disclose the risks related to short sales of ETF shares. In the staff's view, the potential for short sales subjects ETF shares to the risk of increased volatility and price decreases.

Premium/Discount Information

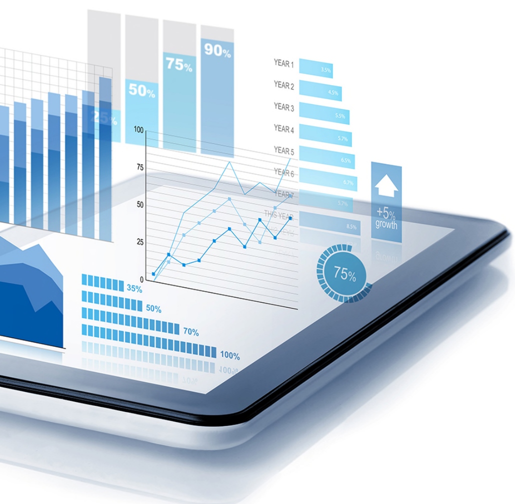
In conducting Sarbanes-Oxley Act (SOX) reviews of annual shareholders reports, the staff reviews fund websites to confirm such websites provide the information required by Item 11(g)(2) of Form N-1A, i.e., the number of days the market price of an ETF's shares was greater than the ETF's net asset value and the number of days it was less than the ETF's net asset value (i.e., premium or discount) for the most recently completed calendar year, and the most recently completed calendar quarters since that year (or the life of the fund, if shorter). As a reminder, issuers should ensure a process is in place to provide this information on ETFs' websites in a timely and complete manner.



NEW PRODUCT REGISTRATIONS

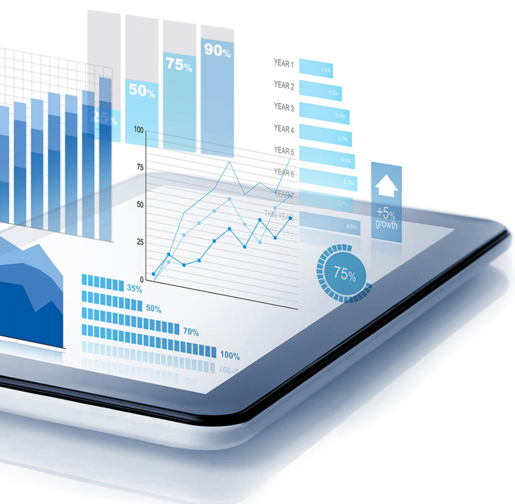
The following is a list of ETFs registered under the 1940 Act that filed a Form 8-A between April 1, 2017 and October 13, 2017. Form 8-A is filed to register a class of securities under Section 12(b) or 12(g) of the Exchange Act and is often filed in close proximity to an ETF's commencement of operations.

- VanEck NDR CMG Long/Flat Allocation ETF (LFEQ)
- NuShares ESG US Aggregate Bond ETF (NUBD)
- PowerShares PureBeta US Aggregate Bond Portfolio (PBND)
- Anfield Capital Diversified Alternatives ETF (DALT)
- Hartford Total Return Bond ETF (HTRB)
- Guggenheim BulletShares 2027 Corporate Bond ETF (BSCR)
- Guggenheim BulletShares 2025 High Yield Corporate Bond ETF (BSJP)
- PowerShares PureBetaSM MSCI USA Portfolio (PBUS)
- PowerShares PureBetaSM MSCI USA Small Cap Portfolio (PBSM)
- PowerShares PureBetaSM FTSE Developed ex-North America Portfolio (PBDM)
- PowerShares PureBetaSM FTSE Emerging Markets Portfolio (PBEE)
- PowerShares PureBetaSM 0-5 Yr US TIPS Portfolio (PBTP)
- Nationwide Risk-Based US Equity ETF (RBUS)
- Nationwide Risk-Based International Equity ETF (RBIN)
- Nationwide Maximum Diversification US Core Equity ETF (MXDU)
- Goldman Sachs Equal Weight US Large Cap Equity ETF (GSEW)
- iShares 5-10 Year Investment Grade Corporate Bond ETF (MLQD)
- iShares 10+ Year Investment Grade Corporate Bond ETF (LLQD)
- iShares iBonds Dec 2027 Term Corporate ETF (IBDS)
- Global X US Preferred ETF (PFFD)
- KraneShares MSCI One Belt One Road Index ETF (OBOR)
- Point Bridge GOP Stock Tracker ETF (MAGA)
- Goldman Sachs Access High Yield Corporate Bond ETF (GHYB)
- Main Sector Rotation ETF (SECT)
- PIMCO RAFI Dynamic Multi-Factor US Equity ETF (MFUS)
- PIMCO RAFI Dynamic Multi-Factor Emerging Markets Equity ETF (MFEM)
- PIMCO RAFI Dynamic Multi-Factor International Equity ETF (MFDX)
- Franklin Liberty Intermediate Municipal Opportunities ETF (FLMI)
- Franklin Liberty Municipal Bond ETF (FLMB)
- First Trust Institutional Preferred Securities and Income ETF (FPEI)
- Fieldstone Merlin Dynamic Large Cap Growth ETF (FMDG)
- Fieldstone/UVA Unconstrained Medium-Term Fixed Income ETF (FFIU)
- Direxion Daily Emerging Markets Bond Bull 3X Shares (EMBU)
- iShares Russell 1000 Pure U.S. Revenue ETF (AMCA)
- First Trust Dow 30 Equal Weight ETF (EDOW)
- DeltaShares S&P 500 Managed Risk ETF (DMRL)



- DeltaShares S&P 400 Managed Risk ETF (DMRM)
- DeltaShares S&P 600 Managed Risk ETF (DMRS)
- DeltaShares S&P International Managed Risk ETF (DMRI)
- ProShares Equities For Rising Rates ETF (EQRR)
- iShares MSCI Emerging Markets ex-China ETF (EMXC)
- iShares ESG 1-5 Year USD Corporate Bond ETF (SUSB)
- iShares ESG USD Corporate Bond ETF (SUSC)
- iShares Edge High Yield Defensive Bond ETF (HYDB)
- iShares Edge Investment Grade Enhanced Bond ETF (IGEB)
- Legg Mason Small-Cap Quality Value ETF (SQLV)
- Oppenheimer Emerging Markets Revenue ETF (REEM)
- Oppenheimer Global Revenue ETF (RGLB)
- Oppenheimer International Revenue ETF (REFA)
- PowerShares S&P 500 Minimum Variance Portfolio (SPMV)
- PowerShares Russell 1000 Enhanced Equal Weight Portfolio (USEQ)
- AdvisorShares New Tech and Media ETF (FNG)
- Direxion Daily EURO Stoxx 50 Bull 3X Shares (EUXL)
- ProSports Sponsors ETF (FANZ)
- Principal Spectrum Preferred Securities Active ETF (PREF)
- Inspire Corporate Bond Impact ETF (IBD)
- iShares Russell 2500 ETF (SMMD)
- WisdomTree U.S. Multifactor Fund (USMF)
- Goldman Sachs ActiveBeta U.S. Small Cap Equity ETF (GSSC)
- TrimTabs All Cap International Free-Cash-Flow ETF (TTAI)
- U.S. Global GO GOLD and Precious Metal Miners ETF (GOAU)
- Virtus Enhanced Short U.S. Equity ETF (VESH)
- ClearShares OCIO ETF (OCIO)
- VictoryShares US Multi-Factor Minimum Volatility ETF (VSMV)
- First Trust Developed International Equity Select ETF (RNDM)
- First Trust Emerging Markets Equity Select ETF (RNEM)
- First Trust Large Cap US Equity Select ETF (RNLC)
- First Trust Mid Cap US Equity Select ETF (RNMC)
- First Trust Small Cap US Equity Select ETF (RNSC)
- First Trust US Equity Dividend Select ETF (RNDV)
- First Trust California Municipal High Income ETF (FCAL)
- Guggenheim Multi-Factor Large Cap ETF (GMFL)
- Pacer Developed Markets International Cash Cows 100 ETF (ICOW)
- Pacer US Small Cap Cash Cows 100 ETF (CALF)
- Brand Value ETF (BVAL)
- Goldman Sachs Access Investment Grade Corporate Bond ETF (GIGB)
- NuShares ESG International Developed Markets Equity ETF (NUDM)
- NuShares ESG Emerging Markets Equity ETF (NUEM)
- FormulaFolios Hedged Growth ETF (FFHG)
- FormulaFolios Tactical Income ETF (FFTI)
- Amplify YieldShares Oil Hedged MLP Income ETF (AMLX)

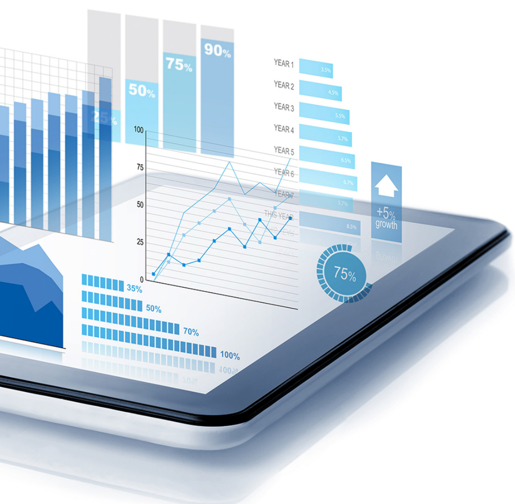
- Cambria Core Equity ETF (CCOR)
- ClearBridge Dividend Strategy ESG ETF (YLDE)
- ClearBridge Large Cap Growth ESG ETF (LRGE)
- GraniteShares Bloomberg Commodity Broad Strategy No K-1 ETF (COMB)
- GraniteShares S&P GSCI Commodity Broad Strategy No K-1 ETF (COMG)
- JPMorgan Ultra-Short Income ETF (JPST)
- WisdomTree Barclays Yield Enhanced U.S. Short-Term Aggregate Bond Fund (SHAG)
- IQ Chaikin U.S. Small Cap ETF (CSML)
- Hartford Multifactor Low Volatility US Equity ETF (LVUS)
- Hartford Multifactor Low Volatility International Equity ETF (LVIN)
- Principal Active Global Dividend Income ETF (GDVD)
- ClearBridge All Cap Growth ETF (CACG)
- Direxion Daily MSCI Mexico Bull 3X Shares (MEXX)
- Direxion Daily Utilities Bull 3X Shares (UTSL)
- Direxion Daily Industrials Bull 3X Shares (DUSL)
- Direxion Daily Transportation Bull 3X Shares (TPOR)
- Direxion Daily Aerospace & Defense Bull 3X Shares (DFEN)
- Alpha Architect Value Momentum Trend ETF (VMOT)
- Franklin LibertyQ US Equity ETF (FLQL)
- Franklin LibertyQ US Mid Cap Equity ETF (FLQM)
- Franklin LibertyQ US Small Cap Equity ETF (FLQS)
- iShares MSCI Argentina and Global Exposure ETF (AGT)
- ETF Industry & Financial Services ETF (TETF)
- VictoryShares Dividend Accelerator ETF (VSDA)
- EquityCompass Risk Manager ETF (ERM)
- EquityCompass Tactical Risk Manager ETF (TERM)
- Cambria Tail Risk ETF (TAIL)



PRIMARY CONTACTS

Our ETF team provides clients with insights into the legal, operational, and regulatory challenges facing the ETF industry. We draw on our understanding of US federal securities laws, derivatives, tax, and other disciplines to collaborate with clients in developing practical solutions and sophisticated products.

For additional information, please contact any of the following lawyers.



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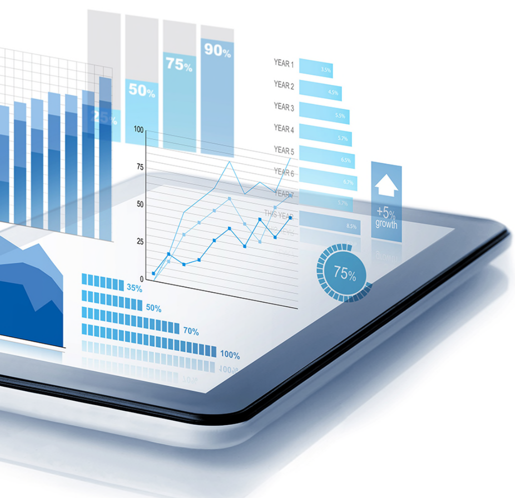

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