

Client Alert

Current Issues Relevant to Our Clients

June 15, 2015

SEC Requests Comment on ETFs and Similar Exchange-Traded Products

On June 12, 2015, the Securities and Exchange Commission (“SEC”) issued a release seeking public comment to help inform its review of the listing and trading of new, novel or complex exchange-traded products (“ETPs”). These products include:

- *ETFs*—exchange-traded funds registered under the Investment Company Act of 1940 (the “1940 Act”) as open-end funds or unit investment trusts;
- *Non-1940 Act Pooled Investment Vehicles*—trust or partnership vehicles that do not invest primarily in securities, but rather physically hold precious metals or commodity or currency derivatives; and
- *Exchange-Traded Notes*—senior debt instruments issued by financial institutions that pay a return based on the performance of a reference asset, such as an index, a stock or basket of stocks, or an investment strategy.

While ETPs are subject to certain requirements under the Securities Act of 1933 and the 1940 Act, the focus of the release is on the oversight of ETPs under the Securities Exchange Act of 1934 (the “Exchange Act”) and the rules thereunder. The SEC release is available [here](#).

Background

ETPs have existed in some form for over twenty years. The release cites statistics illustrating the dramatic, and increasingly rapid, growth in the number, aggregate market capitalization and variety of ETPs in the market and also highlights the growing complexity of the strategies being pursued by the individual products within it. Correspondingly, the SEC has seen a marked increase in the number and complexity of requests by issuers seeking exemptive relief under the Exchange Act to allow ETPs to be offered for sale on securities exchanges and in the rule changes filed by securities exchanges to establish listing standards for new ETPs. The SEC issued this release to help inform its decisions on these requests.

While the SEC has periodically solicited comments on issues relating to ETPs, the focus has tended to be on 1940 Act registered ETFs. In 2001, the SEC issued a concept release on actively managed ETFs, focusing on their operation as open-end investment companies and 1940 Act exemptive relief. That release is available [here](#). In 2008, the SEC proposed and sought comment on a rule that would exempt ETFs from certain 1940 Act provisions and permit certain ETFs to operate without obtaining an exemptive order under the 1940 Act. That release is available [here](#). The current request for comments differs from prior requests in two key respects. First, the current

request focuses on a broader group of products rather than just 1940 Act ETFs. Second, the request focuses on oversight of ETPs under the Exchange Act.

Request for Comments

The SEC is soliciting public comment to help inform its review of the listing and trading of new, novel, or complex ETPs, including both the exemptive and no-action relief granted to ETPs under the Exchange Act and the requirement that a national securities exchange have SEC-approved listing standards applicable to the ETP securities being traded. The release also seeks comment on the ways that broker-dealers market ETPs and on investor understanding of the nature and uses of ETPs. More specifically, the release seeks responses to questions posed by the SEC that fall within five categories:

- arbitrage mechanism and market pricing;
- Exchange Act exemptions and no-action positions (specifically the application of Rules 101 and 102 of Regulation M to ETPs);
- exchange-listing standards;
- broker-dealer sales practices and investor understanding and use of ETPs; and

- a catch-all category containing questions regarding the consequences of an ETP's closure and the application of market structure research and interactive data visualization tools provided by the SEC, as well as questions requesting explanations for the ETP market's rapid growth and forecasts as to the future of the ETP market.

Submitting Comments

You may submit comments to the SEC by submitting a hard copy or by submitting comments electronically by clicking on "Submit comments on S7-11-15" at [this link](#). Comments are due within 60 days of the release's publication in the Federal Register.

For More Information

To discuss any topic covered in this Client Alert, please contact a member of the Investment Management Group or visit us online at chapman.com.

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