

June 26, 2015

SEC Requests Public Comment on Issues Concerning Exchange-Traded Products

On June 12, 2015, the SEC published a [Request for Comment](#) (the “Request”) seeking public comment on topics related to the SEC’s oversight of the listing and trading of exchange-traded products (“ETPs”) on national securities exchanges. The Request classified ETPs into three categories: (i) exchange-traded funds (“ETFs”) registered under the Investment Company Act of 1940, (ii) pooled investment vehicles that do not invest primarily in securities, registered under the Securities Act of 1933 (the “Securities Act”), and (iii) exchange-traded notes (debt instruments issued by financial institutions) that are registered under the Securities Act (“ETNs”).

In the Request, the SEC solicited public comment to help inform its review of the listing and trading of new, novel or complex ETPs, including requests by ETPs for exemptive and no-action relief under the Securities and Exchange Act of 1934 (the “Exchange Act”), and filings by securities exchanges to adopt listing standards applicable to ETPs. The SEC also solicited public comment regarding the ways in which broker-dealers market ETPs, especially to retail investors. Finally, the SEC solicited public comment on investors’ understanding of the nature and uses of ETPs.

Specific Requests for Comment

In the Request, the SEC requested public comment in four topic areas. The following is an overview of some of the key information requested by the SEC.

- **Arbitrage and Market Pricing.** The SEC requested comment on the effectiveness of the arbitrage mechanism for ETP securities, including how arbitrage operates in periods of market volatility or market stress. In addition, the SEC requested comment on whether there are other mechanisms that might ensure efficient market pricing of ETP securities relative to underlying or reference assets, and also asked for comment regarding ETP characteristics that either facilitate or hinder such efficient market pricing.
- **Existing Exemptive Relief and No-Action Positions.** The trading of ETP securities on a securities exchange normally requires the ETP issuer to obtain exemptive or no-action relief from various provisions of the Exchange Act and rules thereunder. For example, Rules 101 and 102 of Exchange Act Regulation M generally prohibit distribution participants, including ETP issuers and “Authorized Participants,” from purchasing covered securities during the restricted period of a securities distribution (for an ETP, the distribution and the restricted period are continuous). In the Request, the SEC solicited public comment on approaches for preventing manipulation of ETP securities distributions in light of the nature, variety and complexity of ETP investment strategies and ETP markets. The SEC also requested public comment with respect to other exemptive relief and no-action positions under the Exchange Act and rules thereunder frequently relied upon by ETPs and market participants.
- **Exchange Listing Process.** The SEC requested public comment on whether the oversight obligations of the securities exchanges as self-regulatory organizations and the oversight obligations of the SEC complement each other, or whether some other allocation of oversight between the exchanges and the SEC would be preferable. The SEC also requested comment on whether current exchange listing standards (including standards with respect to ETP component eligibility, diversification and pricing) are effective, in light of the increasing complexity of ETPs (e.g., whether existing listing standards adequately address the use by ETPs of non-exchange-listed derivatives and leverage).
- **Broker-Dealer Sales Practices and Investor Understanding and Use of ETPs.** The SEC requested public comment on the use of ETPs by investors and the ways in which ETP securities are recommended or sold to

investors, particularly retail investors. The SEC requested comment on the extent to which individual investors buy or sell ETP securities with complex investment strategies based on the recommendation of a broker-dealer, and the extent to which individual investors understand the nature and operation of such ETPs. The SEC also requested comment on the effectiveness of broker-dealer suitability requirements in this context, especially in light of the growing number of ETP options and the growing complexity of ETP investment strategies.

The Request was published in the Federal Register on June 17, 2015. Comments must be submitted no later than August 17, 2015.

If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney.