Morgan Lewis

# ETF ROUNDUP

Welcome to the latest issue of *ETF Roundup*, our guide to recent legal and regulatory developments affecting the exchange-traded fund (ETF) industry. We hope you find this newsletter useful. If you have any questions, 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 on page 14.

## SEC APPROVES STRUCTURE FOR NON-TRANSPARENT, ACTIVELY MANAGED ETFS

Over the last decade, the US Securities and Exchange Commission (SEC) has issued more than 100 orders under the Investment Company Act of 1940 (1940 Act) that involve actively managed exchange-traded funds (ETFs). One condition to those orders, however, has been that, before commencement of trading on each "business day" (defined as any day an ETF is open), the ETF would disclose on its website the identities and quantities of all of the portfolio instruments held by the ETF that would form the basis for the ETF's calculation of its net asset value (NAV) at the end of that day. As a result, some asset managers have been reluctant to utilize a traditional ETF format for fear that the daily disclosure of portfolio holdings could lead to front-running of an ETF's portfolio trades and allow other investors to replicate an ETF's portfolio positioning. With that in mind, several applicants have proposed structures and sought exemptive relief to permit ETFs that will trade at market prices at or close to the NAV per share of the ETF without disclosing the ETF's portfolio each day.

On May 20, the SEC issued an **order** to Precidian Investments that granted necessary exemptions from the 1940 Act to permit an actively managed ETF that does not disclose its portfolio on a daily basis. Similarly, on May 22, the SEC issued an **order** to Precidian providing an exemption from Rule 14e-5 under the Securities Exchange Act of 1934 (Exchange Act). The proposed structure, known as ActiveShares℠, is the only such structure approved by the SEC to date.

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An ActiveShares℠ ETF will trade like any other ETF, but rather than providing daily disclosure of the ETF's underlying portfolio, a verified intraday indicative value (VIIV) of the portfolio holdings, which is an estimate of the intraday NAV per share, would be disclosed every second. The VIIV is intended to provide investors with enough information for each ETF to have an effective arbitrage mechanism that will keep ETF shares trading at market prices at or close to the underlying NAV per share without disclosing the underlying portfolio. The underlying portfolio holdings would be required to be publicly disclosed on a quarterly basis only, similar to mutual fund portfolio holdings.

The creation and redemption process for an ActiveShares℠ ETF, while essentially the same as for existing ETFs, will have one significant difference: because one of the goals of the ActiveSharesSM structure is to keep the ETF's portfolio holdings from being disclosed, the creation and redemption process for each ActiveShares℠ ETF will require that creation and redemption transactions be effected through a confidential brokerage account (Confidential Account) with an agent, which will be a broker-dealer (AP Representative), for the benefit of an authorized participant (AP). Before the commencement of trading each business day, each AP Representative will be given the ETF's portfolio holdings and weightings. This information will permit the AP Representative to buy and sell positions in the portfolio holdings to permit creations or redemptions upon receiving a corresponding instruction from an AP, without disclosing the information to the AP. Pursuant to a contract, the AP Representative will be restricted from disclosing the identity of the portfolio securities of an ETF. In addition, the AP Representative will undertake an obligation not to use the identity of the portfolio securities for any purpose other than executing creations and redemptions for facilitating the operations of the ETF.

Asset managers who wish to use the ActiveShares℠ structure may file a "**short form**" exemptive application with the SEC that incorporates the terms and conditions of the Precidian application, notice, and order by reference.

## UPDATE ON PROPOSED ETF RULE

Since **issuing its proposal** for an ETF rule in June 2018 (see our **LawFlash**), the SEC has received at least 90 comment letters from a wide range of interested parties, including industry trade groups, market participants, and academics. On the whole, commenters have expressed support for the proposed rule, generally agreeing with the SEC that the rule would help modernize the regulatory framework for ETFs and acknowledging, as the SEC states in its proposal, that the rule would allow many future ETFs to commence operation without the expense and delay of obtaining an exemptive order from the SEC under the 1940 Act. Commenters also have made a number of recommendations to help enhance the rule, including the following:

- *Classification of ETF Shares as "Redeemable Securities."* Under the proposal, an ETF relying on the rule would be considered to issue a "redeemable security" within the meaning of Section 2(a)(32) of the 1940 Act. This is important because it would allow ETFs relying on the proposed rule to become eligible for the "redeemable securities" exceptions in Rules 101(c)(4) and 102(d)(4) of Regulation M and Rule 10b-17(c) under the Exchange Act in connection with secondary market transactions in ETF shares and the creation or redemption of creation units. Similarly, the SEC would view ETFs relying on the rule as within the "registered open-end investment company" exemption in Rule 11d1-2 under the Exchange Act. In proposing this aspect of the rule, the SEC explained that "[a]lthough individual ETF shares cannot be redeemed, except in limited circumstances, they can be redeemed in creation unit aggregations."

  Under the proposal, ETFs that do not rely on the rule to operate would not be able to rely on the rule's definitional relief described above, even though all ETFs, whether they would rely on the rule or not, issue shares that can be redeemed in creation unit aggregations. As a result, ETFs that do not rely on the rule would be required to continue to rely on one of the numerous "class" no-action, exemptive, and/or interpretive letters previously issued by the SEC staff (see our previous **LawFlash**), or must request bespoke relief based on individual facts and circumstances, which can be a time- and resource-consuming process. Accordingly, **it has been recommended** that the SEC extend the definitional relief to all ETFs, whether or not they rely on the proposed rule to operate.

- *Use of Cash Substitutions in Custom Baskets*. An ETF relying on the proposed rule would be permitted to use baskets that do not reflect a pro rata representation of the ETF's portfolio or that differ from other baskets used in transactions on the same business day (i.e., "custom baskets") if the ETF adopts written policies and procedures setting forth detailed parameters for the construction and acceptance of custom baskets that are in the best interests of the ETF and its shareholders. Under the proposal, however, "if an ETF substitutes cash in lieu of a portion of basket assets for a single authorized participant, that basket would be a custom basket." As a result, the proposed rule would subject an ETF's use of custom baskets that include cash substitutions to the ETF's custom basket policies and procedures.

  The SEC believes that the use of custom baskets presents an increased risk that the ETF may be subject to improper pressure by an AP to create specific baskets that favor that AP. Because such concerns are not present when an ETF substitutes cash for a security in a creation or redemption basket, commenters **have urged** the SEC to make clear that cash substitutions should only be governed by an ETF's regular basket policies and procedures.

- *Proposed Amendments to Form N-1A*. In connection with the proposed rule, the SEC proposed to amend Form N-1A to add a number of disclosure requirements for ETFs, including qualitative disclosure regarding transaction fees and costs for ETFs such as brokerage commissions, bid-ask spreads, and costs attributable to premiums and discounts, as well as quantitative disclosure regarding bid-ask spreads. Although commenters generally support the inclusion of the qualitative disclosure, concerns have been raised regarding the proposed quantitative disclosure, including the concern that the information furnished in response to the proposed disclosure requirements would quickly become stale and that the information will be considered misleading if an investor's actual bid-ask spread costs could differ from the disclosures.

  In addition, **a recommendation** for an exchange-traded product classification scheme from the SEC's Fixed Income Market Structure Advisory Committee has generated some discussion, including **a response** urging the SEC to encourage a dialogue with industry participants on the most effective means to improve uniform disclosures for such products.

Although it is not yet clear when the proposed rule will be finalized, in a **keynote address** at the ICI Mutual Funds and Investment Management Conference in March, Dalia Blass, director of the SEC's Division of Investment Management (IM Division), reiterated that finalizing the ETF rule will be a "high priority" for the IM Division in 2019.

## COMMISSIONER PEIRCE PROVIDES REMARKS ABOUT THE ETF INDUSTRY

SEC Commissioner Hester M. Peirce recently gave some **noteworthy remarks** about the ETF industry and, in particular, the SEC's role with respect to the industry's evolution. Among other things, she provided her views on the SEC's recent work to propose an ETF rule and approve non-transparent actively managed ETFs, as well as how she thinks the SEC should approach cryptocurrency products in the future. She also discussed the SEC's continuing moratorium on leveraged and inverse ETFs.

## OCIE RELEASES 2019 EXAM PRIORITIES, ISSUES RISK ALERT RELATED TO REGISTERED INVESTMENT COMPANIES

In December 2018, the SEC's Office of Compliance Inspections and Examinations (OCIE) announced its **examination priorities for 2019**, noting that, among other things, it would continue to prioritize examinations of ETFs and mutual funds, the activities of their advisers, and oversight practices of their boards of directors. In particular, OCIE noted that it plans to focus on index funds that track custom-built or bespoke indexes, ETFs that have little trading volume in the secondary market, funds with high allocation to certain securitized assets, funds with aberrational underperformance relative to peer groups, funds managed by advisers that are new to the registered funds space, and advisers that provide advice to both registered investment companies and private funds with similar strategies.

OCIE's release of its 2019 examination priorities follows its issuance of a **Risk Alert** in November 2018 in which OCIE announced that it is conducting a series of examination initiatives focused on ETFs and mutual funds to assess industry practices and regulatory compliance in certain areas that may have an impact on retail investors. OCIE's examination initiatives relevant to ETFs include the following:

- **Index ETFs that track custom-built indexes (i.e., indexes that are created and/or maintained by an index provider for a single fund or sponsor)**. OCIE will assess the risks associated with the roles of advisers and index providers as they relate to the selection and weighting of custom-built or bespoke index components, ongoing index administration, fund management, and related performance advertising. OCIE also will seek to do the following:
  - Review the manner in which the portfolios are managed compared to the ETFs' disclosures to investors describing their strategies
  - Understand the nature of services provided by the index providers, and the adequacy of disclosures made to the ETFs' boards regarding the index providers
  - Assess whether any conflicts of interest between the index providers and advisers are appropriately addressed
  - Review the effectiveness of the ETFs' compliance programs for portfolio management and their boards' oversight of such programs
- **Smaller and thinly traded ETFs**. OCIE believes that smaller ETFs and ETFs that have little secondary market trading volume may present risks to investors including, for example, increases in bid-ask spreads, increasing premiums/discounts to NAV, and the risk that such ETFs may be delisted from an exchange and have to liquidate their assets, in which case the market price of the ETFs has the potential to rapidly decline and investors may bear the cost to liquidate the ETFs' assets. Accordingly, some of the compliance risks, conflicts, and practices OCIE will assess include whether
  - investment risks are adequately disclosed to investors, including risks associated with liquidating ETFs, as applicable;

- board oversight incorporates the ETF's ability to continue as an ongoing concern;
- tracking errors are effectively monitored;
- portfolios are appropriately liquidated for distribution to shareholders upon liquidation, as applicable; and
- delisting and associated liquidation proceedings have received the requisite board approvals and oversight, as applicable.

- **ETFs managed by advisers that are relatively new to managing registered investment companies**. Although advisers that are relatively new to managing ETFs may not be new to the investment management industry, OCIE believes there is the potential for these firms to lack experience or sufficient knowledge regarding the 1940 Act. OCIE believes that a lack of adequate compliance support increases the risk of not complying with fund-specific regulatory requirements, engaging in prohibited transactions, and omitting information required to be disclosed to investors. As such, OCIE will evaluate the following:
  - Fund governance, to ensure that boards are provided with sufficient information to perform their duties
  - Effectiveness of advisers' and ETFs' compliance programs
  - Marketing and distribution efforts related to ETFs

## THE LATEST IN EXCHANGE ACT ISSUES FOR ETFS

In February, NYSE Arca filed two rule change proposals pursuant to Rule 19b-4 under the Exchange Act that, if adopted, would (1) **adopt generic listing standards** for municipal bond index ETFs and (2) **amend existing generic listing standards** for active ETFs that include fixed income securities in their portfolios. Below, we summarize the conditions that an ETF would have to satisfy to rely on the proposed generic listing standards. In addition, we summarize a rule change that the SEC **approved in March** that requires issuers of leveraged and inverse ETFs to post on their websites warnings regarding the risks of such products, as well as a recently issued no-action relief that permits fixed-income ETFs and "combination" ETFs to issue and redeem shares without being bound to a minimum creation unit size or value.

### NYSE Arca Proposes Generic Listing Standards for Municipal Bond Index ETFs

On February 8, NYSE Arca filed a **proposed rule change** to adopt generic listing standards for ETFs based on indexes of municipal securities.[1] In proposing the rule change, NYSE Arca noted that, in its experience, indices of municipal securities are often unable to satisfy the generic listing requirements applicable to fixed income indices with respect to minimum original principal amount outstanding. In particular, because municipal securities are generally issued with individual maturities of relatively small size, municipal bond indices typically are unable to satisfy the requirement that fixed income securities that, in the aggregate, account for at least 75% of the fixed income securities portion of the weight of an index each have a minimum principal amount outstanding of $100 million or more. As a result, issuers have had to work with exchanges to obtain separate Rule 19b-4 orders from the SEC to list and trade shares of municipal bond index ETFs.

ETFs seeking to rely on the new listing standards would need to meet certain quantitative requirements that are more stringent than those applicable to an index of fixed income securities, as described below. The purpose of these heightened requirements is to ensure significant diversification and lack of concentration among constituent securities to provide a strong degree of protection against index manipulation. In addition to these requirements, NYSE Arca also proposed to adopt additional rules related to index methodology and calculation, dissemination of information, initial shares outstanding, hours of trading, surveillance procedures, and disclosures.

| Requirement | Existing Requirement for Fixed Income Securities | Proposed Requirement for Municipal Securities |
|---|---|---|
| Original Principal Amount | Fixed income security components that in aggregate account for at least 75% of the fixed income securities portion of the weight of the index or portfolio each shall have a minimum original principal amount outstanding of $100 million or more. | Municipal security components that in aggregate account for at least 90% of the municipal securities portion of the weight of the index or portfolio each shall have a minimum original principal amount outstanding of at least $5 million and have been issued as part of a transaction of at least $20 million. |

1 The term "municipal securities" is defined in Section 3(a)(29) of the Exchange Act.

| | | |
|---|---|---|
| Maximum Weight of Component Securities | No component fixed income security (excluding Treasury securities and government-sponsored entity securities) shall represent more than 30% of the fixed income securities portion of the weight of the index or portfolio, and the five most heavily weighted component fixed income securities in the index or portfolio shall not in the aggregate account for more than 65% of the fixed income securities portion of the weight of the index or portfolio. | No component municipal security shall represent more than 10% of the municipal securities portion of the weight of the index or portfolio, and the five most heavily weighted component municipal securities in the index or portfolio shall not in the aggregate account for more than 30% of the municipal securities portion of the weight of the index or portfolio |
| Diversification of Issuers | An underlying index or portfolio (excluding one consisting entirely of exempted securities) must include a minimum of 13 non-affiliated issuers.[2] | An underlying index or portfolio must include a minimum of 13 non-affiliated issuers. |
| Minimum Number of Components | 13 | 500 |

The SEC received no comments on the rule proposal, which were due on March 20. On April 9, **the SEC extended the date**—from April 13 to May 28—by which it will either approve or disapprove (or institute proceedings to determine whether to disapprove) the proposed rule change. On May 28, the SEC **issued an order** instituting proceedings to determine whether to approve or disapprove the proposed rule change. In this order, the SEC set forth a number of areas where it is seeking comment. The SEC specifically requested comment on whether the proposed requirement that an underlying index or portfolio must include a minimum of 500 component municipal securities is consistent with the requirement that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade," and "to protect investors and the public interest."

### NYSE Arca Proposes to Amend Generic Listing Standards for Active ETFs that Include Non-Agency Asset-Backed Securities in Their Portfolios

In a separate filing on February 14, NYSE Arca **proposed to amend generic listing standards** applicable to fixed income securities included in the portfolio of an active ETF. Specifically, where the existing standards limit non-agency, non-government-sponsored entity, and privately issued mortgage-related and other asset-backed securities (ABS and, collectively, non-agency ABS) to not more than 20% of the fixed income portion of an active ETF's portfolio, the amended standards would permit non-agency ABS to account for not more than 20% of the weight of the entire portfolio. NYSE Arca believes that this amendment may provide funds with benefits associated with increased diversification, as non-agency ABS may be less correlated to interest rates than many other fixed income securities. In addition, NYSE Arca believes that application of the 20% limit to a fund's entire portfolio would be more equitable to a fund with different investment objectives and holdings (i.e., a fund that does not hold 100% of its assets in fixed income securities).

The SEC received no comments on the rule proposal, which were due on March 27. On April 18, **the SEC extended the date**—from April 20 to June 4—by which it will either approve or disapprove (or institute proceedings to determine whether to disapprove) the proposed rule change. The SEC **issued an order** approving the proposed rule change on June 3.

### NYSE Arca Proposes to Amend Generic Listing Standards for Active ETFs that Include Non-Agency Asset-Backed Securities in Their Portfolios

On March 19, the SEC **approved a rule change** proposed by The Nasdaq Stock Market LLC to require issuers of leveraged and inverse exchange-traded products (ETPs) that seek returns on a daily basis to provide additional website disclosure highlighting the daily return feature of these products and the risks associated with holding these products for longer than one day. Issuers of such products are now required to include on each such product's website a statement that the product seeks returns for a single day and that, due to the compounding of returns, holding periods of longer than one day can result in investment returns that are significantly different than the product's target returns. The website disclosure is also required to direct investors to consult the prospectus for further information on the calculation of the returns and other risks associated with investing in this type of product. For the most part, the rule change simply codifies the existing practice of issuers of leveraged and inverse ETPs.

2 Municipal securities are included in the definition of exempted securities in Section 3(a)(12) of the Exchange Act. As a result, an index of municipal securities that otherwise meets the current generic listing requirements would not be required to satisfy any minimum issuer diversification requirements.

**No-Action Relief re: Creation Unit Size and Value Issued for Fixed Income and Combination ETFs**

We previously reported on **exemptive relief** that provides equity index–based ETFs with the ability to issue shares even if they are unable to meet the minimum creation unit size or dollar value they must meet to rely on the **Equity Class Relief Letter**. Until recently, fixed income ETFs and "combination" ETFs (i.e., ETFs that track a mix of equity- and fixed income-based indexes) have not been afforded such relief and thus generally have had to continue to issue and redeem shares in creation unit aggregations of 50,000 shares, or such other amount where the value of a creation unit aggregation is at least $1 million. In September 2018, however, the SEC staff issued **no-action relief** permitting fixed-income and combination ETFs to issue and redeem shares without being bound by a specific size or dollar value, so long as (1) the aggregation is set at a size best designed to facilitate the purchase and sales activities of the ETF to ensure an efficient arbitrage mechanism and (2) the amount is fully disclosed in the ETF's registration statement. It is worth noting that Form N-1A currently permits ETFs to omit certain information from their prospectuses so long as they issue and redeem shares in creation units of not less than 25,000 shares each. However, under the SEC's proposal for Rule 6c-11, the SEC would not mandate a particular minimum creation unit size or dollar value. As a result, the Form N-1A disclosure relief currently available to ETFs with a basket size of at least 25,000 shares would be available to all ETFs regardless of their basket sizes.

# SEC ADOPTS RULES TO PROMOTE RESEARCH ON INVESTMENT FUNDS

On November 30, 2018, the SEC **adopted Rule 139b under the Securities Act of 1933** (1933 Act), which establishes a non-exclusive safe harbor for an unaffiliated broker-dealer to publish or distribute a research report on an ETF or other "covered investment fund"[3] without such publication or distribution being deemed an offer to sell the covered investment fund's securities for purposes of Sections 2(a)(10) and 5(c) of the 1933 Act. The rule applies even if the broker-dealer is participating or may participate in a registered offering of the covered investment fund's securities. The rule, which was mandated by the Fair Access to Investment Research Act of 2017 (FAIR Act), expands the safe harbor available under Rule 139 for the publication or distribution of certain operating company research reports. Under this expanded safe harbor, research reports on ETFs and other covered investment funds are deemed not to constitute an offer for sale or offer to sell securities for purposes of the 1933 Act, thereby removing prospectus delivery obligations and reducing the potential for materials to be deemed to be non-conforming prospectuses.

The following conditions of the rule apply to research reports about mutual funds and ETFs in substantially continuous distribution:

| | |
|---|---|
| **General** | • The broker-dealer publishes or distributes research reports in the regular course of its business; and<br>• any quotation of the fund's performance is presented in accordance with Rule 482 under the 1933 Act. |
| **Issuer-Specific Research Reports** | • The fund has been subject to the reporting requirements of the 1940 Act for at least 12 months and has filed in a timely manner all of the reports required to be filed pursuant to the 1940 Act for the 12 months immediately preceding the date of the broker-dealer's reliance on the rule; and<br>• the aggregate market value of the ETF, or the net asset value of the mutual fund, is at least $75 million at the time of the broker-dealer's initial publication or distribution of a research report on the fund (or reinitiation thereof), and at least quarterly thereafter. |
| **Industry Research Reports** | • The fund is subject to the reporting requirements of the 1940 Act;<br>• the research report (1) includes similar information with respect to a substantial number of covered investment funds of the fund's type (e.g., money market fund, bond fund, balanced fund) or investment focus (e.g., primarily invested in the same industry or sub-industry, or the same country or geographic region), or (2) contains a comprehensive list of unaffiliated covered investment funds currently recommended by the broker-dealer; and<br>• the analysis regarding the fund is not given materially greater space or prominence in the publication than that given to other covered investment funds. |

3 "Covered investment funds" include registered investment companies, business development companies, and trusts or other persons issuing securities in an offering registered under the 1933 Act whose (1) securities are listed for trading on a national securities exchange, (2) assets consist primarily of commodities, currencies, or derivative instruments that reference commodities or currencies or interests in the foregoing, and (3) registration statement under the 1933 Act reflects that its securities are purchased or redeemed, subject to conditions or limitations, for a ratable share of its assets (e.g., ETFs).

As directed by the FAIR Act, the SEC also adopted new Rule 24b-4 under the 1940 Act, which excludes a research report about a covered investment fund published or distributed by an unaffiliated broker-dealer from the filing requirements of Section 24(b) of the 1940 Act, except to the extent that the research report is otherwise not subject to the content standards in self-regulatory organization rules related to research reports. In addition, the SEC also approved a conforming amendment to Rule 101 of Regulation M that aligns the treatment of research under Rule 139b with the treatment of research under other rules of Regulation M. The new rules are expected to have a significant impact on the ETF marketplace, as they expand the universe of broker-dealers able to provide research reports on ETFs.

## FINRA STAFF PERMITS PRE-INCEPTION INDEX PERFORMANCE DATA AND CERTAIN COMMUNICATIONS

On January 31, the Financial Industry Regulatory Authority (FINRA) staff **issued an interpretive letter** permitting the use of pre-inception index performance (PIP) data in communications concerning open-end investment companies. The guidance permits the use of such data (also referred to as "hypothetical" or "backtested" data) in communications with institutional investors[4] and subject to a number of conditions. The conditions are similar to those imposed in a **2013 letter** in which FINRA permitted the use of PIP data in institutional communications concerning index-tracking ETPs, including ETFs.

FINRA notes that the newly issued guidance does not affect its "long standing position that the presentation of hypothetical back-tested performance in communications used with retail investors does not comply with FINRA Rule 2210(d)." Issuers also should note that disclosure reviewers in the IM Division routinely issue comments regarding the inclusion on index providers' websites of backtested index performance information.

## INDUSTRY IN BRIEF

### SEC Proposes New Comprehensive Registered Fund of Funds Rule

In December 2018, the SEC **voted unanimously** to **propose Rule 12d1-4** under the 1940 Act, make related amendments to Rule 12d1-1 and Form N-CEN, and rescind Rule 12d1-2. The proposal, which we discuss further in our **LawFlash**, would permit registered funds, including ETFs, and business development companies (BDCs) to invest in other registered funds and BDCs beyond the limits of Section 12(d)(1) of the 1940 Act without the need to obtain individual exemptive orders from the SEC.

The proposal is most noteworthy in that the SEC did not choose to codify the exemptive relief that virtually every existing ETF has obtained, but rather focused on creating "a more consistent and efficient regulatory framework than the current regulatory framework for funds of funds." As a result, the proposal does not focus on the unique characteristics of an ETF that (1) make it impractical for an ETF to invest in an underlying unlisted closed-end fund or most open-end funds or (2) make ETFs particularly suitable as an underlying acquired fund.

Comments on the proposal were due May 2. In her March keynote address, Ms. Blass reiterated that finalizing the fund of funds rule will be a "high priority" for the IM Division in 2019.

### SEC Proposes New Comprehensive Registered Fund of Funds Rule

The IM Division issued a no-action letter on February 28 relieving fund boards of directors from in-person voting requirements in certain circumstances. In particular, the no-action letter addresses situations where directors (1) are unable to meet in person due to unforeseen or emergency circumstances or (2) previously fully discussed and considered all material matters related to a proposed action at an in-person meeting but did not vote at the in-person meeting. In issuing the no-action letter, the staff agreed that the relief would remove significant or unnecessary burdens for funds and their boards, and would not diminish a board's ability to carry out its general oversight role or other specific duties. For an overview of the relief and the circumstances under which it is available, see our **LawFlash**. It is important to note that the relief does not exempt the fund, its adviser, or its board of directors from any statutory requirements, but rather provides assurance that the SEC will not take enforcement action against them for failing to fully meet certain in-person voting requirements.

### IRS, Treasury Issue Final Guidance Regarding Certain Investments by RICs

The Internal Revenue Service and the US Department of the Treasury issued final regulations amending Treasury Regulations § 1.851-2 on March 19. Among other things, the regulations provide that regulated investment companies can now treat income inclusions in respect of controlled foreign corporations (CFCs) and certain passive foreign investment companies (PFICs) as qualifying income regardless of whether the CFCs or PFICs make distributions out of earnings and profits, provided that the income is

4 As defined in FINRA Rule 2210(a)(4).

derived with respect to a corporation's business of investing in stock, securities, or currencies. See our **LawFlash** for a full analysis of the regulations.

### News from the SEC

*Regulatory Agenda*. In **remarks given on December 6, 2018**, SEC Chairman Jay Clayton reviewed the SEC's progress under its 2018 regulatory agenda and outlined the SEC's agenda for 2019. He noted that, compared to previous years, the SEC took a more focused approach to the near-term portion of its regulatory agenda in 2018 and was able to advance 23 of the 26 rules on its agenda, and that he expects the SEC to take a similarly focused approach in 2019.

*Review of Existing Rules*. In November 2018, the SEC announced that it **will review certain existing rules** pursuant to the Regulatory Flexibility Act (RFA) to determine whether these rules should be continued without change, amended, or rescinded. The RFA requires administrative agencies to review rules that have a significant economic impact on a substantial number of small entities within 10 years of the publication of such rules as final rules. In conducting such a review, agencies must address the continued need for the rule; the nature of complaints or comments received concerning the rule from the public; the complexity of the rule; the extent to which the rule overlaps, duplicates, or conflicts with other federal rules, and, to the extent feasible, with state and local government rules; and the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

In addition, as a matter of policy, the SEC reviews all final rules that have been published for notice and comment to assess their continued utility. As such, the list of rules the SEC is undertaking to review is broader than what the RFA requires. The SEC has undertaken to review Rules 12d1-1, 12d1-2, and 12d1-3 under the 1940 Act, among others (as noted above, the SEC has issued a proposal regarding fund of funds arrangements). The SEC also will review rules relating to custody under the Investment Advisers Act of 1940.

*Use of Derivatives by Registered Investment Companies*. The SEC originally proposed a rule governing fund use of derivatives in December 2015 but has not taken any further action since that time. Addressing this proposal in **a keynote address** at the ICI Securities Law Developments Conference in October 2018, Ms. Blass stated that the staff has started to take a "fresh look" at the issue in light of feedback from commenters. She added that the staff is working toward a recommendation for a re-proposal and encouraged interested parties to share their thoughts with the staff as they work it. In a **keynote address** at the ICI Mutual Funds and Investment Management Conference in March, Ms. Blass stated that she anticipates that the IM Division will present such a re-proposal this year.

*Modernization of Investment Company Disclosure*. Pursuant to an initiative launched in 2017 to review the investor experience, the IM Division is seeking opportunities to improve the quality and usefulness of information that investors receive about funds and advisers. In June 2018, the SEC **issued a request for comment** on fund retail investor experience and disclosure. In her March keynote address, Ms. Blass said that the IM Division is considering ideas from commenters, noting that preliminary areas of focus for that work include exploring options for a summary shareholder report and ways to improve fee and risk disclosures.

### SEC Staff Issues Guidance on Rule 485(a) Filings

The SEC staff recently **issued guidance** regarding registrants' use of Rule 485(a) under the 1933 Act. The guidance is notable in that it (1) requests "registrants planning filings under Rule 485(a) that may raise material questions of first impression—or that address issues in a manner inconsistent with previous precedent—to contact the staff to discuss these issues before making a Rule 485(a) filing"; and (2) requests that registrants respond to comments on a Rule 485(a) filing no later than five business days before the filing is scheduled to become effective automatically and that, to the extent registrants are unable to submit responses by that time, file an amendment under Rule 485(b)(1)(iii) delaying the effectiveness date of the filing as needed until staff comments have been resolved.

## NEW PRODUCT REGISTRATIONS

The following is a list of ETFs registered under the 1940 Act that filed a Form 8-A between January 1 and March 31. 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.

| Fund | Ticker Symbol |
|---|---|
| Pacer Trendpilot International ETF | PTIN |
| Pacer Trendpilot Fund of Funds ETF | TRND |
| Pacer US Cash Cows Growth ETF | BUL |
| Pacer Cash Cows Fund of Funds ETF | HERD |
| Pacer Emerging Markets Cash Cows 100 ETF | ECOW |
| AGFiQ Global Infrastructure ETF | GLIF |
| AGFiQ Dynamic Hedged U.S. Equity ETF | USHG |
| Timothy Plan US Large Cap Core ETF | TPLC |
| Timothy Plan High Dividend Stock ETF | TPHD |

| | |
|---|---|
| **iM DBi Managed Futures Strategy ETF** | DBMF |
| **Amplify CrowdBureau® Peer-to-Peer Lending & Crowdfunding ETF** | LEND |
| **Virtus Seix Senior Loan ETF** | SEIX |
| **Global X Russell 2000 Covered Call ETF** | RYLD |
| **AdvisorShares Pure Cannabis ETF** | YOLO |
| **Global X Cloud Computing ETF** | CLOU |
| **Quadratic Interest Rate Volatility and Inflation Hedge ETF** | IVOL |
| **The Acquirers Fund** | ZIG |
| **Principal Ultra-Short Active Income ETF** | USI |
| **SoFi Select 500 ETF** | SFY |
| **SoFi Next 500 ETF** | SFYX |
| **SoFi 50 ETF** | SFYF |
| **SoFi Gig Economy ETF** | GIGE |
| **iShares Self-Driving EV and Tech ETF** | IDRV |
| **KraneShares MSCI Emerging Markets ex China Index ETF** | KEMX |
| **Procure Space ETF** | UFO |
| **SPDR SSGA US Sector Rotation ETF** | XLSR |
| **SPDR SSGA Fixed Income Sector Rotation ETF** | FISR |
| **WisdomTree India Ex-State-Owned Enterprises Fund** | IXSE |
| **Goldman Sachs Access Ultra Short Bond ETF** | GSST |
| **iShares iBonds Dec 2026 Term Muni Bond ETF** | IBMO |
| **iShares iBonds Dec 2027 Term Muni Bond ETF** | IBMP |
| **iShares iBonds Dec 2028 Term Muni Bond ETF** | IBMQ |
| **Innovator S&P 500 Buffer ETF™ – April** | BAPR |
| **Innovator S&P 500 Power Buffer ETF™ – April** | PAPR |
| **Innovator S&P 500 Ultra Buffer ETF™ – April** | UAPR |
| **DeltaShares S&P EM 100 & Managed Risk ETF** | DMRE |
| **DeltaShares S&P 500 Managed Risk ETF** | DMRL |
| **DeltaShares S&P 400 Managed Risk ETF** | DMRM |

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| **DeltaShares S&P 600 Managed Risk ETF** | DMRS |
| **DeltaShares S&P International Managed Risk ETF** | DMRI |
| **BlackRock U.S. Equity Factor Rotation ETF** | DYNF |
| **Global X Genomics & Biotechnology ETF** | GNOM |
| **iShares Focused Value Factor ETF** | FOVL |
| **RYZZ Managed Futures Strategy Plus ETF** | RYZZ |
| **NETLease Corporate Real Estate ETF** | NETL |
| **Hoya Capital Housing ETF** | HOMZ |
| **JPMorgan BetaBuilders 1-5 Year U.S. Aggregate Bond ETF** | BBSA |
| **JPMorgan BetaBuilders U.S. Equity ETF** | BBUS |
| **Salt Low truBeta US Market ETF** | LSLT |
| **Xtrackers MSCI USA ESG Leaders Equity ETF** | USSG |
| **Virtus WMC Risk-Managed Alternative Equity ETF** | VWRM |
| **Defiance Next Gen Connectivity ETF** | FIVG |
| **iShares MSCI Japan Value ETF** | EWJV |
| **iShares MSCI Japan Equal Weighted ETF** | EWJE |
| **John Hancock Multifactor Media and Communications ETF** | JHCS |
| **Fidelity Targeted Emerging Markets Factor ETF** | FDEM |
| **Fidelity Targeted International Factor ETF** | FDEV |
| **Fidelity Small-Mid Factor ETF** | FSMD |
| **Pacific Global US Equity Income ETF** | USDY |
| **Virtus Private Credit Strategy ETF** | VPC |
| **Virtus Real Asset Income ETF** | VRAI |
| **ARK Fintech Innovation ETF** | ARKF |
| **Aware Ultra-Short Duration Enhanced Income ETF** | AWTM |
| **Tortoise Cloud Infrastructure Fund** | TCLD |
| **Tortoise Digital Payments Infrastructure Fund** | TPAY |
| **JPMorgan Core Plus Bond ETF** | JCPB |
| **First Trust Long Duration Opportunities ETF** | LGOV |
| **Amplify International Online Retail ETF** | XBUY |

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| ProShares UltraShort Communication Services Select Sector | YCOM |
| ProShares UltraPro Short Communication Services Select Sector | SCOM |
| ProShares Ultra Communication Services Select Sector | XCOM |
| ProShares UltraPro Communication Services Select Sector | UCOM |
| Direxion Russell 1000® Value Over Growth ETF | RWVG |
| Direxion Russell 1000® Growth Over Value ETF | RWGV |
| Direxion Russell Large Over Small Cap ETF | RWLS |
| Direxion Russell Small Over Large Cap ETF | RWSL |
| Direxion MSCI Cyclicals Over Defensives ETF | RWCD |
| Direxion MSCI Defensives Over Cyclicals ETF | RWDC |
| Direxion MSCI Emerging Over Developed Markets ETF | RWED |
| Direxion MSCI Developed Over Emerging Markets ETF | RWDE |
| Direxion FTSE Russell US Over International ETF | RWUI |
| Direxion FTSE Russell International Over US ETF | RWIU |
| Goldman Sachs Motif Data-Driven World ETF | GDAT |
| Goldman Sachs Motif Finance Reimagined ETF | GFIN |
| Goldman Sachs Motif Human Evolution ETF | GDNA |
| Goldman Sachs Motif Manufacturing Revolution ETF | GMAN |
| Goldman Sachs Motif New Age Consumer ETF | GBUY |
| Western Asset Short Duration Income ETF | WINC |
| First Trust Low Duration Strategic Focus ETF | LDSF |
| AdvisorShares Sabretooth ETF | BKCH |
| Syntax Stratified LargeCap ETF | SSPY |
| ERShares Non-US Small Cap ETF | ERSX |
| VanEck Vectors AMT-Free Intermediate Municipal Index ETF | ITM |
| VanEck Vectors AMT-Free Long Municipal Index ETF | MLN |
| VanEck Vectors AMT-Free Short Municipal Index ETF | SMB |
| VanEck Vectors CEF Municipal Income ETF | XMPT |

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| VanEck Vectors High-Yield Municipal Index ETF | HYD |
| VanEck Vectors Pre-Refunded Municipal Index ETF | PRB |
| VanEck Vectors Short High-Yield Municipal Index ETF | SHYD |
| FlexShares® Morningstar US Market Factor Tilt Index Fund | TILT |
| FlexShares ® STOXX® US ESG Impact Index Fund | ESG |
| Innovator S&P 500 Buffer ETF—January | BJUL |
| Innovator S&P 500 Power Buffer ETF—January | PJUL |
| Innovator S&P 500 Ultra Buffer ETF—January | UJUL |
| Global X DAX Germany ETF | DAX |
| Global X NASDAQ 100® Covered Call ETF | QYLD |
| Global X S&P 500® Covered Call ETF | HSPX |
| Xtrackers Indxx Advanced Life Sciences & Smart Healthcare ETF | ELXR |
| Xtrackers Indxx New Energy & Environment ETF | JOLT |
| Xtrackers Indxx Space & Exploration ETF | GLXY |
| IQ Short Duration Enhanced Core Bond U.S. ETF | SDAG |
| WisdomTree Yield Enhanced Global Aggregate Bond Fund | GLBY |
| Cambria Shareholder Yield ETF | SYLD |
| Cambria Global Value ETF | GVAL |
| Cambria Global Momentum ETF | GMOM |
| IQ 500 International ETF | IQIN |
| Quadratic Interest Rate Volatility and Inflation Hedge ETF | HCPI |
| JPMorgan Corporate Bond Research Enhanced ETF | JIGB |
| JPMorgan U.S. Aggregate Bond ETF | JAGG |
| PGIM QMA Strategic Alpha International Equity ETF | PQIN |
| Cushing® Energy & MLP ETF | XLEY |
| Cushing® Utility & MLP ETF | XLUY |
| Cushing® Transportation & MLP ETF | XLTY |
| Cushing® Energy Supply Chain & MLP ETF | XLSY |
| Global X MSCI China Large-Cap 50 ETF | CHIL |

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| **Global X MSCI China Consumer Staples ETF** | CHIS |
| **Global X MSCI China Health Care ETF** | CHIH |
| **Global X MSCI China Information Technology ETF** | CHIK |
| **Global X MSCI China Real Estate ETF** | CHIR |
| **Global X MSCI China Utilities ETF** | CHIU |
| **Direxion Daily Consumer Staples Bull 3X Shares** | NEED |
| **Direxion Daily Consumer Staples Bear 3X Shares** | LACK |
| **Invesco Multi-Factor Defensive Core Fixed Income ETF** | IMFD |
| **Invesco Multi-Factor Income ETF** | IMFI |
| **AAM S&P Developed Markets High Dividend Value ETF** | DMDV |
| **Global X E-commerce ETF** | EBIZ |
| **PGIM QMA Strategic Alpha Small-Cap Growth ETF** | PQSG |
| **PGIM QMA Strategic Alpha Small-Cap Value ETF** | PQSV |
| **Gadsden Dynamic Growth ETF** | GDG |
| **Gadsden Dynamic Multi-Asset ETF** | GDMA |
| **iShares iBonds Dec 2025 Term Muni Bond ETF** | IBMN |
| **iShares Global Green Bond ETF** | BGRN |
| **TigerShares China-U.S. Internet Titans ETF** | TTTN |
| **Amplify BlackSwan Growth & Treasury Core ETF** | SWAN |
| **Reality Shares Fundstrat DQM Long ETF** | DQML |
| **Direxion Daily Communication Services Index Bull 3X Shares** | TAWK |
| **Direxion Daily Communication Services Index Bear 3X Shares** | MUTE |
| **Direxion Daily Consumer Discretionary Bull 3X Shares** | WANT |
| **Direxion Daily Consumer Discretionary Bear 3X Shares** | PASS |
| **VanEck Vectors Morningstar Global Wide Moat ETF** | GOAT |
| **VanEck Vectors Morningstar Durable Dividend ETF** | DURA |
| **Invesco S&P 500® Equal Weight Communication Services ETF** | EWCO |
| **First Trust Short Duration Managed Municipal ETF** | FSMB |

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| **First Trust Ultra Short Duration Municipal ETF** | FUMB |
| **First Trust Dow Jones International Internet ETF** | FDNI |
| **Motley Fool Small-Cap Growth ETF** | MFMS |
| **SPDR Kensho Clean Power ETF** | XKCP |
| **SPDR Kensho Final Frontiers ETF** | XKFF |
| **SPDR Kensho New Economies Composite ETF** | KOMP |
| **JPMorgan Municipal ETF** | JMUB |
| **PGIM QMA Strategic Alpha Large-Cap Core ETF** | PQLC |
| **Distillate U.S. Fundamental Stability & Value ETF** | DSTL |
| **VanEck Vectors Video Gaming and eSports ETF** | ESPO |
| **iShares ESG U.S. Aggregate Bond ETF** | EAGG |
| **JPMorgan Ultra-Short Municipal ETF** | JMST |
| **ProShares Pet Care ETF** | PAWZ |
| **Invesco BulletShares 2021 USD Emerging Markets Debt ETF** | BSAE |
| **Invesco BulletShares 2022 USD Emerging Markets Debt ETF** | BSBE |
| **Invesco BulletShares 2023 USD Emerging Markets Debt ETF** | BSCE |
| **Invesco BulletShares 2024 USD Emerging Markets Debt ETF** | BSDE |
| **Innovator S&P 500 Buffer ETF – October** | BOCT |
| **Innovator S&P 500 Power Buffer ETF – October** | POCT |
| **Innovator S&P 500 Ultra Buffer ETF – October** | UOCT |
| **LeaderSharesTM AlphaFactor® US Core Equity ETF** | LSAF |
| **First Trust IPOX Europe Equity Opportunities ETF** | FPXE |
| **PGIM Active High Yield Bond ETF** | PHYL |
| **Vesper U.S. Large Cap Short-Term Reversal Strategy ETF** | UTRN |
| **Vanguard ESG U.S. Stock ETF** | ESGV |
| **Vanguard ESG International Stock ETF** | VSGX |
| **SPDR Solactive Hong Kong ETF** | ZHOK |
| **John Hancock Multifactor Emerging Markets ETF** | JHEM |

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| **iShares iBonds Dec 2028 Term Corporate ETF** | IBDT |
| **Franklin FTSE Latin America ETF** | FLLA |
| **Franklin FTSE Saudi Arabia ETF** | FLSA |
| **Franklin FTSE South Africa ETF** | FLZA |
| **Janus Henderson Mortgage-Backed Securities ETF** | JMBS |
| **Innovator IBD® Breakout Opportunities ETF** | BOUT |
| **Anfield Universal Fixed Income ETF** | AFIF |
| **Invesco Strategic US ETF** | IUS |
| **Invesco Strategic US Small Company ETF** | IUSS |
| **Invesco Strategic Developed ex-US ETF** | ISDX |
| **Invesco Strategic Developed ex-US Small Company ETF** | ISDS |
| **Invesco Strategic Emerging Markets ETF** | ISEM |
| **Impact Shares Sustainable Development Goals Global Equity ETF** | SDGA |
| **Cambria Trinity ETF** | TRTY |
| **American Century Diversified Municipal Bond ETF** | TAXF |
| **American Century Quality Diversified International ETF** | QINT |
| **American Century STOXX® U.S. Quality Growth ETF** | QGRO |
| **First Trust Dorsey Wright Momentum & Low Volatility ETF** | DVOL |
| **First Trust Dorsey Wright Momentum & Value ETF** | DVLU |
| **KraneShares Emerging Markets Healthcare Index ETF** | KMED |
| **Goldman Sachs Access Inflation Protected USD Bond ETF** | GTIP |
| **Defiance Quantum ETF** | QTUM |
| **Xtrackers MSCI Emerging Markets ESG Leaders Equity ETF** | EMSG |
| **Xtrackers MSCI EAFE ESG Leaders Equity ETF** | EASG |
| **Xtrackers MSCI ACWI ex USA ESG Leaders Equity ETF** | ACSG |
| **Impact Shares YWCA Women's Empowerment ETF** | WOMN |
| **Global X Adaptive U.S. Factor ETF** | AUSF |

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| **Loncar China BioPharma ETF** | CHNA |
| **WisdomTree Emerging Markets Multifactor Fund** | EMMF |
| **WisdomTree International Multifactor Fund** | DWMF |
| **Aptus Defined Risk ETF** | DRSK |
| **Innovator S&P 500 Buffer ETF – July** | BJUL |
| **Innovator S&P 500 Power Buffer ETF – July** | PJUL |
| **Innovator S&P 500 Ultra Buffer ETF – July** | UJUL |
| **Columbia Multi-Sector Municipal Income ETF** | MUST |
| **Invesco BulletShares 2028 Corporate Bond ETF** | BSCS |
| **Invesco BulletShares 2026 High Yield Corporate Bond ETF** | BSJQ |
| **WisdomTree 90/60 U.S. Balanced Fund** | NTSX |
| **Western Asset Total Return ETF** | WBND |
| **Oppenheimer Emerging Markets Ultra Dividend Revenue ETF** | REDV |
| **Oppenheimer International Ultra Dividend Revenue ETF** | RIDV |
| **Defiance Future Tech ETF** | AUGR |
| **KraneShares MSCI All China Index ETF** | KALL |
| **Global X TargetIncomeTM 5 ETF** | TFIV |
| **Global X TargetIncomeTM Plus 2 ETF** | TFLT |
| **JPMorgan BetaBuilders Canada ETF** | BBCA |
| **JPMorgan BetaBuilders Developed Asia ex-Japan ETF** | BBAX |
| **Innovator Loup Frontier Tech ETF** | LOUP |
| **Vanguard Total World Bond ETF** | BNDW |
| **First Trust Lunt U.S. Factor Rotation ETF** | FCTR |
| **Pacer US Export Leaders ETF** | PEXL |
| **Pacer CFRA-Stovall Global Seasonal Rotation ETF** | SZNG |
| **Pacer CFRA-Stovall Small Cap Seasonal Rotation ETF** | SZNZ |
| **Pacer CFRA-Stovall Large Cap Seasonal Rotation ETF** | SZNL |
| **Pacer CFRA-Stovall Equal Weight Seasonal Rotation ETF** | SZNE |

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| **Opus Small Cap Value Plus ETF** | OSCV |
| **Opus International Small/Mid Cap ETF** | OISC |
| **Impact Shares NAACP Minority Empowerment ETF** | NACP |
| **Global X S&P 500® Quality Dividend ETF** | QDIV |
| **Invesco Emerging Markets Debt Defensive ETF** | IEMD |
| **Invesco Emerging Markets Debt Value ETF** | IEMV |
| **Invesco Corporate Income Defensive ETF** | IHYD |
| **Invesco Corporate Income Value ETF** | IHYV |
| **Invesco Investment Grade Defensive ETF** | IIGD |
| **Invesco Investment Grade Value ETF** | IIGV |
| **Invesco Multi-Factor Core Fixed Income ETF** | IMFC |
| **Invesco Multi-Factor Core Plus Fixed Income ETF** | IMFP |
| **ProShares Online Retail ETF** | ONLN |
| **Vanguard Total Bond Market Index Fund ETF** | BND |
| **ClearShares Ultra-Short Maturity ETF** | OPER |

Morgan Lewis

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

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