

August 17, 2015

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Request for Comment on Exchange-Traded Products
Release No. 34-75165; File No. S7-11-15

Dear Mr. Fields:

I appreciate the opportunity to comment on the Securities and Exchange Commission's *Request for Comment on Exchange-Traded Products*. For the past fourteen years I have worked closely with the listing and trading of exchange-traded products ("ETPs") as well as their development and sales. In 2000 I was hired as the Associate Director of the American Stock Exchange's Index Fund Shares Department, and in 2001 became a registered representative of the SPDR Trust, MidCap SPDR Trust and DIAMONDS Trust.¹

In the years that followed I worked closely with ETP issuers, market makers, exchange rule filings (19b-4 filings), the Commission's Division of Trading and Markets, service providers such as custodian banks and distributors, and all manner of broker-dealer employees. For several years I provided educational programs on the topic of ETPs to the Commissions interns, new hires and other staff members, as well as international exchanges and market regulators.

In 2005 I became the American Stock Exchange's Assistant Director of Derivatives Regulation where I worked closely with the listing rules for ETPs and other derivative securities. I began working for registered investment advisors on ETP product development in 2006 producing several ETP innovations such as the first Index Fund Shares with equity and bond constituents in the same basket, the development of Commodity Futures Trust Shares, and early examples of Managed Fund Shares.

In 2009 I founded ETP Resources, LLC, a privately owned, independent consulting firm and data service provider specializing in ETP development, and ETP data that is not readily available from securities exchanges, regulators, and other data service providers. As a consultant I regularly work with former Commission staffers that provide counsel to ETP issuers on matters such as exemptive relief applications. As a data service provider I have published the ETP Taxonomy® and ETP Directory® to help clients distinguish between different types of exchange-traded products. Lastly, for the past several years I have served as an independent trustee to an issuer of Index Fund Shares and Managed Fund Shares.

As a general matter I support the Commissions efforts to solicit public comment to help inform its review of listing standards and the marketing of ETPs. This is a positive step forward and will hopefully improve

¹ The American Stock Exchange is now known as NYSE MKT LLC. The Index Fund Shares Department was renamed the ETF Marketplace in 2001.

the understanding and proper usage of these securities. The Commission's scope for this request and definition of ETPs closely resembles that contained within the ETP Taxonomy®. Taxon 10 of the ETP Taxonomy® groups those equity derivative securities that are issued and redeemed daily in specified aggregate amounts. References to these securities as ETPs is a vast improvement over many flawed examples where these securities are all labeled as exchange-traded funds ("ETFs"), which implies that they are all registered as investment companies under the Investment Company Act of 1940 ("1940 Act"), I should caution the Commission that ETP can also logically apply to a large number of equity derivative securities that are not issued and redeemed daily in specified aggregate amounts such as Equity-Linked Term Notes or Closed-End Funds.

With regard to the Commission's defining Exchange-Traded Funds (ETFs) as those ETPs that are issued and redeemed daily and are registered under the Investment Company Act of 1940, particularly, "Portfolio Depositary Receipts", "Index Fund Shares", and "Managed Fund Shares", I would like to point out that the Commission recently approved the listing standards for Exchange-Traded Managed Funds ("ETMFs").² ETMFs will issue and redeem shares daily and be registered under the 1940 Act, but are prohibited from marketing themselves as "ETFs". In addition, the Commission approved a 19b-4 for a Trust Issued Receipt Based on Investment Shares with "ETF" in its name that would, according to your categories, be contained in the "Non-1940 Act Pooled Investment Vehicles".³

With regard to the Commission's second category of ETPs, the "Non-1940 Act Pooled Investment Vehicles", the Commission should have specifically identified the securities it intended to include in this category. A proper analysis of exchange listing standards requires one to know if certain types of structured products should be included. The ETP Taxonomy® identifies those equity derivative securities that are issued and redeemed daily and are not registered under the 1940 Act:

- Commodity Futures Trust Shares
- Commodity Index Trust Shares
- Commodity-Based Trust Shares
- Currency Trust Shares
- Managed Trust Securities
- Paired Class Shares
- Paired Trust Shares
- Partnership Units
- Trust Issued Receipts
- Trust Issued Receipts Based on Investment Shares

The Commission's third category of ETPs, "Exchange-Traded Notes" ("ETNs"), belies a concerning misunderstanding of these securities and other similar structured products. If the Commission wished to include structured products that issue and redeem daily it should have referenced specifically "Index-Linked Exchangeable Notes". Index-Linked Exchangeable Notes were first approved for listing at the American Stock Exchange in 2001.⁴ Index-Linked Exchangeable Notes are often confused with Index-

² Securities Exchange Act Release No. 34-73562 (Nov. 7, 2014), (SR-NASDAQ-2014-020).

³ Securities Exchange Act Release No. 34-73866 (Dec. 17, 2014), (SR-NYSEArca-2014-120). The Sit Rising Rate Fund, a Trust Issued Receipt Based on Investment Shares sponsored by ETF Managers Group Commodity Trust I (333-199190), was renamed Sit Rising Rate ETF in a Preliminary Prospectus filing made on Nov. 26, 2014 after its 19b-4 was noticed on Nov. 14, 2014.

⁴ Securities Exchange Act Release No. 44621 (July 30, 2001), 66 FR 41064 (August 6, 2001) (SR-Amex-2001-23).

Linked Securities (that are also linked to an index but do not offer a holder the opportunity to redeem shares in specified aggregate amounts).⁵

References to “ETNs” as a security type are prevalent today and have created confusion for investors and professionals alike since it was trademarked by Barclays Bank PLC in 2006.⁶ For example, many lists of “ETNs” from exchanges and broker-dealer security masters are void of any Index-Linked Exchangeable Notes that were listed between 2001 and 2006. Consider a list of “ETFs” that only contains those issues that had “ETF” in the name, when the first “ETF” to use “ETF” in its name didn’t arrive until 2002, ten years after the listing of the SuperTrust.

In addition, “ETN” could logically be applied to a number of other exchange-traded bond derivative securities (“Notes”) with unimaginative names that do not issue and redeem daily but have substantially similar initial listing requirements, continued listing requirements and may be listed utilizing generic listing standards such as:

- Combination-Linked Securities
- Commodity-Linked Securities
- Currency-Linked Securities
- Equity Linked Term Notes
- Fixed Income-Linked Securities
- Futures-Linked Securities
- Index-Linked Securities
- Trust Certificate Securities

I would strongly recommend that the Commission find a better way to refer to structured notes collectively, and review the procedures and systems of SROs that list and trade these types of securities.

The ETP Taxonomy® classification system and the ETP Directory® were created to improve the transparency, understanding, analysis, and regulation of equity derivative security types listed in the United States that have historically been confusing to consumers because of branding efforts, trademarks, and poorly defined acronyms used by the media, issuers and regulators alike. Their creation was made possible by my involvement in the rule filings, listings, regulation and sales of these securities and particularly my years spent at the American Stock Exchange. I am deeply indebted to a number of Amex colleagues that were instrumental in the development of many of these products and were willing to share their knowledge with me over the years.

⁵ SROs rely on their employees to manually review the listings of other SROs for newly-listed derivative securities. When those employees identify a new derivative security in the market, they file a 19b-4(e) form in order to trade it on an UTP basis. This manual process results in procedural errors and human errors when employees misidentify similar derivative security types, or have inadequate information technology systems to classify equity derivative securities. It has not been uncommon for SROs to trade ETPs without appropriate rules, for example by confusing Trust Issued Receipts Based on Investment Shares for Trust Issued Receipts, or confusing Commodity-Based Trust Shares for an Index Fund Share “ETF”.

⁶ Barclays Bank PLC filed for trademark registration of iPath ETNs on Sep. 30, 2005 prior to the launch of their first Index-Linked Exchangeable Notes. Barclays Global Investor Services, a subsidiary of Barclays Bank PLC assisted in the promotion of iPath ETNs, as well as the iShares ETFs. As a result of their extensive education and marketing efforts, over the years I have met numerous investment advisors that use ETN to describe any Non-1940 Act Pooled Investment Vehicle.

The ETP Taxonomy® and ETP Directory® fill an unfortunate void created by two ongoing problems, (1) the introduction of generic listing standards for exchange-traded products and the Commission's failure to scan 19b-4(e) forms received from SROs, and (2) the inability of SROs to disseminate ETP security type to data vendors for lack of improvements in their own security master databases.⁷

Generic listing standards for ETPs have greatly reduced the administrative burdens of exchange employees and Commission staff over the years, which is especially important considering the growing popularity and issuance of these securities. As I work with new issuers on business plans, I see firsthand the benefits of certain timelines, and cost savings, associated with developing ETPs that meet generic listing standards versus those that require full exchange rule filings. This is an important factor in ETP innovation and strategy. In addition, SRO staff dedicated to ETPs has actually decreased in recent years despite the increased number of listings.

Form 19b-4(e), Part I, No. 3 "Class of New Derivative Securities Product" contains the only publicly available source for security type identification for a generically listed ETP.⁸ The Commission still requires SROs to file an original copy and nine additional copies for each Form 19b-4(e) as it did when first introduced in 2000, and to my knowledge has no immediate plans to automate their systems for the submission of these forms electronically despite receiving hundreds of them on a monthly basis for primary listings and unlisted trading privileges.⁹ The form is also allowed to be filed up to five days after the commencement of trading in a new equity derivative security, which is typically after the security has been established in security master databases at broker-dealers and data service providers, leaving proper security identification to guess work or absence.

The Commission did scan and post these forms in the past, and the form's disclosure section informs SROs that the public has access to the information contained in the form. In reality, the Commission does not scan them any longer and/or post them on EDGAR, and the public has no access to this information. The only access I had to this information was via a FOIA request that was initially denied by the Commission, but granted upon appeal after I pointed out that the public has access to the information contained on the form. The results of my request for copies of the original 19b-4(e)s submitted by the American Stock Exchange for 2001 yielded roughly 70% of those originally filed.

The proper classification of exchange-traded products is quite simple when one has 19b-4 rule filings, notices and orders to examine, but I am not proposing we return to an era where each new listing requires a full 19b-4 rule filing so that we can properly identify the security type. Please just scan the 19b-4(e) forms and post them on EDGAR like the Commission used to do, or automate these filings by SROs as I requested in my comment letter to the Commission dated Nov. 7, 2011 regarding the Use of Derivatives by Investment Companies Under the Investment Company Act of 1940.¹⁰

⁷ For example the NYSE Arca ETP Master File refers to a number of Non-1940 Act Pooled Investment Vehicles simply as "ETVs". The "ETF List & Screener" available on NASDAQ.com includes numerous equity derivative security types. If these, and other, SROs lack the ability to properly identify certain equity derivative security types, how can they be properly performing surveillance and continued listing analysis?

⁸ This information can sometimes be collected from SRO Regulatory Bulletins, but historically Regulatory Bulletins have not been reliable, and are not always made publicly available since they are technically notices to member firms.

⁹ The Commission received thirty eight 19b-4(e) filings from various SROs on August 7, 2015 alone.

¹⁰ Release No. IC-29776; File No. S7-33-11

The proper identification of equity derivative security types is critical to reducing systemic risks and performing regulatory oversight, surveillance, compliance, due diligence and suitability functions.

Examine if you will the broker-dealer firms censured and fined for failure to deliver ETF prospectuses to clients. Improper coding in firms' automated systems led to numerous failures. And more recently, broker-dealer firms have been fined for improper sales of "non-traditional ETFs" and their lack of adequate systems.¹¹

These actions have prompted small improvements in sales and labeling, as now broker-dealer security master databases include "ETF" and a flag for leveraged/inverse exposure. This is an improvement over labeling these products "equities", but it does not go far enough. How long before a broker-dealer gets fined for improper sales of Commodity-Based Trust Shares, or Partnership Units, followed by a media article about the dark side of "ETFs"?

The Commission highlights their Market Structure Data and Analysis website in the request, and asks how quoting and trading of ETPs compares to other equity securities, as if an Index Fund Share based on domestic large-cap equities has similar trading and liquidity characteristics as a Partnership Unit owning oil futures contracts.

I recommend that the Commission reference equity derivative securities by the names that they approved in 19b-4 filings from SROs in the past. I also recommend that the Commission work with SROs on making this information more available to the public. I encourage the Commission and other regulatory bodies to continue their employee educational programs with regard to equity derivative securities. I would also suggest to the Commission that it try to focus on a particular topic or issue, rather than seek comments on fifty three questions covering such broad topics.

I shall leave the exemptive relief questions to my esteemed colleagues in the legal profession, and the marketing making questions to those that do it every day for a living. And as there are very few individuals with experience with exchange listing standards for ETPs and many of them are probably not in a position to respond, I will do my best to provide a few comments on your questions in that area.

26. The exchanges (as SROs) and the Commission both have responsibilities with respect to determining whether the proposed listing and trading of ETP Securities is consistent with the Exchange Act and the rules and regulations thereunder. Do commenters believe that these independent obligations, in practice, complement each other? Do commenters believe that these obligations overlap each other? To the extent that these obligations overlap, how do commenters believe they should be allocated between the exchanges and the Commission?

Yes, I believe that both the SROs and the Commission should have these responsibilities and should complement each other. In practice, I believe that they have been affected by turnover of key staff at both the Commission and the SROs, as well as the experience levels of their replacements. Employee retention and education should be prioritized considering the complexity of the securities and the topics themselves. I would also like to include "incentive". It is not in a SROs best interest to introduce a new derivative security type that injures investors and never trades. A \$5,000 listing fee doesn't come close to

¹¹ "Non-Traditional ETFs" is another example of a poorly labeled category for equity derivative security types created by a SRO. See FINRA's News Release dated May 6, 2015: FINRA Sanctions LPL Financial LLC \$11.7 Million for Widespread Supervisory Failures Related to Complex Product Sales, Trade Surveillance and Trade Confirmations Delivery.

making up for the development of procedures, rule filings, months of staff engagement, etc. If the product isn't beneficial to the consumer and won't lead to increased trading/tape revenue, there isn't much incentive for a SRO to go to the trouble. To that extent, the SRO has a greater incentive than the Commission to get it right.

27. Do the business practices of an exchange with respect to attracting, listing, and trading ETP Securities differ from an exchange's business practices with respect to more traditional equity listing services? If so, how do these business practices align with the existing regulatory framework for exchanges as SROs?

Of course they differ. The relationship management of an issuer like BlackRock with their 300+ listings is different than for a more traditional equity listing. The existing regulatory framework for traditional equity listings is extensive, well documented and has evolved over many generations. This is not always the case for ETPs. It often feels like we are borrowing ideas from options regulation, or equity regulation in the absence of ETP regulation. For example, one of the continued listing standards for most ETPs is to have at least fifty beneficial shareholders of record after twelve months of being listed, for thirty consecutive days. The fifty beneficial shareholders of record part comes from options regulations that preceded ETPs. In order to reduce the potential for manipulation of an equity option, it's logical to have more than fifty beneficial shareholders in the underlying instrument. How does that help an investor in an Index Fund Share based on large-cap domestic equities? In practice, this keeps investors away from new issuers for fear that they will be liquidated in the future. The thirty consecutive days part was added on because ETPs can be created/redeemed on a daily basis. A nice attempt by the lawyers to accommodate ETPs, but in practice, no one can get beneficial shareholder information on a daily basis.

28. Are current exchange listing standards (including standards with respect to component eligibility, diversification, and pricing) effective, given the increasing complexity of ETP investment strategies and the expansion of the types of underlying and reference assets and benchmarks? For example, do existing listing standards adequately address the use by ETPs of non-exchange-listed derivatives or of leverage?

The current exchange listing standards should be effective, as both the SROs and the Commission approved them. On the topic of initial listing standards I might suggest that you look to make them consistent across security types. I'm not even certain anymore if the max weighting for the five largest holdings of a Managed Fund Share is the same as for an Index Fund Share and an index option. Why are there narrow and broad-based index options, but no such concept for Index Fund Shares?

This is a minor inconvenience for initial listing standards, but in practice is much more complex for continued listing standards. For example, SROs that list Index-Linked Exchangeable Notes (or ETNs as the Commission refers to them) under generic listing standards are required to analyze the benchmark index for certain requirements on a regular basis. Ideally the analysts at the SROs are performing this in an automated fashion. Programming these regulatory systems with different requirements for each different equity derivative security type seems to be an unnecessary burden on the SROs regulatory and information technology departments.

Given that we performed these functions without automated systems at Amex Regulation, found it difficult to get index constituent data from index providers and did not have access to the NSCC's Portfolio Composition File on a daily basis, I wonder if the SROs currently trading ETPs have found it challenging in recent years to implement these procedures given the large number of ETPs listings and the expanded

adoption of generic listing standards.

29. Given the increasing complexity of ETP investment strategies and the expansion of the types of underlying or reference assets and benchmarks, what types of information do commenters believe would assist the Commission in evaluating whether a proposed rule filing by an exchange to list and trade a specific ETP is consistent with the Exchange Act?

I believe the only information the Commission needs is the reassurance and proof that SROs can properly monitor the ETPs they list and the underlying reference assets those ETPs use. This should be being performed in the Commission's periodic examinations of SROs.

30. Should certain characteristics of an ETP receive particular emphasis in the Commission's evaluation of whether a proposed rule filing related to that ETP is consistent with the Exchange Act? If so, which ones? For example, should the Commission's evaluation focus on the nature, characteristics, or liquidity of the specific investments, holdings, indices, or reference assets of the ETP and on the public availability of information about these underlying or reference assets? Should the Commission's evaluation focus on the effectiveness or efficiency of the creation and redemption process in facilitating arbitrage opportunities with respect to an ETP? What other factors, if any, should the Commission consider in its evaluation of whether a proposed rule filing related to an ETP is consistent with the Exchange Act?

The nature, characteristics and liquidity of the underlying investments has always been a focus of U.S.-listed equity derivative products, whether they are ETPs or not. How would the Commission propose evaluating the effectiveness of a hypothetical creation/redemption process? How would it perform these tests for different market conditions? What assumptions would the Commission make with regard to number of creations/redemptions on a given day? Would testing include assumptions for matrix pricing or committee pricing in certain situations? Would the Commission analyze all accepted forms of creation orders such as cash-in-lieu, custom baskets, or all-cash creates?

The Commission should consider in its evaluation the proposed benefits to investors and the importance of competition. Imagine if the Commission had not acted upon the SuperTrust, or SPDR Trust, rule filings for concerns over the efficiency of the creation/redemption process? Would investors have been better off using the same securities they had available to them in the market crash of 1987?

31. Exchange listing standards for ETP Securities often contain both initial listing criteria and continuing listing criteria. The initial listing criteria include requirements that must be met when ETP Securities are initially listed on an exchange. The continuing listing criteria include requirements that must be met on an ongoing basis. Should exchange listing standards always contain both initial and continuing listing criteria? Should initial and continuing listing standards for ETP Securities be substantially identical?

There is a case to be made for having substantially similar initial and continued listing standards. When these criteria were first developed for Portfolio Depositary Receipts, the sponsors and custodians of the trusts were unable to deviate significantly from the underlying reference index, which is why they are not very popular with issuers today that require sampling techniques to make certain indices available to investors effectively. However, types of ETPs that are registered investment companies under the 1940 Act are allowed a great deal of flexibility, such as Index Fund Shares and Managed Fund Shares, as to what their portfolio managers are allowed to invest in within the framework of the '40 Act. This presents challenges to continued listing analysts. Say, for example, that a new issuer lists an Index Fund Share

based on a proprietary index (self-indexing) that does not contain derivatives such as swaps. Then, a year later the portfolio manager for the fund begins using OTC swaps, which would not violate any 1940 Act compliance rules if it is disclosed properly. How does the SRO handle this? Do they have the necessary information on a daily basis to monitor all holdings? Would the SRO have to submit a rule filing?

32. What, if any, is the appropriate role of an exchange that lists ETP Securities with respect to monitoring creation and redemption activity? For example, should the exchange be informed of an ETP's decision to suspend creations or redemptions during the trading day? If so, should the exchange be required to alert its members, investors, and other market participants?

I feel that a SRO, and investors, should be made aware of any changes with respect to the suspension of a creation/redemption process. This is similar to other investor protections for equity securities commonly found in a SRO Company Guide, such as announcements of mergers and acquisitions. I strongly recommend SROs and the Commission review SRO Company Guides with regard to ETPs. I also feel strongly that ETP issuers should do a better job of communicating other changes to SRO staff such as benchmark changes or name changes.

33. What, if any, is the appropriate role of an exchange that lists ETP Securities with respect to monitoring or overseeing the calculation of IIV or NAV?

The calculations of IIV and NAV are protected by policies and procedures of the issuers, and are obligations of the issuers, typically overseen by a board of trustees. SROs should be made aware of issues affecting IIV and NAV calculation as mentioned in my response to question 32 above when discussing the need for SROs to update their Company Guides for ETPs.

34. Do market participants believe that certain types of ETPs are more susceptible to manipulation than others? If so, please explain. To what extent, if at all, does the nature, characteristics, liquidity, or volatility of an ETP's underlying or reference assets affect the ETP's susceptibility to manipulation?

In the past fourteen years I can recall just a single instance in which fines or censures were levied against an organization or individual for manipulating an ETP listed in the United States. In that time I recall reading a lot about late trading of mutual funds, conflicts of interest between mutual fund share classes, insider trading of equity securities, numerous bond trading scandals, the manipulation of Libor which underpins approximately \$350 trillion in derivatives (ETP assets are approaching \$3 trillion I believe), and many instances of private fund fraud.



Thank you for the opportunity to submit these comments and for your consideration. Please feel free to contact me if you have any questions. www.etpresources.com

Sincerely,

James A. Simpson

James A. Simpson
PRESIDENT

7020 Rob Roy Drive Dublin, Ohio 43017 USA
james.simpson@etpresources.com

<i>tel</i>	1.614.389.3225
<i>mob</i>	1.917.538.4538
<i>fax</i>	1.614.389.3225