

SEC Reconsiders Exchange-Traded Products

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The SEC recently published myriad questions about the listing, trading, and marketing (especially to retail investors) of "new, novel, or complex" exchange-traded products (ETPs). Such ETPs include exchange-traded funds (ETFs), certain pooled investment vehicles that do not invest primarily in securities, and exchange-traded notes.

ETPs have grown and evolved enormously since 1992, when the SEC approved the first ETP, the SPDR S&P 500 ETF. Not surprisingly, the SEC also has received more—and more complex—requests by ETP issuers for relief to allow ETPs to be listed on securities exchanges and requests by securities exchanges to establish listing standards for new types of ETPs.

Now, however, the SEC is revisiting the basic question of whether effective and efficient "arbitrage mechanisms" exist to help ensure that secondary market prices of ETPs closely track the value of their underlying portfolio or reference assets.

The SEC also is making inquiries concerning:

- how potentially manipulative conduct in the distribution of ETPs can best be prevented;
- the extent to which the positions of the SEC and its staff that are reflected in existing ETP exemptive and no-action relief under the Securities Exchange Act of 1934 remain appropriate, given the increasing complexity and diversity of ETP investment strategies, underlying and reference assets, and benchmarks;
- how retail broker-dealers satisfy their sales practice and suitability obligations to investors with respect to ETPs; and
- the extent to which retail investors are informed about, and understand, the nature and operation of ETPs.

Prior SEC concept releases have focused on the operation of ETFs registered under the Investment Company Act of 1940 and the exemptive relief that ETFs require under that act. The SEC now seeks to engage the public on the treatment of all ETPs, a broader group of products, with respect to Securities Exchange Act regulation.

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