

## SEC Proposes Rules to Permit ETFs to Operate without Obtaining Exemptive Relief and Investment Companies to Invest in ETFs in Excess of Current Limitations

The U.S. Securities and Exchange Commission ("SEC" or "Commission") published two proposed rules on March 11, 2008, that would reduce the time and cost of introducing new and more innovative exchange-traded funds ("ETFs") into the market and allow greater investments in ETFs by investment companies, including mutual funds. Rule 6c-11, which generally codifies exemptive orders previously issued by the Commission, would permit ETFs to operate without obtaining an exemptive order. Rule 12d1-4, which generally codifies much of the anti-pyramiding exemptive relief generally obtained by ETFs but eliminates many of the conditions imposed in previously issued exemptive orders, would allow investment companies to invest in ETFs in excess of the current limits imposed by Section 12(d)(1) of the Investment Company Act of 1940 (the "Act").<sup>1</sup> Additionally, the Commission proposed amendments to Form N-1A, the registration statement used by open-end investment companies to register under the Act and offer their securities under the Securities Act of 1933, to provide enhanced disclosures to, among others, retail investors purchasing and selling ETF shares in secondary market transactions on national securities exchanges. Comments must be submitted by May 19, 2008.

### Exchange-Traded Funds: How they Operate and the Arbitrage Mechanism

ETFs are pooled investment vehicles that historically have selected securities that replicated the component securities of broad-based securities indices, such as the Standard & Poor's 500 Composite Stock Price Index. More recently, ETFs have sought to replicate the component securities of more specialized indices, such as international, bond, and custom indices. Moreover, in February 2008, the Commission, for the first time, granted exemptive relief to several actively managed ETFs, which, unlike their passive counterparts, select securities without regard to a particular index.<sup>2</sup>

ETFs are generally structured as mutual funds (i.e., open-end investment companies). However, unlike traditional mutual funds, ETFs neither issue nor redeem individual ETF shares at net asset value ("NAV"). Instead, ETFs issue and redeem large blocks of shares called creation units ("Creation Units"), making financial

<sup>1</sup> See Exchange Traded Funds, Investment Company Act Release No. 28193, available at <http://www.sec.gov/rules/proposed/2008/33-8901.pdf>.

<sup>2</sup> See WisdomTree Trust, et al., Investment Company Act Release Nos. 28147 (Feb. 6, 2008) (notice) and 28174 (Feb. 27, 2008) (order); Barclays Global Fund Advisors, et al., Investment Company Act Release Nos. 28146 (Feb. 6, 2008) (notice) and 28173 (Feb. 27, 2008) (order); Bear Sterns Asset Management, Inc., et al., Investment Company Act Release Nos. 28143 (Feb. 5, 2008) (notice) and 28172 (Feb. 27, 2008) (order); PowerShares Capital Management LLC, et al., Investment Company Act Release Nos. 28140 (Feb. 1, 2008) (notice) and 28171 (Feb. 27, 2008) (order).

institutions the typical purchasers of such Creation Units. Financial institutions that acquire Creation Units may sell some or all of the individual ETF shares to, among others, retail investors in secondary market transactions.<sup>3</sup>

Whereas the purchase and sale of individual ETF shares in secondary market transactions is similar to the purchase and sale of shares of operating companies and closed-end funds, the purchase and redemption of Creation Units is unique to ETFs. Specifically, a financial institution that purchases a Creation Unit is required to deposit with an ETF a basket of certain securities and other assets (a "Purchase Basket"). Upon redemption of a Creation Unit, the ETF will deliver to the redeeming financial institution a basket of certain securities and other assets (a "Redemption Basket"). The composition of Purchase and Redemption Baskets is identified daily by the ETF, generally reflects the ETF's portfolio holdings, and equals the aggregate NAV of the ETF shares comprising a Creation Unit.

Similar to sales of closed-end fund shares, ETF shares trade throughout the day in secondary market transactions and, as such, may trade at a premium or discount to NAV. However, arbitrage opportunities are present given financial institutions' ability to purchase and redeem Creation Units at an ETF's NAV, which helps maintain a market price at or near the ETF shares' NAV.<sup>4</sup> The arbitrage mechanism depends, in

<sup>3</sup> Offerings of ETF shares are registered under the Securities Act of 1933, and ETF shares are approved for listing and trading on a national securities exchange under the Securities Exchange Act of 1934.

<sup>4</sup> For example, if ETF shares are trading at a market price higher than the shares' NAV (i.e., a premium), a financial institution may purchase a Creation Unit and sell individual ETF shares in secondary market transactions at the higher market price, creating downward pressure on the market price to a level closer to the shares' NAV. Conversely, if ETF shares are trading at a market price lower than the shares' NAV (i.e., a discount), a financial institution may purchase ETF shares in secondary market transactions and, after acquiring the necessary number of ETF shares composing a Creation Unit, redeem such Creation Unit for a Redemption Basket, the value of which will be greater than the ETF shares. The increased demand for ETF shares in secondary market transactions should create upward pressure on the market price to a level closer to the shares' NAV.

part, on the transparency of an ETF's portfolio and the liquidity of the securities therein. Transparency facilitates the arbitrage mechanism because it assists arbitrageurs in deciding whether to purchase or redeem Creation Units based on the relative values of ETF shares in the secondary market and the securities comprising an ETF's portfolio. The liquidity of securities composing an ETF's portfolio facilitates the arbitrage mechanism because arbitrageurs must be readily able to purchase and sell the securities comprising Purchase and Redemption Baskets.

## Rule 6c-11

**Scope and Exemptive Relief.** Rule 6c-11 would allow index-based and actively managed ETFs formed as open-end investment companies to operate without obtaining exemptive relief from the Commission.<sup>5</sup> Actively managed ETFs entitled to rely on the rule would be limited to those that provide portfolio transparency to market participants, thereby promoting an effective arbitrage mechanism, without which more significant premiums and discounts could occur in secondary market transactions. Although not covered by Rule 6c-11, non-transparent, actively managed ETFs may continue to seek exemptive relief from the Commission through individual exemptive order applications.

Similar to the exemptive orders previously granted to index-based and actively managed ETFs, Rule 6c-11 will provide to ETFs that satisfy certain conditions, as discussed below, exemptive relief from the following provisions of the Act:

- **Issuance of "Redeemable Securities"** — Rule 6c-11 would provide exemptive relief from Sections 2(a)(32) and 5(a)(1) of the Act, thereby allowing ETFs to register as open-end investment companies despite

<sup>5</sup> Rule 6c-11 would not afford similar exemptive relief to ETFs formed as unit investment trusts because of little demand from such entities. According to the Commission, as of December 2007, approximately 99% of the ETFs in existence were organized as open-end investment companies, and the SEC has not received an application for exemptive relief from a unit investment trust since 2002.

limiting redemptions solely to Creation Units<sup>6</sup> and not individual ETF shares.<sup>7</sup>

- **Trading of ETF Shares at Negotiated Prices** — Rule 6c-11 would provide exemptive relief from Section 22(d) of the Act and Rule 22c-1 thereunder. This would allow ETF shares to be purchased and sold at market prices in secondary market transactions and not at a price listed in a prospectus or based on NAV.<sup>8</sup>
- **In-Kind Transactions between ETFs and Certain Affiliates** — Rule 6c-11 would provide exemptive relief from Section 17(a)(1) and Section 17(a)(2) of the Act, thereby allowing certain affiliated entities of an ETF, including (but not limited to) entities that own more than 5% of its voting securities, the ability to purchase and redeem Creation Units through in-kind transactions.<sup>9</sup>
- **Additional Time for Delivering Redemption Proceeds** — Subject to certain disclosures and conditions, Rule 6c-11 would provide exemptive relief from Section 22(e) of the

<sup>6</sup> Rule 6c-11 does not specify the number of ETF shares required to compose a Creation Unit, but rather requires that Creation Units be reasonably designed to facilitate the arbitrage mechanism.

<sup>7</sup> Pursuant to Section 5(a)(1) of the Act, an “open-end company” is any management company which offers for sale or has outstanding any redeemable security of which it is the issuer. Pursuant to Section 2(a)(32), a “redeemable security” is any security, other than short-term paper, which allows the holder to receive its approximate proportionate share of the issuer’s current net assets or the cash equivalent thereof.

<sup>8</sup> Designed to prevent dilution from so-called “riskless trading” and unjust discrimination among investors, Section 22(d) prohibits, among other things, dealers from selling redeemable shares at prices other than the current public offering price set forth in a prospectus. Rule 22c-1 generally prohibits dealers from selling, redeeming, or repurchasing redeemable securities at prices other than those based on NAV.

<sup>9</sup> Section 17(a)(1) and Section 17(a)(2) of the Act prohibit any affiliated person of a registered investment company, or any affiliated person of such person, acting as principal, to knowingly sell to, or purchase from, respectively, such registered investment company any security or other property.

Act, thereby allowing an ETF that includes foreign securities in its Redemption Basket to postpone delivery of such foreign securities, for a period not exceeding 12 days, upon the tender of a Creation Unit for redemption.<sup>10</sup>

**Conditions.** ETFs relying on Rule 6c-11 would need to adhere to the following conditions, which were designed to be consistent with the purpose of the Act without sacrificing investor protection:

- **Transparency of Index and Portfolio Holdings** — An ETF relying on Rule 6c-11 would either need to (i) disclose on its Web site each business day the identities and weightings of the component securities and other assets held by that ETF; or (ii) have a stated investment objective of obtaining returns that correspond to the returns of a securities index, whose “index provider” discloses on its Web site the identities and weightings of the component securities and other assets of the index.<sup>11</sup> These disclosures must be publicly accessible at no charge. To address “free-riding” and “front-running” concerns implicit in fully transparent portfolio holdings, Rule 6c-11 would not require disclosure of intraday changes to portfolio holdings or advance notification of portfolio trades.
- **Listing of ETF Shares on a National Securities Exchange and Dissemination of the Intraday Value of Purchase and Redemption Baskets** — Shares of an ETF relying on Rule 6c-11 would need to be approved for listing and trading on a national securities exchange which discloses, at regular intervals during the trading day, the intraday value of

<sup>10</sup> Section 22(e) of the Act requires satisfaction of redemption requests within seven days after the tender of a redeemable security for redemption.

<sup>11</sup> Rule 6c-11 defines “index provider” as “the person that determines the securities and other assets that comprise a securities index.” See Rule 6c-11(e)(7). An index-based ETF, the investment objective of which is to obtain returns that correspond to the returns of multiple indices, may rely on Rule 6c-11, provided that it discloses its portfolio holdings in the same manner as actively managed ETFs relying on the rule.

the securities composing Purchase and Redemption Baskets, calculated on a per share basis.

- **Marketing of ETF Shares** — Rule 6c-11 would require, in any sales literature, ETFs to identify themselves as ETFs and explain that they neither sell nor redeem individual ETF shares. Further, ETFs must explain to investors that individual ETF shares are purchased and sold in secondary market transactions that do not involve the issuing ETFs.

In addition to the conditions above, ETFs relying on Rule 6c-11 would need to disclose on their Web sites, each business day, the prior business day's NAV and the closing market price of ETF shares in secondary market transactions, and the premium or discount of the closing market price against the ETF shares' NAV, calculated as a percentage of NAV. Further, ETFs would need to disclose, each business day, the securities composing Purchase and Redemption Baskets.

The Commission is requesting comment on whether to also impose conditions (i) prohibiting an investment adviser of an actively managed ETF from causing a purchaser of a Creation Unit to acquire a security for the ETF through a transaction in which the ETF could not engage directly; and (ii) preventing the communication of material, non-public information between an ETF and its affiliated index provider.

**Disclosure Amendments.** In addition to Rule 6c-11, the Commission is proposing amendments to exemptive orders previously issued to ETFs and amendments to Form N-1A. The purpose of such amendments is to provide enhanced disclosure to, among others, retail investors purchasing and selling ETF shares in secondary market transactions.

- **Prospectus Delivery Obligation** — In exemptive orders previously issued to ETFs, the Commission generally exempted broker-dealers from the obligation to deliver ETF prospectuses in most secondary market transactions pursuant to Section 24(d) of the Act, and instead allowed such broker-dealers to deliver "product descriptions," which contained basic information about ETFs and their shares. The Commission is proposing to amend previously issued ex-

emptive orders to eliminate this exemption. Rule 6c-11 contemplates that broker-dealers will utilize "summary prospectuses," which are the subject of a rule proposal slated for adoption by the Commission.<sup>12</sup> Upon the assumption that the summary prospectus rule proposal is adopted, a broker-dealer could satisfy its prospectus delivery obligation using a summary prospectus.

- **Form N-1A Amendments** — The proposed amendments to Form N-1A are generally designed to provide retail investors additional information in connection with the purchase and sale of ETF shares in secondary market transactions. These amendments also generally would eliminate certain disclosures required in a prospectus regarding the purchase and redemption of Creation Units and other information generally applicable to financial institutions purchasing Creation Units. Certain information may be required in the Statement of Additional Information. However, for ETFs with Creation Units composed of less than 25,000 ETF shares, such information would be disclosed in a prospectus on the theory that smaller-sized Creation Units may enable retail investors to transact directly with an ETF, thereby making such information applicable to retail investors. In addition, the amendments to Form N-1A would, among other things, require the disclosure of (i) total return based on the market price of ETF shares, in addition to total return determined with reference to NAV; (ii) the extent and frequency with which the market price of ETF shares has tracked NAV; and (iii) upon the assumption that the summary prospectus rule proposal is adopted, other information, including the foregoing, in the

<sup>12</sup> The summary prospectus rule proposal would require a fund to provide key investment information in plain English in a standardized order at the front of its statutory prospectus, using the same format as the summary prospectus, which may be delivered in satisfaction of its prospectus delivery obligations under the Securities Act of 1933. For a discussion and analysis of the proposal, see [http://www.dechert.com/library/FS\\_3\\_SEC\\_Proposes\\_Use\\_of\\_Summary\\_Prospectus.pdf](http://www.dechert.com/library/FS_3_SEC_Proposes_Use_of_Summary_Prospectus.pdf).

summary section of a prospectus and, accordingly, the summary prospectus.

## Rule 12d1-4

**Scope and Exemptive Relief.** The ability of a fund (an “Acquiring Fund”) to invest in another investment company, including an ETF (an “Acquired Fund”), is limited by Section 12(d)(1) of the Act, which, among other things, generally prohibits an Acquiring Fund (and companies or funds it controls) from (i) acquiring more than 3% of the outstanding voting securities of any Acquired Fund; (ii) investing more than 5% of the Acquiring Fund’s total assets in any one Acquired Fund; or (iii) investing more than 10% of the Acquiring Fund’s total assets in all Acquired Funds.<sup>13</sup> Furthermore, a registered open-end fund, its principal underwriter, or any registered broker-dealer, are prohibited from selling such fund’s securities to any other fund (and companies or funds it controls) if, immediately after the sale, the Acquiring Fund would (i) together with companies and funds it controls, own more than 3% of the Acquired Fund’s voting securities; or (ii) together with other funds (and companies they control) own more than 10% of the Acquired Fund’s voting securities.<sup>14</sup>

The purpose of such prohibitions was to address the historical abuses of “pyramiding” (i.e., “fund of funds” arrangements). Specifically, an Acquiring Fund may acquire indirect control of an Acquired Fund through coercive threats to redeem large blocks of shares and require the Acquired Fund to, among other things, direct underwriting and brokerage transactions to affiliated entities of the Acquiring Fund. Fund of funds arrangements may also be confusing to investors and impose duplicative costs. The Commission, however, has adopted rules providing relief to certain arrangements whereby an Acquiring Fund may permissibly invest in an Acquired Fund in excess of the limits imposed by Section 12(d)(1). Similar relief, in the form of exemptive orders with burdensome conditions, has been granted to ETFs.

Rule 12d1-4 would provide exemptive relief to permit open-end and closed-end management companies,

<sup>13</sup> See Section 12(d)(1)(A)(i)–(iii) of the Act.

<sup>14</sup> See Section 12(d)(1)(B)(i) and (ii) of the Act.

including business development companies, and unit investment trusts to invest in ETFs in excess of the limits imposed by Section 12(d)(1) of the Act. Additionally, Rule 12d1-4 would provide exemptive relief allowing certain transactions between an Acquiring Fund and an affiliated ETF, including the purchase and redemption of Creation Units through in-kind transactions, which might otherwise be prohibited by Sections 17(a)(1), 17(a)(2), 57(a)(1), and 57(a)(2) of the Act.<sup>15</sup> Furthermore, Rule 12d1-4 would provide limited exemptive relief from Section 17(e)(2), thereby allowing certain brokerage transactions between an Acquiring Fund and an ETF’s affiliated broker-dealer, which, but for this exemption, would require, among other things, quarterly board review and retention of certain records.<sup>16</sup>

**Conditions.** Reliance on Rule 12d1-4 would be subject to four conditions designed to address the historical abuses that may result from pyramiding and the threat of large-scale redemptions of ETF shares. Rule 12d1-4 generally codifies much of the exemptive relief contained in previously issued exemptive orders, while eliminating many of the conditions imposed by such orders. Unlike these orders, however, Rule 12d1-4 would restrict the ability of an Acquiring Fund to redeem ETF shares.

- **Control** — Rule 12d1-4 would limit exemptive relief to an Acquiring Fund (and any entity in a control relationship with such fund) that does not “control” an ETF.<sup>17</sup>

<sup>15</sup> Section 57(a)(1) and Section 57(a)(2) of the Act, like Section 17(a)(1) and Section 17(a)(2) of the Act, prohibit certain transactions between business development companies and certain affiliates.

<sup>16</sup> Section 17(e)(2) of the Act prohibits an affiliated person, or an affiliated person of such person (i.e., second-tier affiliated person), of a fund from receiving compensation for acting as a broker, in excess of the limitations set forth in that section. An Acquiring Fund’s investment in an ETF may cause an affiliated broker-dealer of such ETF to become a second-tier affiliated person of such Acquiring Fund, and any transaction between such Acquiring Fund and such broker-dealer may trigger certain requirements under Rule 17e-1, an exemptive rule promulgated under Section 17(e)(2).

<sup>17</sup> The Act defines “control” as “the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such com-

## ■ Redemptions

- Rule 12d1-4 would prohibit an Acquiring Fund that, in reliance on the rule, acquires an ETF's shares in excess of the limit in Section 12(d)(1)(A)(i) (i.e., more than 3% of an ETF's shares) from redeeming those shares. Instead, such an Acquiring Fund must dispose of the shares (or at least those that exceed the 3% limit) in secondary market transactions. An Acquiring Fund would be deemed to have first redeemed or sold the most recently acquired ETF shares, thereby allowing such Acquiring Fund to redeem ETF shares solely when it (and companies or funds it controls) holds ETF shares within the limit imposed by Section 12(d)(1)(A)(i). An Acquiring Fund that, in reliance on the rule, acquires ETF shares in excess of the limits in Section 12(d)(1)(A)(ii) and (iii) (i.e., more than 5% of an Acquiring Fund's assets in any one Acquired Fund or more than 10% of its assets in all Acquired Funds, respectively), but that does not acquire more than 3% of the Acquired Fund's securities, would be unaffected by this prohibition.
- Rule 12d1-4 would prohibit an ETF, its principal underwriter, and any broker-dealer that, in reliance on the rule, sells ETF shares in excess of the limit in Section 12(d)(1)(B), from redeeming (or submitting an order to redeem) such ETF shares acquired by an Acquiring Fund in excess of the limit in Section 12(d)(1)(A)(i) (i.e., more than 3% of an ETF's shares). Rule 12d1-4 would provide a safe harbor for such selling entities if they (i) receive a representation from the Acquiring Fund that none of the ETF shares that such Acquiring Fund is redeeming were acquired in excess of the limit in Section

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pany." Additionally, the Act creates a rebuttable presumption of control for any person who, directly or indirectly, beneficially owns more than 25% of a company's voting securities. See Section 2 (a)(9) of the Act.

12(d)(1)(A)(i) in reliance on the rule; and (ii) have no reason to believe that such Acquiring Fund acquired such ETF shares in excess of the limit in Section 12(d)(1)(A)(i) in reliance on the rule.

- **Complex Structures** — In order to prevent overly complex, multi-tiered fund structures, Rule 12d1-4 would prohibit an ETF whose shares are acquired in reliance on the rule from itself being a fund of funds. Specifically, the rule would require that the ETF have a disclosed policy that prohibits it from investing more than 10% of its assets in (i) investment companies in reliance on Sections 12(d)(1)(F) or (G) of the Act;<sup>18</sup> and (ii) any company excepted from the definition of "investment company" pursuant to Sections 3(c)(1) or 3(c)(7) of the Act.<sup>19</sup>
- **Layering of Fees** — Rule 12d1-4 would (i) limit service fees and sales charges imposed by an Acquiring Fund to those set forth in the Financial Industry Regulatory Authority's sales charge rule, which takes into consideration the fees charged at both levels of a fund of funds arrangement, and (ii) limit the layering of fees in separate accounts that invest in Acquiring Funds.

## Conclusion

During the Commission's open meeting discussing the rule proposals, SEC Chairman Christopher Cox asked Andrew "Buddy" Donohue, Director of the SEC's Division of Investment Management, to describe the

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<sup>18</sup> Section 12(d)(1)(F) of the Act provides a partial exemption from Section 12(d)(1) to registered investment companies that impose minimal sales loads on their securities, and Section 12(d)(1)(G) provides an exemption from Section 12(d)(1)(A) and (B), provided that, among other things, the Acquiring Fund and Acquired Fund are part of the same group of investment companies.

<sup>19</sup> Sections 3(c)(1) and 3(c)(7) of the Act exclude from the definition of "investment company" certain private investment funds.

benefits of Rule 6c-11. Mr. Donohue responded that the rule will:

- allow new entrants to access the market without the cost and delay of obtaining exemptive relief;
- enable existing ETF sponsors to avoid costly updates to existing exemptive orders when introducing new products; and
- reduce the workload of the SEC staff, thereby enabling it “to focus on more novel and more difficult exemptive requests and to respond to them in a more timely fashion.”

The scope of the proposed rules is limited to ETFs that provide portfolio transparency to market participants because portfolio transparency permits an effective arbitrage mechanism, without which more significant premiums and discounts between an ETF’s NAV and market price could occur in secondary market transactions. It is worthy of note, however, that during the open meeting, Mr. Donohue expressed a

willingness to further consider the circumstances under which exemptive relief may be available to non-transparent, actively managed ETFs. The release also states that the Commission is willing to consider such exemptive relief. The proposed rules and forward-looking statements of the Commission and its staff are encouraging statements for the still developing ETF sector.

Dechert LLP will continue to monitor the proposed rules and inform you as to any developments.



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