ROPES & GRAY

Converting Traditional Open-End Funds into ETFs

In this article, we provide a high-level overview of key considerations in converting an existing traditional open-end fund ("OEF") into an exchange-traded fund ("ETF"). To our knowledge, no OEF has yet been converted into an ETF, but now may be the right time to seriously consider it. While we expect that there will be various regulatory and operational hurdles in converting an OEF into an ETF, we do not think there is any legal reason that these hurdles cannot be overcome.

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ABOUT ROPES & GRAY'S ETF PRACTICE

- Ropes & Gray advises ETF sponsors that represent over half of all of the assets under management in the ETF industry on matters relating to the sponsorship and operation of ETFs, product design, operational matters, capital markets issues, tax issues related to custom baskets, index licensing matters, business issues, and exchange listing and trading relief issues.
- Ropes & Gray works with ETFs of all kinds, including actively-managed ETFs, non-transparent ETFs, leveraged and inverse ETFs, as well as other exchange traded products, including non-1940 Act ETFs investing in physical metals and futures-based commodities.
- Ropes & Gray's ETF practice group includes the former in-house Chief Legal Officer to the largest ETF complex in the world who has over 12 years of experience working closely on all matters related to ETF sponsorship.
- Ropes & Gray's recent ETF-related engagements have included advising on non-transparent ETF products, custom basket compliance policies and procedures, order-taking procedures, authorized participant oversight, ETF market-making activities, arbitrage activities, and market structure and trading regulations.
- Ropes & Gray has partnered with ETF sponsors on ETF product development since 2007.

Converting Traditional Open-End Funds into ETFs

The Securities and Exchange Commission (the "SEC") recently published a notice relating to an application for exemptive relief filed by Precidian ETFs Trust ("Precidian") that would permit an actively managed exchange-traded fund ("ETF") to operate without being subject to the current daily portfolio transparency condition included in past active ETF orders. Other applications for exemptive relief that would allow similar actively managed non-transparent ETFs are currently under consideration by the SEC and may be granted in the future.[1] We anticipate that this structure may be attractive to many active managers, and that many active equity managers may seek to offer their strategies as ETFs, including potentially through the conversion of an existing open-end fund into an ETF. This article provides a high-level overview of key considerations in converting an existing traditional open-end fund ("OEF") into an ETF. While it is intended to serve as a useful reference point in evaluating a possible conversion, we encourage sponsors considering a conversion to engage with their Ropes & Gray contact early in the process.

EXECUTIVE SUMMARY

While we are not aware of any OEF that has successfully completed a conversion to an ETF, and there may be significant obstacles to overcome in converting an OEF into an ETF, we do not believe that there is any legal reason such obstacles cannot be overcome. At a high level, a conversion would involve the following:

- ***Direct Conversion or Merger.*** The conversion can be effected through a direct conversion or a merger. In a direct conversion, the OEF converts into an ETF by obtaining an exemptive order and amending its fund documents as necessary. In a merger, the OEF merges into a shell ETF that has obtained the necessary exemptive order. In some cases, the "merger" may technically be effected through an asset sale.
- ***SEC Exemptive Relief and Regulatory Filings.*** Any non-transparent actively managed ETF ("NT Active ETF") would need to operate pursuant to exemptive relief from the SEC. The conversion will also involve the filing of various registration statement amendments and supplements. In addition, the SEC will generally have to authorize listing rules for any NT Active ETF, and the NT Active ETF will have to meet other SEC requirements applicable to ETFs.
- ***Board and Shareholder Approvals and Communications.*** The conversion must be approved by the OEF's board. Shareholder approval may also be required under the Investment Company Act of 1940, as amended (the "1940 Act"), applicable state law, the organizational documents, or applicable exchange rules. If shareholder approval is required, a joint prospectus/proxy statement would generally be filed with the SEC on Form N-14.
- ***Other Steps.*** Other steps that may be necessary include, among others, adjusting the OEF's portfolio to be compliant with the conditions of the applicable exemptive relief, consolidating share classes to accommodate the typical single-class structure of ETFs, and redeeming fractional shares.

BACKGROUND

The SEC's indication that it is open to approving the Precidian model marks a shift in the regulation of ETFs and paves the way for other managers seeking to launch NT Active ETFs, either following the Precidian model or pursuant to exemptive relief based on a different model. Many active managers have been reluctant to launch active ETFs due to concerns that daily portfolio transparency would result in front-running of positions that are bought or sold over more than one trading day or free-riding by investors that might seek to replicate the disclosed portfolio outside of the Fund (and thereby avoiding management fees and other expenses). The terms of the Precidian model seek to address those concerns. While the SEC may, in the future, provide similar exemptive relief for NT Active ETFs following other models that may have other conditions or features, understanding the key characteristics of the Precidian model provides a helpful catalyst for considering the OEF to ETF conversion process.

ACTIVE NON-TRANSPARENT ETFS The Precidian model will allow active ETFs that do not disclose their portfolio holdings on a daily basis. The Precidian model contains certain key features that are not present in prior ETF orders and are designed to ensure the efficient operation of the arbitrage mechanism and minimize risks associated with the unique structure.

- **VIIV** The ETF publishes a verified intraday indicative value ("VIIV") every second, calculated by two independent pricing services at the mid-point of the national best bid and offer of the securities in the portfolio at the prior day's close.[2]
- **AUTHORIZED PARTICIPANT ("AP") REPRESENTATIVES** APs purchase and redeem shares through AP representatives, which are independent broker-dealers who know (and must keep confidential) the composition of the ETF's creation basket and who effect purchases and redemptions in ETF shares upon an AP's instruction, without disclosing to the AP the identity and weighting of the ETF's holdings.[3]
- **INVESTMENT RESTRICTIONS** An ETF operating under the Precidian model is permitted to hold only securities that trade on a U.S. exchange contemporaneously with the ETF's shares (e.g., ETFs, exchange-traded notes, common stocks, American depositary notes, exchange-traded preferred stocks, real estate investment trusts, commodity pools, metal trusts, currency trusts, futures). An ETF operating under the Precidian order is also not permitted to hold short positions, which may affect the ETF's ability to engage in certain hedging activities.

In addition to the legal and regulatory matters discussed herein, the conversion of an OEF into an ETF would raise important business considerations, including, among others, the effects of the conversion on existing OEF shareholders and on existing agreements among an OEF, its distributor and/or its transfer agent, and various intermediaries that sell OEF shares and provide services to OEF shareholders.

POTENTIAL BENEFITS OF ACTIVE ETFS OVER OEFS There may be significant benefits to converting an OEF to an ETF. We have outlined some of the key benefits below, though other significant benefits may exist depending on the particular facts and circumstances. Your regular Ropes & Gray contact can help you identify specific additional advantages or disadvantages of your potential conversion.

- **TAX EFFICIENCY** Because ETFs often do not have to sell securities (and thereby potentially realize capital gains) to meet redemption requests, ETFs typically recognize fewer capital gains than equivalent OEFs. ETFs can also generally minimize the realization of capital gains by satisfying redemption requests using the most appreciated securities of each instrument that is part of the ETF's creation basket. An OEF with significant unrealized capital gains or a tax-managed strategy may represent a compelling opportunity for a conversion, though the potential tax efficiency of an active non-transparent ETF may be partly limited by a requirement that the

ETF's creation basket represent a pro rata portion of the portfolio.[4]

- **LOWER OPERATIONAL COSTS** ETFs do not typically have to maintain a cash position or sell securities to meet redemptions and therefore may operate with less cash drag and lower transaction costs. ETFs also bear significantly lower transfer agency costs than OEFs, and most ETFs do not pay 12b-1 fees,[5] further reducing the costs borne by investors. Finally, ETFs may be attractive to managers of OEFs because investment advisers to ETFs do not typically make revenue-sharing payments to intermediaries.[6]
- **INVESTOR INTEREST** Many investors have been drawn to ETFs by their relative tax efficiency, lower operating costs, the ability to trade shares intraday using flexible order types, and the ability to lend, pledge, margin and sell short their shares. ETFs are often the preferred vehicle in model portfolio arrangements and most robo-advisors predominantly utilize ETFs in their portfolio solutions.

A NOVEL IDEA While there are a few OEFs that have taken steps to convert or merge into ETFs in the past, we are not aware of any OEF that has successfully completed a conversion to an ETF.[7] As a result, there may be advantages and disadvantages to being among the first to convert. The SEC staff may have objections to the specifics of particular conversion or merger plans, and there may be other significant obstacles to overcome in converting an OEF into an ETF. However, we do not believe that there is any legal reason such obstacles cannot be overcome.

Conversion Mechanics

There are two basic approaches to converting an OEF into and ETF: a direct conversion and a merger. While a direct conversion may involve fewer procedural steps than a merger, different or additional approvals may be required in connection with a direct conversion. Careful consideration should be given to the relative advantages or disadvantages of the two basic approaches in light of the specific structure and operations of the existing OEF and the abilities and preferences of the sponsor.

- **DIRECT CONVERSION** In a direct conversion, the OEF converts into an ETF by obtaining an exemptive order, amending its registration statement and organizational documents, and adjusting its operations accordingly.
- **MERGER/ASSET SALE** A shell ETF is created, presumably with the same Board and the same investment policies and objectives as the OEF, with such differences as may be necessary to operate as an ETF and in accordance with the exemptive order (e.g., contemplating the unique redemption process and the limited universe of permissible investments). As discussed below, the shell ETF would need to obtain an exemptive order and file a registration statement with the SEC. The OEF then merges into the ETF (depending on the form and state of organization of the OEF and the ETF, the "merger" may technically be effected through an asset sale).

While each conversion from an OEF into an ETF will be different, there are several key considerations that will be relevant to any such conversion. The relative importance of each of these considerations will vary depending on the intended structure of the conversion.

SEC EXEMPTIVE ORDER Any NT Active ETF will need to operate under an exemptive order from the SEC. Whether the OEF or the NT Active ETF has to file the exemptive application will depend on whether the conversion is effected through a direct conversion or a merger: If an OEF converts directly into an NT Active ETF, the converting OEF would apply for the order; if the conversion is effected through a merger, the shell ETF would apply for the order. In addition to the typical considerations relevant when seeking to obtain exemptive relief from the SEC, additional considerations may be relevant in the context of a conversion to a NT Active ETF.

- **EXPEDITED ORDER PROCESS** The Precidian model contemplates an expedited order process for future NT Active ETFs through incorporation by reference to the Precidian application. An ETF may tailor its application to the extent it cannot or does not want to mirror the Precidian model, but there may be potential time-savings and other advantages to relying on the Precidian appli-

cation, as the SEC has already reviewed and indicated that it is open to approving the Precidian application.

- **LICENSING** The Precidian application contends that certain aspects of the ETFs described therein are subject to intellectual property rights and contemplates licensing of the intellectual property to other NT Active ETFs relying on the order.

BOARD APPROVAL Managers contemplating a conversion of an OEF into an ETF should carefully craft a strategy for communicating the conversion plans to the funds' boards. The board of the OEF and, for a merger, the ETF (as applicable, the "Board"), will have to approve the conversion or merger. In doing so, the Board must find that the conversion is in the best interest of the funds and, in the case of a merger, that existing shareholders will not be diluted as a result, consistent with Rule 17a-8 under the 1940 Act.

The Board should be provided all information reasonably necessary to make the required determinations. Given the structural differences between OEFs and ETFs, such information would include, among other things, information relating to the loss of the right to redeem individual shares, the intra-day liquidity provided by the ETF structure, and the potentially significant tax benefits of operating as an ETF. Various other Board approvals will also be needed. For example, the Board may have to authorize filings (such as the registration statement amendments or exemptive applications discussed herein), amend compliance procedures to reflect changing operations, and authorize various other steps of the conversion or merger, including where applicable a shareholder vote.

FORM N-1A REGISTRATION STATEMENT AND PROSPECTUS Whether the conversion is effected through a direct conversion or a merger, various registration statement amendments or prospectus updates will be required in connection with the conversion.

- **FILINGS** For a direct conversion, the OEF's prospectus will need to be supplemented, presumably shortly after the Board approves the conversion, to disclose the intended conversion. In addition, the OEF's registration statement will need to be amended in a filing pursuant to Rule 485(a) under the Securities Act of 1933 (the "Securities Act") to reflect the conversion. A registration statement amendment filed pursuant to Rule 485(a) under the Securities Act is subject a 60-day review period before the amendment can become effective, during which period the SEC staff may provide comments on the filing.

  For a merger, a new registration statement will need to be filed for the ETF, the effectiveness of which will require acceleration by the SEC staff. If the shell ETF is a series of an existing trust with an effective registration statement, the shell ETF could be added in a registration statement amendment pursuant to Rule 485(a) under the Securities Act, which would be subject to a 75-day review period.

- **DISCLOSURE** The Precidian application mandates certain disclosures for the NT Active ETF, including disclosure aimed at highlighting the specific risks of the Precidian model. For example, the prospectus for a NT Active ETF following the Precidian model must disclose the possibility of reverse engineering of the strategy by competitors, the potentially wider bid-ask spreads and larger premiums or discounts due to the lack of transparency, and the potentially greater trading costs. Exemptive orders issued by the SEC in the future to other NT Active ETFs may require disclosure of different risks or other specific statements.

LISTING THE ETF ON AN EXCHANGE The ETF needs to be listed on an exchange. Generally, an ETF seeking to list on an exchange would need to either obtain the approval of the SEC's Division of Trading and Markets or satisfy certain specified generic listing standards previously approved by the SEC staff. While there are generic listing standards for certain types of active ETFs, they would not be available to a NT Active ETF. As a result, a NT Active ETF would only be able to list on an exchange if an application pursuant to Rule 19b-4 under the Securities Exchange Act of 1934 (the "Exchange Act")[8] were approved by the SEC's Division of Trading and Markets. The Rule 19b-4 process can take six to nine months and involves an additional layer of regulatory review, introducing significant uncertainty into the design and time frame for launching the ETF and completing the conversion. In light of the required application process, sponsors may wish to communicate with the relevant listing exchange during the planning stage.[9]

SHAREHOLDER APPROVAL A key question in evaluating and structuring a potential conversion from an OEF into an ETF is whether approval by the shareholders of the OEF, the ETF, or both will be required. Approval by the OEF's shareholders may be required under a variety of corporate law or regulatory regimes. Even if shareholder approval is not technically required, however, sponsors may wish to consider speaking with members of the SEC staff prior to commencing the conversion process, in order to ensure that any concerns the SEC staff might have are appropriately considered and addressed.[10] If approval by the ETF's shareholders is required, it may be possible for that approval to be obtained from the ETF's sole shareholder prior to listing.

- **THE 1940 ACT** Rule 17a-8 under the 1940 Act generally permits mergers between affiliated funds, subject to certain conditions, and would not require shareholder approval if certain conditions are satisfied. Generally, Rule 17a-8 permits a merger between an OEF and an affiliated ETF without a shareholder vote if the advisory agreements and fundamental policies of the OEF and the ETF are not materially different, independent Board members of the OEF who were elected by its shareholders represent a majority of the independent Board members of the ETF, and the ETF does not have a plan pursuant to Rule 12b-1 under the 1940 Act (a "Rule 12b-1 Plan") that authorizes greater payments for distribution than does the OEF's Rule 12b-1 Plan.
- **STATE LAW AND/OR ORGANIZATIONAL DOCUMENTS** The laws of the state under which an OEF or ETF is organized may require a shareholder vote prior to effecting the conversion or merger. The Declaration of Trust or other organizational documents of the OEF or the ETF may also require shareholder approval.
- **LISTING RULES** If the OEF is merging into an existing ETF that is already listed on an exchange, approval by the ETF's shareholders may be required under applicable listing rules. For instance, both Nasdaq and the NYSE require shareholder approval before a listed company can (1) issue in a transaction securities that will represent 20% or more of the outstanding voting power before the issuance or that will constitute 20% of the number of outstanding shares before the issuance, or (2) issue securities that will result in a change of control of the issuer. In such circumstances, communications with the relevant exchanges may be necessary during the planning stage, as it may or may not be possible to obtain the requisite shareholder approval prior to listing.

SHAREHOLDER COMMUNICATIONS As part of a merger or asset sale, the shareholders of the OEF would receive shares of the ETF in exchange for their shares of the OEF. ETF shares that are to be offered in connection with a merger for which approval by the OEF's shareholders is required generally must be registered on Form N-14. The heart of Form N-14 is a combined prospectus/proxy statement that simultaneously registers the ETF shares for public offering and solicits proxies from the shareholders of the OEF. The Form N-14 is publicly filed with the SEC and the prospectus/proxy statement is distributed to shareholders. Even if shareholder approval is not required in connection with a conversion, sponsors should consider whether the ETF should file with the SEC and distribute to shareholders an information statement (essentially, a joint prospectus/proxy statement that does not request a shareholder to vote) on Form N-14.

PREPARING THE OEF FOR CONVERSION As discussed above, a NT Active ETF will operate pursuant to an exemptive order that imposes certain specific conditions on the NT Active ETF's operations. In some cases, those conditions as well as other structural differences between OEFs and ETFs may require certain changes to be made to the OEF's existing portfolio prior to the completion of the conversion. The exact nature and extent of any required changes will depend on the current operations of the OEF and the specific conditions described in the exemptive order, but likely include:

- **ADJUSTING THE PORTFOLIO** The NT Active ETF's exemptive order may limit the ability of the NT Active ETF to invest in certain types of instruments. An OEF that holds investments that are not permitted under the relevant order (e.g., under the Precidian model, bonds, foreign stock, short positions, etc.) will need to divest any non-compliant investments before a direct conversion or merger, which may require careful planning to minimize transaction costs and adverse tax consequences.

In a direct conversion, corresponding changes to the OEF's principal investment strategies and investment restrictions will need to be effected to disclose the restrictions on the NT Active ETF's investments and operations and permit the NT Active ETF to rely on the order; in a merger, the NT Active ETF's initial registration statement would reflect the investment restrictions applicable under the order.

- **CONSOLIDATING SHARE CLASSES** ETFs typically do not offer multiple share classes. If the OEF offers multiple share classes, the classes may, in the case of a direct conversion, need to be consolidated into a single class prior to the conversion. The consolidation of share classes may require an amendment to the OEF's multi-class plan adopted pursuant to Rule 18f-3 under the 1940 Act to adjust the eligibility conditions for shares of the class into which the other classes will be consolidated. In a merger, the terms of the merger agreements can include provisions that give OEF shareholders of each class a number of shares of the ETF that corresponds to the net asset value of their OEF shares.
- **FRACTIONAL SHARES** Unlike OEFs, ETFs typically do not issue fractional shares.[11] For a direct conversion, any existing fractional shares of the OEF may need to be converted to cash prior to the conversion. For a merger, the terms of the merger may need to provide for the conversion to cash of fractional ETF shares that would otherwise have been issued in the merger. The conversion of fractional shares to cash would likely be treated as a taxable event to the shareholders.

Tax Considerations

The conversion of an OEF to an ETF should itself not have any significant, negative tax consequences to the OEF, the ETF, or their shareholders. As discussed above, there generally are ongoing tax benefits to operating as an ETF rather than as an OEF. However, given the unique nature of NT Active ETFs, there may be additional tax considerations or limitations relevant to such ETFs under the Internal Revenue Code of 1986, as amended (the "Code"). For example, to ensure that the NT Active ETF's in-kind transactions with the AP through the AP representatives are respected for tax purposes, a NT Active ETF may need to take steps to ensure that the AP representative is not treated as an agent of the NT Active ETF when selling securities received from the NT Active ETF.

Sponsors should consult with their Ropes & Gray tax counsel to ensure that the tax implications of their specific conversion plans and the resulting ETF are understood. Some of the key factors relevant in evaluating the tax consequences of the OEF-ETF conversion are summarized below:

- **DIRECT CONVERSION** A direct conversion generally should not result in any tax consequences for the Fund or its shareholders. If fractional shares were exchanged for cash in connection with the direct conversion, such exchange to cash would be treated as a taxable event to the shareholders.
- **MERGERS** The factors that will determine whether a merger between an OEF and an ETF represents a tax-free reorganization will generally be the same as those with respect to the merger of two OEFs. Generally, the merger is not taxable to the OEF, the ETF or shareholders if it qualifies as a tax-free reorganization the Code, except to the extent fractional shares are exchanged for cash. For mergers into an ETF that has not commenced investment operations at the time of the merger, the transaction may meet the requirements of a so-called "F" reorganization,[12] including that the ETF not have issued shares or held property prior to the merger (except for seed amounts necessary to form the ETF) and that the ETF assume all the liabilities of the OEF. An "F" reorganization is a type of tax-free reorganization in which the ETF would be treated as a continuation of the OEF for income tax purposes, such that the ETF keeps the EIN of the OEF and the merger does not close the taxable year of the OEF.
- **DISPOSITION OF SECURITIES** A disposition of securities prior to the conversion, whether a direct conversion or merger, may result in the recognition of capital gain, which would be required to be distributed to shareholders in taxable distributions.

Other Important Considerations

In addition to the points outlined above, a conversion from an OEF into an ETF will raise a variety of additional operational, business, and compliance considerations.

OPERATIONAL HURDLES Before effecting a conversion, an OEF will want to work closely with its transfer agent and intermediaries that hold OEF shares to ensure that accounts holding OEF shares will be able to hold and transact in ETF shares following the conversion.

DISTRIBUTION Because the distribution models for OEFs and ETFs differ significantly, sponsors should engage with distribution partners to ensure a smooth transition for investors.

REGULATION FAIR DISCLOSURE The Precidian application provides that NT Active ETFs be subject to Regulation FD, which may require the implementation of additional procedures to prevent selective disclosure of portfolio holdings information

AVAILABILITY OF AP REPRESENTATIVES As the model for NT Active ETFs is novel, an existing infrastructure may not be available to facilitate trading in the ETF shares. For example, a network of AP representatives may not exist or develop for some time.

PROPOSED ETF RULE UNAVAILABLE NT Active ETFs may not be able to rely on the SEC's proposed ETF rule, which may raise operational and infrastructure issues on an ongoing basis.

CREATION AND REDEMPTION The ETF creation and redemption process differs from the OEF portfolio management process. Portfolio managers will have to understand the differences in processes and be ready to manage the creation and redemption process from the first day in the life of the ETF.

CUSTOM BASKETS Traditional ETFs, including potentially existing active ETFs, would be permitted to engage in custom basket transactions under the SEC's proposed ETF rule, which allows for greater flexibility in selecting securities to use to meet redemption requests. NT Active ETFs operating under the Precidian model may not be granted similar flexibility, which may limit the tax efficiency of NT Active ETFs relative to traditional ETFs.

Ropes & Gray would be pleased to assist you in analyzing whether a conversion would be appropriate for your business and in structuring the conversion to address your particular facts and circumstances. Please contact the authors or your regular Ropes & Gray contact for assistance.

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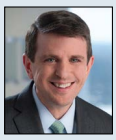

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ENDNOTES

[1] *See, e.g.,* T. Rowe Price Associates, Inc. et al. (File No. 812-14214) (Sept. 23, 2013, as amended on Mar. 14, 2014, Feb. 23, 2018, and June 18, 2018); Fidelity Beach Street Trust et al. (File No. 812-14364) (Sept. 26, 2014, as amended on Jan. 26, 2018, May 18, 2018, and Aug. 8, 2018); Blue Tractor ETF Trust et al. (File No. 812-14625) (Mar. 14, 2016, as amended on Sept. 28, 2016, Feb. 1, 2017, July 31, 2017, Jan. 17, 2018, Apr. 11, 2018, and May 23, 2018); Natixis Advisors, L.P., et al. (File No. 812-14870) (Jan. 22, 2018, as amended on June 15, 2018, and Nov. 9, 2018).

[2] Careful thought should be given to the alignment of the ETF's procedures for calculating its net asset value ("NAV") and the process used to calculate the VIIV, as a significant misalignment could potentially raise questions about the effectiveness of the arbitrage mechanism.

[3] AP representatives must be unaffiliated with the ETF and arrange creation and redemption transactions between the ETF and its APs on an agency basis.

[4] We note that the SEC's proposed ETF rule would permit traditional ETFs to engage in custom basket transactions, which allow for greater flexibility in selecting securities to use to meet redemption requests. Since NT Active ETFs generally will not be able to rely on the proposed ETF rule as proposed, NT Active ETFs may not be granted similar flexibility, which may limit the tax efficiency of such ETFs relative to traditional ETFs. See the Ropes & Gray client alert here for more information about the proposed ETF rule.

[5] The Precidian application expressly contemplates the prospect of fees paid pursuant to Rule 12b-1 under the 1940 Act. Many ETFs have plans adopted pursuant to Rule 12b-1 that provide for no payment. A handful have Rule 12b-1 plans and charge Rule 12b-1 fees, but ETFs typically only use such fees for broad-based marketing rather than to compensate financial intermediaries.

[6] ETF sponsors occasionally make disclosed payments such as platform fees or data.

[7] OEFs have in the past converted into closed-end funds that were traded on an exchange. See the Ropes & Gray alert here. Closed-end funds have also converted into ETFs in the past, and ETFs have been converted into OEFs and into ETF shells. Note that the proposed ETF rule expressly contemplates making shares individually redeemable in connection with transactions such as liquidations and re-organizations, though active non-transparent ETFs may not be able to rely on the rule as proposed given its requirement for daily portfolio transparency. See the Ropes & Gray client alert here for more information about the proposed ETF rule.

[8] Rule 19b-4 under the Exchange Act requires any rule change necessary to list and trade a new derivative securities product to be approved by the SEC in advance of listing such product, unless the SEC has approved a self-regulatory organization's ("SRO") trading rules, procedures and listing standards for the product class, and the SRO has a surveillance program for that product class. ETFs must obtain SEC approval of a Rule 19b-4 application or rely on an exception to Rule 19b-4.

[9] In addition to the Rule 19b-4 application, the sponsor may need to seek separate relief from the SEC from certain trading rules under the Exchange Act that may apply to secondary market transactions in ETF shares, such as Regulation M and Rule 10b-17(c). The SEC staff has issued so-called "class relief" from certain of these trading rules, but it is unclear whether these non-transparent ETFs would be eligible for this class relief. This uncertainty may lead to additional delays (although many of these steps can occur contemporaneously).

[10] In addition, even if shareholder approval is not technically required by operation of law or the OEF's or ETF's organizational documents, the Boards of the OEF and the ETF may be more comfortable proceeding with the conversion if shareholder approval is also obtained.

[11] While ETFs generally do not issue fractional shares, ETFs held by brokers in a dividend reinvestment plan may reflect fractional shares. Further, other platforms that let investors purchase ETF shares ostensibly permit investments in "fractional" shares of ETFs, but such "fractional" shares represent bookkeeping done outside of the ETF's books and records.

[12] An "F" re-organization derives its name from Section 368(a)(1)(F) of the Code, pursuant to which the re-organization is effected.

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