



205 Hudson Street, 7th Floor  
New York, NY 10013

info@graniteshares.com  
graniteshares.com

June 26, 2019

**VIA ELECTRONIC SUBMISSION**

Ms. Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**Re: Securities Offering Reform for Closed-End Investment Companies  
File No. S7-03-19**

Dear Ms. Countryman:

GraniteShares greatly appreciates the opportunity to respond to the request of the U.S. Securities and Exchange Commission (the “**Commission**”) for comment on the above-captioned proposed rule release (the “**Proposing Release**”) regarding, among other things, proposed amendments to Rule 24f-2 under the Investment Company Act of 1940 (the “**Investment Company Act**”). These proposed amendments would allow interval funds to pay registration fees on an annual net basis. Under the Investment Company Act, many registered investment companies, such as mutual funds and exchange traded funds, register an indefinite amount of securities upon their registration statements’ effectiveness, but pay registration fees based on their net issuance of shares within 90 days after the fund’s fiscal year-end. In response to the Commission’s request for comment on whether to permit additional categories of issuers to pay registration fees on an annual net basis,<sup>1</sup> we urge the Commission to extend this same opportunity to other pooled investment vehicles, such as commodity-backed exchange traded products that are registered only under the Securities Act of 1933 (“**1933 Act ETPs**”), so they may also pay registration fees on an annual net basis like exchange traded funds registered under the Investment Company Act (“**ETFs**”).

**I. The GraniteShares 1933 Act ETPs**

GraniteShares LLC is the sponsor to two 1933 Act ETPs. GraniteShares Gold Trust (“**BAR**”) offers investors the ability to invest in the gold market without having to acquire or hold physical gold. GraniteShares Platinum Trust (“**PLTM**”) offers investors the opportunity to invest in the platinum market without having to acquire or hold physical platinum. BAR holds gold and regularly issues and redeems shares in baskets of set amounts in exchange for deposits of gold and distributes gold in connection with redemptions of its shares. PLTM follows the same procedures with respect to platinum. Shares of BAR and PLTM trade on the NYSE Arca stock exchange.

---

<sup>1</sup> See Securities Offering Reform for Closed-End Investment Companies, Release No. 33-10619 (Mar. 20, 2019) (the “**Proposing Release**”), at 65.

BAR began trading in 2017 and is a Smaller Reporting Company and an Emerging Growth Company under Rule 405 of the Securities Act of 1933 (the “**Securities Act**”). PLTM began trading in 2018 and is a Smaller Reporting Company and an Emerging Growth Company. BAR and PLTM are each organized as a Delaware statutory trust, which are considered the registrants for purposes of the Securities Act and the Securities Exchange Act of 1934 (the “1934 Act”).

## **II. Summary of Regulatory Similarities and Differences between ETFs and 1933 Act ETPs.**

### **A. The Operational Structure of ETFs and 1933 Act ETPs Are Substantially the Same**

#### **1. Operational Structure of ETFs**

ETFs began solely as, and many still are, a variant of index mutual funds. The investment objective of these ETFs is to track the performance of a specified index, up or down, by investing in all, or a representative sample of, the component securities of the index. For example, the first ETF, the “SPDR” S&P 500 ETF, invests in the stocks comprising the S&P 500<sup>®</sup> Index. There are also numerous sector-specific ETFs, ranging from industrials to health care and medical development, which track a variety of other market indexes. In recent years, more innovative types of index-based ETFs have been launched, including since 2006 “proprietary” indexes created and maintained by a fund affiliate. Perhaps the most recent, important trend has been the development of actively-managed ETFs (as opposed to passive or index-based ETFs).

Unlike index and other mutual funds, ETFs do not sell shares to, or redeem shares from, individual investors at net asset value (“NAV”). Instead, ETFs sell and redeem their shares at NAV only in large blocks (such as 100,000 shares) called “creation units.” Brokerage firms and institutional investors that purchase or redeem ETF shares in creation units (referred to as “Authorized Purchasers” or “APs”) often do so through “in-kind” transactions involving a “portfolio deposit” equal in value to the aggregate NAV of the ETF shares in the respective creation unit. However, ETFs that invest in futures contracts and other investments that cannot be transferred in-kind, conduct cash-only creates and redemptions.<sup>2</sup>

Whether creates and redemptions are conducted in-kind or on a cash basis, the ETF’s sponsor (typically its investment adviser) announces the contents of the portfolio deposit at the beginning of each business day. The portfolio deposit for in-kind creates generally consists of a basket of securities that mirrors the composition of the ETF’s portfolio. Because the purchase price of the creation unit must equal the aggregate NAV of the underlying ETF shares, the requisite portfolio deposit generally also includes a small amount of cash to account for the difference between the

---

<sup>2</sup> The terms “creates” and “redemptions” are often used shorthands for the purchase of creation baskets and the redemption of creation baskets, respectively,

market value of the deposit basket and the aggregate NAV of the ETF shares. The portfolio deposit for cash creates is, of course, a specified amount of cash. The value of a creation unit is typically several million dollars.

After purchasing a creation unit, the AP may hold the ETF shares, but will typically (or, at least, hopefully) sell the shares relatively quickly to other brokerage firms, institutional investors, or individual investors. Thereafter, the shares are listed on a national stock exchange (such as the New York Stock Exchange) and trade through purchase and sale transactions in the secondary market, just like shares of stock of any public company, until such time as an Authorized Purchaser purchases the shares in the secondary market to sell them back to the ETF in a creation unit.

In this regard, ETFs possess characteristics of conventional “closed-end” funds, which generally issue shares that trade at negotiated prices on national securities exchanges and are not redeemable. Like closed-end funds and conventional corporate issuers generally, in order for their shares to be traded actively in the secondary market, ETFs must list their shares for trading on a national securities exchange under the 1934 Act. As with any listed security, investors also may trade ETF shares in the secondary market in off-exchange transactions. In either case, ETF shares trade at negotiated prices determined by the demand and supply for the ETF shares and by the values of the securities or other investments in the ETF portfolio.

The development of the secondary market in ETF shares has depended upon numerous factors, including the activities of market makers who have agreed to make a market in the ETF shares. ETF shares purchased in the secondary market are not redeemable back to the ETF itself except in creation units. If an Authorized Purchaser purchases enough shares of an ETF in the secondary market to make up a creation unit and presents this block of shares to the ETF for redemption, the AP receives a “redemption basket” of portfolio securities (or the equivalent amount of cash) in return, the contents of which are identified by the ETF sponsor at the beginning of every business day. The redemption basket (usually the same as the portfolio deposit) consists of securities and a small amount of cash in the case of an in-kind ETF, or cash in the case of cash ETFs. As with purchases from the ETF, redemptions are priced at NAV (*i.e.*, the value of the redemption basket is equal to the NAV of the ETF shares sold back to the fund in the creation unit-sized block of shares). An investor holding fewer ETF shares than the amount needed to redeem a creation unit-sized block of shares may dispose of those ETF shares only by selling them in the secondary market. The investor receives market price for the ETF shares, but generally pays customary brokerage commissions on the sale and the purchase of ETF shares.

## **2. The Operational Characteristics of 1933 Act ETPs**

Witnessing the success of ETFs, around 2005 creative fund sponsors began to explore whether the ETF structure could be used to “equitize” *non*-security asset classes such as gold, silver, crude oil or other types of commodities not generally available to individual investors.

***Precious Metals ETPs.*** After a significant investment of time, resources and creative thinking, the ETF structure was eventually used successfully to “equitize” precious metals. The first 1933 Act ETP to be offered in the United States was the “Equity Gold Trust” (now called “SPDR Gold Trust”).<sup>3</sup> The Gold Trust operates by holding gold bullion transferred to it in exchange for Trust shares issued in creation units. Each Gold Trust share represents a fractional undivided beneficial interest in the net assets of the Trust. The assets of the Trust normally consist of gold held by the custodian on behalf of the Trust. The objective of the Trust is for the value of the shares to reflect, at any given time, the price of the gold owned by the Trust at that time less the Trust’s expenses and liabilities. The Trust issues creation units shares in exchange for actual gold bullion deposited with the custodian as consideration, and delivers gold in exchange for creation units of shares surrendered for redemption.

***ETPs Based on Energy Commodities.*** Other precious metal 1933 Act ETPs followed on the heels of the Gold Trust, sharing with the Trust the goal of creating a vehicle to permit individual investors access to investments in gold and other precious metals without the traditional barriers of storage and other physical impediments. Around the same time, similar interest began developing in creating a 1933 Act ETP that would provide individual investors a direct means of investing in and/or hedging their exposure to the spot price of crude oil. There were, however, important differences in the two types of funds’ respective underlying commodity-based investments that had to be taken into account from an operational perspective. First, investing directly in crude oil was unworkable; selling and redeeming creation units in in-kind transactions in crude oil also would have been fundamentally unworkable. This left crude oil-based *derivative* instruments as the only viable alternative.

There were other challenges as well. Futures contracts, unlike securities and precious metals, generally cannot be transferred in an in-kind transaction -- futures contracts are agreements between two parties, and the corresponding obligation between the parties is fundamentally different from a legal standpoint than property such as securities or precious metals. The first oil-based 1933 Act ETP, United States Commodity Funds’ United States Oil Fund (“USO”), therefore required creation units to be purchased and redeemed through cash transactions, with the cash then being used as a basis for the fund’s entering directly into crude oil futures contracts.<sup>4</sup> Subsequently, a number of similar 1933 Act ETPs based on other energy products, including petroleum products, have been brought to market.

***Other Commodity-Based 1933 Act ETPs.*** 1933 Act ETPs that invest in commodities other than gold and oil have been developed and successfully brought to market. Commodity ETPs generally operate like index funds, but they track non-securities indexes or benchmarks. Commodity-based ETPs have historically tended to track the price of a basket of commodities or commodity futures contracts by purchasing futures contracts or engaging in other commodity-based investment strategies involving derivative instruments. Additionally, there are single

---

<sup>3</sup> We note that the two principals of GraniteShares were the CEO and Head of Product Management at the World Gold Council, the sponsor of the SPDR Gold Trust.

<sup>4</sup> As explained below, many ETFs also conduct creation and redemption transactions solely in cash.

commodity ETVs that track the price of a single commodity other than precious metals or petroleum products.

In addition to the variety of commodity-based 1933 Act ETPs, investors also can invest in currency ETPs, which as the name suggests, invest in a particular foreign currency. In 2005, Rydex Investments launched the first currency ETP called the Euro Currency Trust, which holds euros, accepts deposits of euros and distributes euros in connection with redemption requests. Rydex also launched a series of funds tracking other major currencies. There are a variety of other currency-based ETPs now available.

The operational characteristics 1933 Act ETPs are essentially the same as described above for ETFs. 1933 Act ETPs create and redeem baskets of shares in kind or for cash just like ETFs. For example, conventional equity securities index-based ETFs create and redeem in-kind, while ETFs that invest in fixed-income instruments and commodity futures contracts generally create and redeem in-kind. The secondary market trading of ETFs and 1933 Act ETPs is the same. ETFs and 1933 Act ETPs alike announce their portfolio deposits at the beginning of the day so that market makers can hedge their creation and redemption basket transactions throughout the day.

The operational characteristics of ETFs and 1933 Act ETPs are the same in material respects for several reasons. When the first physical and energy commodities 1933 Act ETPs were first being developed around 2005, sponsors of those funds were told by major third-party service providers – Authorized Purchasers, market makers, administrators, communications network providers, distributors, and stock exchanges -- that because there was already a complete operational system in place for ETFs, 1933 Act ETPs would have to use that same system.

#### **B. ETFs and 1933 Act ETPs Are Both Subject to Extensive Regulation under the Federal Securities Laws**

ETFs and 1933 Act ETPs are both subject to extensive regulation under the federal securities laws. The following section provides a summary of similarities between the regulation of ETFs and the regulation of 1933 Act ETPs, as well as the differences. Importantly, and as we believe will be evident, none of the differences are material to the purpose of this comment letter – to obtain parity for the registration fee payment system for both ETFs and 1933 Act ETPs.

## **1. Registration Requirements Under the 1933 Act and the Investment Company Act of 1940**

Absent an applicable exemption, securities issued by general corporate issuers are required to be registered under the 1933 Act by filing a registration statement on the prescribed registration form. ETFs and 1933 Act ETPs are no different in this regard, and accordingly, these entities register their shares under the 1933 Act. Additionally, ETFs register as open-end investment companies under the Investment Company Act, but a “combined” registration statement achieves 1933 and Investment Company Act registration for ETFs.

However, the mechanics of registering and paying the registration fees on 1933 Act ETP shares as opposed to ETF shares can be significantly more complex. Because 1933 Act ETPs are not investment companies, they are not permitted to sell an unlimited number of shares; they must register a definite amount of securities, and when those securities are sold, a new registration statement must be filed. Moreover, unlike ETFs, redemptions cannot be netted against sales. Moreover, while there are certain “shelf” registration procedures that can potentially be used by a 1933 Act ETP to streamline registration requirements, generally a new Form S-1 (or, if eligible and as discussed below, Form S-3) must be filed when the ETP has sold all of the shares it has registered. This requirement effectively obligates the ETP to pay significant amounts of ongoing SEC registration fees. Additionally, the ETP incurs substantial legal, accounting, and other expenses.<sup>5</sup>

## **2. Prospectus Delivery Requirements**

Pursuant to Section 5(b) of the 1933 Act, both ETFs and 1933 Act ETP prospectuses generally must be provided to investors upon a sale of shares.

## **3. Keeping Registration Statements and Prospectuses Current**

Section 10(a)(3) of the 1933 Act has the effect of requiring both ETFs and 1933 Act ETPs, because they engage in “continuous offerings” of their shares, to maintain a current or “evergreen” prospectus. In particular, when a prospectus is used more than nine months after the effective date of the registration statement, the financial and other information contained therein must be as of a date no more than sixteen months prior to such use. Both ETFs and 1933 Act ETPs generally must file a post-effective amendment (or a [prospectus supplement in certain cases) each year to do so, but importantly, 1933 Act ETPs must also file a new registration statement every three years or when shares currently registered run out, whichever comes earlier.

---

<sup>5</sup> As discussed below, the registration and updating requirements under the 1933 Act are considerably simpler for 1933 Act ETPs that have achieved “well-known seasoned issuer,” or “WKSI,” status and can therefore register their shares on the “short-form” registration statement, Form S-3.

#### **4. Exemptive Relief from the Investment Company Act and Rules Adopted Thereunder**

Because of their unique structure, ETFs must obtain exemptive relief from certain provisions of the 1940 Act. Specifically, an ETF, because it is organized as an open-end fund, generally is required to request an order: (i) to redeem shares in large aggregations only; (ii) to permit the purchase and sale of individual ETF shares in the secondary market at negotiated prices; and (iii) to permit in-kind purchases and redemptions of creation units by persons who may be affiliated with the ETF. Certain ETFs that track foreign indexes also have obtained relief so that they may satisfy redemption requests more than seven days after the tender of a creation unit for redemption due to delivery cycles for securities in the local market, and to permit certain “funds-of-funds” arrangements.

Because they are not investment companies and are therefore not regulated under the Investment Company Act, 1933 Act ETPs are not required to obtain exemptive relief from provisions of the 1940 Act. On the other hand, because ETPs, unlike most ETFs, do not have “generic” listing authority on the NYSE Arca Stock Exchange (where many ETFs are listed) or other listing exchanges, the exchange must file a listing application for each new 1933 Act ETP with the Commission’s Division of Trading and Markets. This process can be involved and potentially lengthy.

#### **5. ETF Requests for Exemptive of “No-Action” Relief under the 1934 Act**

Both ETF and 1933 Act ETP shares are listed on national exchanges and trade in the secondary market. This aspect of ETFs has been viewed as potentially triggering the application of certain provisions of the 1934 Act and rules adopted by the SEC thereunder. Many of these provisions, however, would prove unworkable if applied to ETFs and 1933 Act ETPs. Accordingly, both types of products have requested special exemptions or “no-action” relief from the Commission to avoid the application of the 1934 Act provisions and rules that would be unworkable. The Division of the SEC that administers the 1934 Act is the Division of Trading and Markets. As often the case after the SEC staff becomes more familiar with certain types of exemptive relief, the Division of Trading and Markets has granted “class relief” to both ETFs and 1933 Act ETPs issuers that obviate the need for the fund seek its own relief.

#### **6. ETFs Versus ETVs: Application of Exchange Listing Standards**

National exchanges must be authorized by the SEC to list securities traded on the exchange. Over time, exchanges have adopted generic listing standards applicable to certain classes of securities such as stocks, bonds, and ETF shares. However, as new types of ETFs have been brought to market, listing exchanges have been required to seek new listing authority from the SEC. To obtain such authority, the exchange must submit a formal application to the Division of Trading and Markets under Rule 19b-4 of the 1934 Act. Through this process, generic ETF

listing rules have been put into place. Similar generic listing standards have been developed for 1933 Act ETPs, but listing exchanges are still required under such standards to submit a 19b-4 application for each new 1933 Act ETP.<sup>6</sup>

### **C. Other Regulatory Considerations**

ETFs and 1933 Act ETPs are both generally organized under state law as Delaware Statutory Trusts and are accordingly subject to the provisions of the Delaware Statutory Trust Act. However, while the Investment Company Act imposes requirements that, in addition to the requirements discussed above that require ETFs to seek exemptive relief under the 1940 Act, require ETFs to have Boards of Directors and audit committees and to engage in annual re-approval of the investment management agreement, 1933 Act ETPs are not required to.

Additionally, Rule 19b-4 orders and listing rules for 1933 Act ETPs will generally require similar ongoing disclosure to be made that is similar to that disclosed by ETFs (e.g., NAV, portfolio baskets, premium/discount, and intra-day NAVs updated every 15 seconds.)

With respect to ongoing reporting requirements, ETFs must provide annual and shareholder reports, and Form N-PORT with only quarterly reports made public. 1933 Act ETPs must file Forms 10-K and 10-Qs, which could be viewed as financial statements and portfolio reports at the same time.

The market making community for 1933-Act ETPs and ETF is the same. Many of the quantitative measurements are identical (portfolio composition file (or pcf), creation and redemption baskets at NAV, creation and redemption baskets of 50,000 or 100,000 shares), they both settle transactions in the DTC system, and have the same service providers. Ultimately, most, if not all, brokers classify the two structures under a single “ETF umbrella” on their platform. We also believe that for most investors, their investing experience is identical.

### **III. The Reasons for Amending Rule 24f-2 Also Apply to 1933 Act ETPs and There Are No Differences in the Current Regulatory Treatment of ETFs Versus 1933 ETPs that Would Lead to a Different Conclusion**

We believe the discussion above points up that the operational characteristics of 1933 Act ETPs are essentially similar in all material respects to that of ETFs. We believe that this similarity between the operational characteristics of 1933 Act ETPs and those of ETFs is an important factor in considering whether the registration fee payment system should be the same for these two types of exchange-traded vehicles. At the same time, we do not believe that the regulatory differences in treatment of 1933 Act ETPs versus ETFs, as discussed above, should lead to a contrary decision; we believe the most important regulatory consideration is that both types of exchange-traded vehicles are subject to extensive regulation under the federal securities laws.

---

<sup>6</sup> See, e.g., Commentary .02(g) under NYSE Arca Rule 8.200.

Moreover, some types of 1933 Act ETPs that the industry believed until 2012 *had* to be registered as such, have since been registered as ETFs. For example, there are now 1933 Act ETPs that track single commodities or commodity futures contracts, while there are virtually identical ETFs that have the same investment objective. In other words, exchange-traded vehicles that have essentially the same investment objectives and operations can now be registered as a 1933 Act ETP or an ETF. We believe that this fact strongly supports registration fee payment system parity between 1933 Act ETPs and ETFs.

With respect to the more narrow question as to whether the specific reasons that the registration fee payment system elucidated by the Commission in the Proposing Release should be applicable to interval funds, should also apply to 1933 Act ETPs. We discuss those reasons below.<sup>7</sup>

In 2015, the Commission acknowledged that “[f]or almost all ETPs, the issuance and redemption of ETP [s]ecurities operates in essentially the same manner.”<sup>8</sup> In fact, we believe the utility of an annual net issuance system for 1933 Act ETPs is even greater than for interval funds, which do not have to continuously offer their securities and, like mutual funds, can stop offering at any time. Conversely, 1933 Act ETPs, just like ETFs registered under the Investment Company Act, are essentially required to issue shares on demand. Further, redemptions for 1933 Act ETPs can occur at any time for any reason, similar to ETFs and unlike interval funds, which have a predictable redemption rhythm.

According to the Proposing Release, the amendments to Rule 24f-2 would yield similar operational benefits to interval funds that open-end funds enjoy today.<sup>9</sup> Parity with interval and open-end funds (including ETFs) would yield similar benefits to 1933 Act ETPs for the same reasons as they would to interval funds.

The Proposing Release highlights two characteristics of interval funds that support amending Rule 24f-2: routine repurchase of shares at net asset value and the possibility of inadvertently selling more shares than the fund had registered. Both characteristics apply to 1933 Act ETPs as well.

The Commission stated it believes the amendments are “appropriate in light of interval funds’ operations,” in particular because such funds “routinely repurchase shares at net asset value and are required to periodically offer to repurchase their shares.”<sup>10</sup> 1933 Act ETPs are in fact *required* to repurchase their shares as a condition to exemptive and no-action relief; in this

---

<sup>7</sup> We note that the following discussion is drawn heavily from the comment letter submitted by the World Gold Counsel, which comment letter we fully support.

<sup>8</sup> Request for Comment on Exchange-Traded Products, Release No. 34-75165 (Jun. 12, 2015) (the “**2015 Request for Comment**”), at 10. The 2015 Request for Comment refers to both ETFs and 1933 Act ETPs as “exchange-traded products,” or “ETPs.”

<sup>9</sup> See *id.*, at 64.

<sup>10</sup> Proposing Release, at 63-64.

regard, the ability for APs and market makers to arbitrage away differences between NAV and the prices in the secondary market depends on their ability to redeem shares. This was the fundamental basis for the Commission Staff initially granting the exemptive relief from various provisions of the Investment Company Act necessary for ETFs to operate.

Similarly, the ability for APs and market makers to redeem shares at net asset value is a key characteristic of 1933 Act ETPs and has been a fundamental basis for the issuance of multiple no-action letters from the Division of Trading and Markets (the “**Division**”).<sup>11</sup> The Division’s Staff granted relief from Rules 101 and 102 of Regulation M on a class-wide basis to certain commodity-based, exchange traded investment vehicles (many of which are 1933 Act ETPs) based in significant part on the fact that such funds continuously issue and redeem shares at net asset value.<sup>12</sup> In fact, the Division’s Staff eventually stated that it would no longer respond to requests for relief from Rules 101 and 102 relating to other commodity-based, exchange traded investment vehicles unless they present novel or unusual issues.<sup>13</sup> As such, we believe that 1933 Act ETPs’ reliance on the foregoing no-action letter precedent, which requires them to redeem shares at net asset value regularly, is analogous to the fundamental policy that interval funds are required to have regarding repurchase offers.<sup>14</sup> We believe the staff’s position epitomizes the

---

<sup>11</sup> See also 2015 Request for Comment, at 17 (discussing that because most ETPs are continually creating and distributing new securities, absent relief from the Division’s staff, the purchase of ETP securities by an authorized participant or by the issuer in the redemption process, would violate Rules 101 and 102 of Regulation M).

<sup>12</sup> See letters from Josephine J. Tao, Esq., Assistant Director, Division of Trading and Markets, to Eric Simanek, Sullivan & Worcester LLP, dated August 8, 2018 (ETF Managers Capital LLC and ETF Managers Commodity Trust I); James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to David Yeres, Esq., Clifford Chance US LLP, dated Apr. 27, 2006 (iShares Silver Trust); James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to George T. Simon, Esq., Foley & Lardner LLP, dated Dec. 5, 2005 (Euro Currency Trust); Josephine J. Tao, Esq., Assistant Director, Division of Trading and Markets, to Robert Murray, Esq., Baker Botts LLP, dated November 10, 2008 (AirShares EU Carbon Allowances Fund); and Racquel L. Russell, Branch Chief, Office of Trading Practices and Processing, Division of Market Regulation, to George T. Simon, Foley & Lardner LLP, dated June 21, 2006 (re: transactions in shares of CurrencyShares British Pound Sterling Trust, CurrencyShares Australian Dollar Trust, CurrencyShares Canadian Dollar Trust, CurrencyShares Mexican Peso Trust, CurrencyShares Swedish Krona Trust and CurrencyShares Swiss Franc Trust; Canadian Dollar Trust, CurrencyShares Mexican Peso Trust, CurrencyShares Swedish Krona Trust and CurrencyShares Swiss Franc Trust) (the “**the Rydex Letter**”). See also Frequently Asked Questions About Regulation M, Division of Market Regulation: Staff Legal Bulletin No. 9 (Oct. 27, 1999).

<sup>13</sup> See Rydex Letter, *supra* n. 12.

<sup>14</sup> Cf. Proposing Release, at note 159. In this regard, we note that the fundamental policy required of interval funds can be changed by shareholder vote, whereas 1933 Act ETPs cannot change their ability to redeem shares at net asset value upon request if they are to rely on the no-action letter precedent discussed above. In fact, 1933 Act ETPs cannot operate as ETPs without the ongoing ability to redeem because such ability is necessary to the arbitrage mechanism available to authorized participants, which in turn keeps the market price of the ETPs’ securities so close to the net asset value of the ETP. See also NYSE ARCA Rule 8.201-E(c)(1) (“stating that [t]he term ‘Commodity-Based Trust Shares’ means a security (a) that is issued by a trust (‘Trust’) that holds a specified commodity deposited with the Trust; (b) that is issued by such Trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) that, when aggregated in the same specified minimum number, may be redeemed at a holder’s request by such Trust which will deliver to the redeeming holder the quantity of the underlying commodity.”).

fact that 1933 Act ETPs, like interval funds, are required to routinely repurchase shares at net asset value.

The Commission also stated that the amendments to Rule 24f-2 “would avoid the possibility that an interval fund would inadvertently sell more shares than it had registered.”<sup>15</sup> A number of 1933 Act ETPs have encountered this problem when demand for their shares surged. Under the current framework, the lack of predictability of demand for shares results in 1933 Act ETPs having to issue and sell shares on short notice, which may leave such funds without enough shares to satisfy demand. If a 1933 Act ETP does not have sufficient shares remaining under its existing registration statement filed under the 1933 Act to fulfill the sudden demand, then that fund must file a new registration statement to register the offer and sale of additional shares. For 1933 Act ETPs that do not have 700 million in assets and, accordingly, are not categorized as “well-known seasoned issuers” or “WKSIs” in accordance with Rule 405 under the 1933 Act, which in turn means they cannot go effective automatically without Staff review and comment, filing a new registration statement entails incurring significant costs and working through the Division of Corporation Finance’s filing review process.<sup>16</sup>

Requiring 1933 ETPs to file registration statements to issue additional shares introduces unnecessary friction into the issuance and trading of those ETPs and decreases the ability for non-WKSI 1933 Act ETPs to compete against ETFs and WKSI 1933 Act ETPs. Preparing and filing a registration statement involves legal, audit, and printer costs and consumes significant non-monetary resources from all parties involved, with little to no benefit to investors. The estimated average burden hours per registration statement on Form S-1 is 671 hours,<sup>17</sup> compared to just two hours of clerical time estimated as the *annual* internal hour burden per fund for filing a Form 24F-2.<sup>18</sup> These costs are ultimately passed on to 1933 Act ETP shareholders.<sup>19</sup>

Even WKSIs can inadvertently sell more shares than they have registered. A leading publicly traded investment management firm’s 1933 Act ETP issued and sold an aggregate of 24,900,000 shares in excess of the total shares registered under its existing registration statement between February and March 2016 due to a surge of investor demand.<sup>20</sup> The 1933 Act ETP was required to suspend the issuance of new shares until it filed a new registration statement to cover additional shares, and even though the ETP was able to go effectively automatically because it

---

<sup>15</sup> *Id.* at 64.

<sup>16</sup> Moreover, Staff review can be delayed by unpredictable events affecting the Commission’s operations, such as the 2018-2019 government shutdown.

<sup>17</sup> See Form S-1, available at: <https://www.sec.gov/about/forms/forms-1.pdf>.

<sup>18</sup> See Proposing Release, at 219.

<sup>19</sup> Moreover, the concern that investors will not continue to have access to small to mid-size asset managers has been a key consideration of the SEC Staff, as explained by Division of Investment Manager Dalia Blass in her speech before the Investment Company Institute Mutual Funds Conference in 2017. In fact, we are meeting with the SEC Staff to express our concerns in this regard later in June.

<sup>20</sup> See, e.g., BlackRock Suspends Issuance of New iShares Gold Trust Shares, The Wall Street Journal (Mar. 4, 2016), available at: <https://www.wsj.com/articles/blackrock-suspends-issuance-of-new-ishares-gold-trust-shares-1457107864>.

was a WKSI, it was required to pay to register the additional shares upfront rather than relying on “pay as you go.”<sup>21</sup> Consequently, the 1933 Act ETP was exposed to potential damages from buyers and penalties from regulators, while potentially being required to repurchase the nearly 25 million shares. This case shows that automatic shelf registration statements and eligibility for “pay as you go” fee payment do not prevent even the most sophisticated funds from inadvertently selling more shares than they have registered. Allowing 1933 Act ETPs to pay registration statement fees on an annual net basis like other ETFs would address the problem.

#### **IV. Parity for 1933 Act ETPs Would Benefit Investors**

The possibility of 1933 Act ETPs running out of registered shares as discussed above is also harmful to investors for two principal reasons. First, investors may be deprived from accessing 1933 Act ETPs when they need it the most. Surges in demand for shares of 1933 Act ETPs are unpredictable because they typically occur during stock market downturns or other periods of volatility, which likewise cannot be predicted. With 1933 Act ETPs out of the market at the precise time when investors demand their shares, investors are precluded from viable investment options to offset significant volatility in the broader market. Under our recommended approach, 1933 Act ETPs could remain in the market regardless of how much the demand for their shares increases at any given time, thereby ensuring investors have viable options to withstand volatility, downturn, and other uncertainties.

Investors are also harmed when a 1933 Act ETP must suspend issuances until additional shares are registered. In such a scenario, the 1933 Act ETP stops being an open-end ETP that tracks the underlying asset closely and becomes in practice a closed-end fund that may not track the underlying asset accurately or at all. This risk is even more acute for 1933 Act ETPs as compared to closed-end interval funds because investors do not expect closed-end interval funds to track their underlying asset closely like they do with 1933 Act ETPs. Indeed, investors expect the 1933 Act ETPs in which they invest to track the underlying commodity closely in order to gain exposure to the commodity without having to acquire the underlying commodity itself. Consequently, parity for 1933 Act ETPs would benefit investors by ensuring that 1933 Act ETPs always have sufficient shares registered to issue and redeem shares as necessary to allow shares held by investors to track the underlying commodity closely.

Another risk resulting from suspending the issuance of additional shares is settlement failures. If a market maker cannot receive new shares to settle trades, it might be subject to buy-ins which can result in prohibitive costs. That could lead a market maker to stop providing liquidity in the product going forward, hence potentially reducing the competition among market participants to capture flows, increasing the bid/ask spreads and lowering the order book depth. The overall that would lower the market quality for investors.

---

<sup>21</sup> Presumably, the fund concluded it was unfeasible or inefficient to rely on “pay as you go” because it would require filing a prospectus supplement every day on which shares were issued or redeemed.

## **V. Other Reasons for Extending Annual Net Basis Payment to 1933 Act ETPs**

Permitting 1933 Act ETPs to calculate their registration fees on an annual net basis like ETFs would reduce costs for such funds. By paying a registration fee before the offer and sale of shares, 1933 Act ETPs incur such cost regardless of how many shares they may be required to issue and redeem in the future. Conversely, funds that enjoy annual net basis payment are required to pay fees covering only the net amount of shares issued and sold during their fiscal year. Under the current payment system, paying up front also acts a barrier for new entrants to the ETF marketplace. The 1940 Act model is in this regard more economically feasible in that a registration fee payment is directly related to a known success level. Demand for redeeming 1933 Act ETP shares—like demand for purchasing those shares—is unpredictable. Accordingly, the current framework results in 1933 Act ETPs possibly incurring the significant costs associated with preparing and filing a registration statement with the Commission, as discussed above, and paying to register a significant amount of shares that they may not issue or sell at all, while being precluded from offsetting that cost with redemptions of outstanding shares. In this regard, we note that 1933 Act ETPs compete for investors' dollars with other funds that pay fees on an annual net basis, such as mutual funds and ETFs. Importantly, and as noted above, our recommended proposal would bring operational costs for 1933 Act ETPs more in line with their competitors.

Moreover, we believe parity for 1933 ETPs would alleviate internal resources within the Division of Corporation Finance by not requiring its Staff to review registration statements for ETPs whose operations have barely changed between one registration statement and the next. Rather, the staff could dedicate its resources to reviewing the disclosure of traditional operating companies.

## **VI. Conclusion**

We welcome the Commission's consideration of extending annual net issuance registration fees to other entities. Parity for 1933 Act ETPs with mutual funds, ETFs and interval funds would yield similar operational benefits that interval funds will enjoy under the proposed amendments, given that the reasons for and the benefits of paying fees on an annual net basis apply equally to 1933 ETPs. Moreover, parity for 1933 Act ETPs would benefit investors by, among other things, ensuring access to 1933 Act ETPs shares regularly, preventing the inadvertent sale of more shares than are registered, and reducing the costs of registering shares for issuance and sale. Therefore, we urge the Commission to extend annual net basis payments of registration fees to 1933 Act ETPs.

We believe the Commission has authority under the Securities Act to adopt new rules or amendments permitting 1933 Act ETPs to pay registration fees on an annual net basis, particularly pursuant to Sections 19(a) and 28 thereof. Like the proposed change for interval

Ms. Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
Page 14



funds, we believe our proposal falls under the “rules and regulations governing registration statements and prospectuses” contemplated in Section 19(a) and under the general exemptive authority of Section 28. The Commission’s adoption “pay-as-you-go” for WKSIs in 2005 is an example of the Commission’s use of its general exemptive authority under the Securities Act to exempt registrants from the requirement in Section 6(c) of the Securities Act that the registration statement be accompanied by the payment of the registration fee.

\* \* \*

We thank you for the opportunity to submit this comment letter. Please do not hesitate to contact the undersigned at [REDACTED], or Tom Conner at our outside counsel law firm, Vedder Price, at [REDACTED], if you would like to discuss these matters further.

Very truly yours,

A handwritten signature in black ink, appearing to read "William Rhind", written over a light gray rectangular background.

William Rhind, CEO