Securities in the Electronic Age
Wall Street LAWYER

June 2021 ▪ Volume 25 ▪ Issue 6

SEMI-TRANSPARENT ETFS: THE NEXT FRONTIER

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In November and December 2014, we wrote a pair of articles for *Wall Street Lawyer* that discussed the U.S. Securities and Exchange Commission's ("SEC's") October 2014 effective denial of two exemptive applications for a blind trust, non-transparent exchange-traded fund ("ETF") structure,[1] followed abruptly by its November 2014 approval of so-called exchange-traded managed funds ("ETMFs"), which offer shares of a registered investment company that trade intraday at a premium or discount to a net asset value ("NAV") that is determined once a day at the close of trading—sort of like a hybrid between mutual funds and ETFs.[2]

Around the same time as the SEC's denial of those applications for a blind trust structure in October 2014, several asset managers were going through the exemptive application process for semi-transparent ETF structures. These structures would have used different combinations of market data and partial disclosure of portfolio holdings in order to ensure that the ETF's NAV was sufficiently close to its exchange-traded price. As a result of the SEC's October 2014 denials, all of those product-development initiatives effectively were put on hold as the market went back to the drawing board to redesign structures that could pass muster with the SEC.

In May 2019, more than four years after the SEC's denials, the first ETF structure that was not fully transparent was approved by the SEC: Precidian ETFs Trust (branded as "ActiveShares"). That fall, four additional semi-transparent structures were approved, with a fifth following not too long thereafter. With the regulatory ice largely thawed, these semi-transparent structures very likely will be the next area of significant growth in the ETF industry. In this article, we provide an overview of these structures and highlight some of the early operational and regulatory issues that the market has navigated while

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learning how to trade and manage these innovative products.

Background

By their very nature, ETFs violate the Investment Company Act of 1940 ("the 1940 Act") in that their redeemable shares are bought and sold at an exchange-traded price that differs from the shares' NAV. One of the cornerstones of the ETF structure has been the price-arbitrage function of broker-dealers—referred to as "authorized participants" or "APs," which transact directly with ETFs in large chunks of shares (known as "creation units") in exchange for an equivalent value of portfolio securities and cash. By intermediating between the ETF and the retail market on the exchange and having the ability to jump in and place creation and redemption orders whenever an ETF's exchange traded price is trading at a premium or discount, respectively, the APs effectively ensure that the exchange-traded price of an ETF's share will typically be substantially similar to its NAV.

In order to preserve the functionality of this price-arbitrage function, in the exemptive orders that it granted to ETFs from 1993 through 2006, the SEC required as a condition of the relief that ETFs disclose their creation basket contents, and in orders granted to actively-managed, leveraged and affiliated index ETFs in 2008 and thereafter, the SEC has required that the ETF disclose its full portfolio holdings. This requirement for portfolio transparency—which is a significant difference from mutual funds that are only required to disclose their portfolio holdings on a quarter basis subject to a 60-day delay—stems from the theory that knowing the exact contents of the portfolio would help with price discovery and valuation. When the SEC finally adopted an ETF exemptive rule—Rule 6c-11 under the 1940 Act—that removed the barrier of obtaining an exemptive order for most ETFs, it too included daily portfolio transparency as a condition of the rule.

But this transparency requirement has had the unintended consequence of dissuading certain actively-managed investment strategies from being offered in an ETF form. The concern articulated by many active managers has been that enterprising data miners could distill key components of proprietary investment strategies through reverse engineering efforts that detect slight changes in an ETF's

Wall Street Lawyer
West LegalEdcenter
610 Opperman Drive
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(ISSN#: 1095-2985)

portfolio from day to day, and then replicate those strategies in their own products or front-run the investments of the ETFs. The numbers support that theory: according to the 2021 Investment Company Institute Factbook ("ICI Factbook"), as of the end of 2020, of the $5.4 trillion of assets invested in U.S. ETFs, actively-managed ETFs represented only $174 billion (or about 3.2%).[3]

However, in the last two years the SEC has approved six exemptive applications that allow for ETFs that do not provide full transparency as to the identity and weighting of each ETF's portfolio holdings. This very well may be the catalyst for actively-managed strategies to start to close the gap against their index-tracking (also called "passively managed") ETF counterparts. In addition, these structures also permit licensing arrangements and a shortened exemptive application process that leverages the base exemptive application and order, both of which could further encourage more asset managers to dive into the ETF space.

Below, we discuss each of these first six structures in more detail. But first, a note on terminology: there is no SEC-dictated proper use of the term "non-transparent" versus "semi-transparent" and both terms seem to be used somewhat interchangeably by financial services companies and the industry journals that cover them. Although the ActiveShares structure could be considered closer to "non-transparent" because there is a second broker-dealer interposed between an AP and the ETF who is sworn to secrecy as to the ETF's portfolio holdings, Precidian actually describes its structure as "semi-transparent." For the sake of simplicity, we will generically refer to all of these structures as "semi-transparent" throughout this article.

Overview of New ETF Structures

Precidian Investments (ActiveShares)

The first exemptive order granted was in May 2019 to Precidian Investments for its ActiveShares structure, an actively-managed ETF that does not disclose its portfolio holdings on a daily basis.[4] ActiveShares ETFs are designed to trade like traditional ETFs, but, rather than providing daily disclosure of the underlying portfolio, they disclose a verified intraday indicative value ("VIIV"). VIIV is an estimate of the intraday NAV of the ETF and is intended to provide investors with enough information for each ETF to have an effective arbitrage mechanism, which keeps the shares at market prices or close to the underlying NAV per share. The ETF does not have to disclose the underlying portfolio with this structure, but it is required to publicly disclose the underlying portfolio holdings on a quarterly basis with a 60-day delay (just like a mutual fund).

Currently, an ActiveShares ETF can invest in other ETFs, exchange-listed common stocks, cash and cash equivalents, and, if exchange-traded, notes, preferred stocks, American depositary receipts ("ADRs"), real estate investment trusts ("REITs"), commodity pools, metals trusts, currency trusts, and futures that trade contemporaneously with the ETF shares.

Creation and redemption transactions must be executed through a confidential brokerage account with an agent for the benefit of an Authorized Participant—referred to as an "AP Representative." Each AP Representative is given the ETF's portfolio holdings and weightings each day to permit it to buy and sell positions in the ETF's creation and redemption baskets for the purpose of doing in-kind creations or redemptions on behalf of an AP, but without disclosing the holdings or weightings of the basket securities to the AP. A broker-dealer cannot be both an AP and an AP Representative with respect to a single ActiveShares ETF, nor can an AP be an affiliated person of its AP Representative. Accordingly, broker-dealers that are in the ETF trading business have had to determine whether they will function as

APs or as AP Representatives with respect to ActiveShares.

From the ETF's perspective, the ActiveShares structure provides maximum efficiency in terms of the beneficial tax treatment of in-kind creations and redemptions and avoided transaction costs (as the ETF manager has few, if any, transactions to effect upon receipt of cash in a creation order). The existence of an additional party in the mix—the AP Representative—presents some additional compliance implications for ETFs, most importantly around the protection of the confidentiality of portfolio holdings.

From the perspective of the AP, ActiveShares are less efficient, because the AP has to deliver cash into its account on the books of the AP Representative that the AP Representative then converts into a basket of portfolio securities for a creation order through market transactions. APs also must open a brokerage account with the AP Representative and negotiate an agreement that sets forth how they will communicate, transact and allocate liability. In general, AP Representatives tend to view their roles as limited-scope order takers that stand between the two transacting parties and, accordingly, try to limit contractual liability to either side. Once these arrangements are implemented, between an AP and an AP Representative there are substantial economies of scale. Already a course of dealing among APs, AP Representatives and ETF distributors seems to have developed as uncertainty around some of the operational nuances of the new products has worn off and trading desks have become more familiar with the new structure. APs are also able to set up standing instructions with AP Representatives to handle cash-in-lieu and account liquidation, allowing operations to proceed semi-autonomously. Still, APs have had to carefully consider certain nuances with this new structure—such as how to handle restricted positions that may be unknowingly held in their blind account on the books of the AP Representative—that actually led to some delays in the launch of early ActiveShares products.

To date, Precidian's ActiveShares ETF structure has been licensed to American Century Funds,[5] Gabelli ETFs Trust,[6] The Alger ETF Trust,[7] JP Morgan Exchange-Traded Fund Trust,[8] BlackRock ETF Trust III,[9] Legg Mason/Franklin Templeton,[10] AdvisorShares Trust,[11] and the Advisors Inner Circle Fund.[12] Several other licensees are reportedly considering the product and may be in the application stage for exemptive relief, but have not yet had their applications noticed.[13]

ETFs with Proxy or Model Portfolios or Baskets

In December 2019 the SEC permitted four more structures to come to market, all of which were semi-transparent: T. Rowe Price, NYSE/Natixis, Blue Tractor, and Fidelity. Currently, each of these structures is limited with respect to the types of instruments in which they can trade, consistent with ActiveShares: other ETFs, exchange-listed common stocks, cash and cash equivalents, and, if exchange-traded, notes, preferred stocks, ADRs, REITs, commodity pools, metals trusts, currency trusts, and futures that trade contemporaneously with the ETF shares. However, we expect that this universe will gradually expand to cover more asset classes, such as fixed income, likely on a glidepath similar to that which the traditional ETF space followed as it evolved over time.

From the ETF's perspective, these structures are slightly less efficient than ActiveShares in that ETF portfolio managers have to trim the securities and cash that are delivered into the ETF following the proxy portfolio instructions with a creation order so that it conforms to the ETF's actual portfolio. This results in some transaction costs and somewhat less tax efficiency, but it still affords the opportunity for

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more efficiency than operating on a fully cash basis like a mutual fund. In the early stages of some of these products, the ETFs have set slightly early order cut-off times (*e.g.*, 3:00 p.m. Eastern) to afford portfolio managers the opportunity to affect their basket trimming transactions to conform to the ETF's portfolio prior to the close of the market.

From the AP's perspective, these semi-transparent models represent relatively little deviation from traditional ETFs in that the AP is tasked with assembling a basket of portfolio securities to deliver in-kind for creation orders, as instructed by the ETF each morning. The absence of full portfolio transparency has resulted in some adjustments to how APs measure and hedge their exposure when they hold ETF shares, but those procedural adjustments have been fairly modest. In particular, for APs that facilitate creation and redemption orders for their customers that function as ETF market makers, the AP may only have exposure to the creation basket or the ETF for a relatively brief moment of time, so data gaps between full portfolio transparency and model or proxy portfolio structures may be less impactful.

T. Rowe Price

T. Rowe Price's ETF[14] trades like any other ETF but provides a "Proxy Portfolio" and other information rather than daily disclosure of underlying portfolio assets. This is to provide AP arbitrageurs sufficient information to ensure that the ETF shares will trade at market prices or close to the underlying NAV per share. The Proxy Portfolio performance is designed to have a high correlation to the performance of the ETF's actual portfolio. The arbitrageurs are provided with a key data set that includes the actual portfolio overlap between the Proxy Portfolio and the ETF portfolio each day, the deviation between the Proxy Portfolio's NAV and the ETF's NAV each day, and a series of deviation information over the past year. The ETF also provides an intraday indicative value ("IIV") every 15 seconds throughout the trading day. The high-quality information will help market participants understand the relationship between the performance of the ETF's actual portfolio and the Proxy Portfolio and provide high-quality pricing and hedging signals.

NYSE/Natixis

Also in December 2019, the SEC issued an order to Natixis for a licensed structure, the NYSE Proxy Portfolio Methodology. This structure also provides a Proxy Portfolio and will closely track the daily performance of the ETF's actual portfolio during all market conditions.[15] The disclosure of components and weightings of the Proxy Portfolio will give market participants enough information to calculate intraday values that will approximate the values of the actual portfolio and provide an effective arbitrage mechanism to keep ETF shares trading at or close to market price and underlying NAV per share. The Proxy Portfolio recreates the ETF's actual portfolio performance by performing a factor-model analysis, composed of three sets of factors: market-based factors, fundamental factors, and industry/sector factors. Each ETF has a universe of securities that the ETF can purchase, and applying the factor model to the applicable universe of securities generates the ETF's Proxy Portfolio.

To date, the NYSE Proxy Portfolio Methodology has been licensed to Natixis, American Century ETF Trust,[16] Spinnaker ETF Series,[17] and Nuveen Fund Advisors LLC.[18]

Blue Tractor (Shielded Alpha)

The SEC also permitted Blue Tractor ETF Trust to use a semi-transparent actively managed ETF structure called Shielded Alpha in December 2019.[19] This structure does not disclose the exact quantities of the portfolio instruments held by the fund, but the ETF's adviser will apply a proprietary algorithmic process to the actual ETF portfolio components to generate the "Dynamic SSR Portfolio." This Dynamic SSR Portfolio will contain all of the names of the securities in the actual portfolio (and only the securities and cash that are in the actual portfolio) and have a minimum weightings overlap of 90% with the Fund portfolio assets at the beginning of each trading day. Every day, the ETF will also disclose the maximum deviations of specific securities in the Dynamic SSR Portfolio from those specific securities in the actual ETF portfolio. The Dynamic SSR Portfolio is intended to provide an alternative to full portfolio transparency that will allow market makers to understand the value and risk of the ETF's actual portfolio so they can make efficient markets in the shares of the ETF.

To date, the Shielded Alpha structure has been licensed to Spinnaker ETF Series,[20] Alps ETF Trust,[21] and the RBB Fund, Inc.[22]

Fidelity

On December 10, 2019 Fidelity received an exemptive order to permit a structure known as the Fidelity Tracking Basket structure.[23] The Tracking Basket is a basket of securities and cash designed to closely track the daily performance of the ETF, constructed using a mathematical optimization process designed to minimize deviations in the daily returns of the Tracking Basket that will be composed of: select recently disclosed portfolio holdings; ETFs that convey information about the types of instruments in which the ETF invests; and cash and cash equivalents. Interestingly, Fidelity does not share the optimization process, but rather requires each licensee fund to provide Fidelity with the fund's full portfolio so Fidelity can calculate the Tracking Basket. Each day, the ETF will publish on its website the percentage weight overlap between the holdings of the prior day's Tracking Basket compared to the holdings of the ETF that formed the basis for the ETF's calculation of NAV at the end of the prior business day. This information is intended to provide APs with enough information to estimate the value of an ETF's shares and hedge positions, which provides an effective arbitrage mechanism to keep ETF shares trading at or close to market prices or underlying NAV per share.

The Fidelity Tracking Basket structure has been licensed to Invesco, Goldman Sachs, Capital Group, Hartford Funds, and Putnam ETF Trust.[24] Only Invesco has launched ETFs using Fidelity's structure thus far.[25]

Invesco

Not wanting to miss out on the party, in September 2019, Invesco Capital Management commenced the exemptive application process with respect to its "Substitute Basket" model. On December 2, 2020, following five amendments to its initial exemptive application, Invesco created the sixth structure (and the fifth semi-transparent structure) to be approved by the SEC. Invesco's order is substantially similar to the five previous proxy portfolio orders granted by the SEC in that the structure follows a proxy portfolio model, and publishes key data metrics each day by using a Substitute Basket to offer a clear view into each ETF's portfolio value.[26] The Substitute Basket is designed to closely track the daily performance of the ETF's portfolio, despite the securities and cash being different from the ETF's portfolio. The ETF will also disclose the percentage weight overlap between the holdings of the prior business day's Substitute Basket compared to the actual holdings of the ETF. This assists market participants in evaluating the risk of Substitute Basket deviation and could be used as a pricing and hedging tool. To further reduce market participants' risk and to provide intra-day price certainty, each ETF may strike and publish its NAV more than once during each business day as determined by the adviser. Market

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Participants may then choose to purchase or redeem shares at either of the published NAVs. In addition, an ETF will make its full portfolio holdings available on the ETF's website at minimum on a quarterly basis with a 30-day lag.

Custom Baskets

Currently, traditional ETFs that follow the ETF Rule are granted uniform flexibility with respect to the use of custom baskets. Over the 25-plus years during which the SEC had granted exemptive orders to ETFs, there had been several different flavors of relief with respect to the issue of so-called custom baskets (*i.e.*, the ability of an ETF to accept a creation or redemption order that varies from the daily published basket). Leveling the playing field with respect to custom baskets was one of the key drivers of the ETF Rule, particularly given the usefulness of custom baskets in connection with portfolio rebalances of passively managed ETFs to track a rebalancing index. However, because semi-transparent ETFs are not covered by the ETF Rule, another potential gap in regulatory permissions was starting to develop. However, that gap is starting to close with new exemptive orders for semi-transparent ETFs.

Some entities with semi-transparent ETF exemptions have applied for further relief that will permit custom creation baskets, thereby allowing funds to use creation baskets that contain instruments that are not included, or are included with different weightings, in the ETF's published basket. So far, Invesco and Blue Tractor ETF Trust have been granted permission to use custom baskets, Precidian filed for exemptive relief in November 2020, and T. Rowe Price applied for exemptive relief in late April 2021.

Invesco's custom basket order allows an ETF to accept creation baskets that differ from the Substitute Basket.[27] The names and quantities of the instruments that may constitute a creation basket will generally be the same as the Fund's Substitute Basket. The ETF will also publish on its website the composition of any creation basket exchanged with an AP on the previous day if it differed from the same business day's Substitute Basket, other than with respect to cash.

Blue Tractor's request was nearly identical to Invesco's, in that it requested to amend its prior exemptive order to allow ETFs to use creation baskets that include instruments that are not included, or are included in different weightings, to the ETF's Dynamic SSR Portfolio.[28] Blue Tractor also stated that it will publish on its website the composition of any creation basket exchanged with an AP on the previous business day that differed from that day's Dynamic SSR Portfolio other than with respect to cash.

Precidian requested relief that would allow their ETFs to have additional basket flexibility, also by including instruments that are not included or are included in different weights (*i.e.*, non-pro rata).[29] On days when a fund wants to request a custom basket, the ActiveShares fund would widely and simultaneously inform market participants and APs that they were requesting a custom basket, as well as provide either the VIIV or composition of that custom basket. APs would only be required to use a custom basket if the only difference from a pro rata basket is cash in lieu of one or more securities. If the identities or weightings of the securities in the custom basket differ from the pro rata basket, APs would be able to choose which creation basket they want to transact with. The SEC has not yet ruled on this application.

The T. Rowe Price application was submitted April 22, 2021 and is still pending.[30] The request is substantially identical to those of Invesco and Blue Tractor.

Looking Ahead

With a number of models now approved and available for licensing, and with the potential for more models to be approved, it is virtually certain that the semi-transparent ETF market will continue to grow, particularly given the room for growth in actively-managed strategies in the ETF space. As additional flexibility is accorded to such ETFs through the permission of custom baskets, and as the types of underlying asset classes expands through future exemptive applications, the space will grow further still.[31] Several large fund families have already launched such ETFs and already there are more than 25 ETFs trading in the market, representing approximately $1.5 billion in assets.[32] Early indications are that such semi-transparent structures have traded efficiently and kept spreads between the price to buy and sell shares relatively close, hopefully assuaging any residual fears among regulators that the lack of complete transparency represents the potential for price deviation between retail investors on the exchange and institutional investors that transact directly with the ETFs.[33] In addition, the Investment Company Institute data, for year-to-date through April 14, showed that equity mutual funds incurred $117 billion of net outflows, while equity ETF new share issuance was $229 billion and the specter of potential changes in tax policy in the new administration, specifically the possibility of a capital gains tax rate increase, may cause more investors to continue to consider ETF structures.[34]

APs should consider making slight adjustments to their current practices in contemplation of semi-transparent ETF structures. For ActiveShares, APs may want to consider establishing key terms for their brokerage agreements with AP Representatives, including standing instructions, and may want to consider having a list of preferred vendors to serve as AP Representatives in order to narrow their scope of dealings. They should also consider whether their procedures for overseeing vendors need to be adjusted in any manner, and should consider whether to paper their compliance files with any reasoned positions on any regulatory nuances associated with the ActiveShares structure. Similarly, for the various proxy-model structures, APs should consider setting up new data feeds that use information made available by the various ETF managers in order to better assess their risk for hedging purposes. Because it is not always obvious that a new ETF is semi-transparent, APs may want to implement a process for internally reviewing new products and marking them on their internal systems as semi-transparent to the extent that different data feeds are applied to such products. Otherwise, existing regulatory compliance practices that have evolved among APs should largely continue as is.

Undoubtedly, there will be at least one day of aberrational market activity at some point in the future that will disproportionately affect at least one semi-transparent ETF—like the “Flash Crash” of May 6, 2010 or the extreme price volatility of August 24, 2015. And just as undoubtedly there will be a disproportionate amount of ink spilled on—and perhaps regulatory attention paid to—the impact on that ETF. But the reality is that ETFs trade with remarkable efficiency and offer investors relatively low-priced solutions for implementing asset-allocation strategies, hedging risk or otherwise taking an opportunistic or strategic position. Semi-transparent ETF structures are not fundamentally divergent from traditional ETFs and should not represent any new material risk to the market. Just as with traditional ETFs, there will be slight speedbumps along the learning curve as more asset managers launch products, and more APs and AP Representatives executive agreements and set up their trading desks to accommodate such products, but many—if not most—of those speedbumps are already in the rearview mirror. With the infrastructure and contracts largely implemented, the potential ex-

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ists for these products to markedly accelerate their market adoption and growth, potentially doubling the current size of the U.S. ETF market—and APs will be there to help facilitate that growth, just as they have been for the past 20-plus years.

ENDNOTES:

[1] *See* Precidian ETFs Trust, et al., Notice of Application, Investment Company Act Rel. No. 31,300 (Oct. 21, 2014) and Spruce ETF Trust, et al., Notice of Application, Investment Company Act Rel. No. 31,301 (Oct. 21, 2014). The SEC indicated that it intended to deny the requests for exemptive relief as "not necessary or appropriate in the public interest and as not consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the [1940 Act]." This caused both firms to withdraw their applications for exemptive relief, which the SEC permitted on November 14, 2014. *See* Precidian ETFs Trust, et al., Order Permitting Withdrawal of Application, Investment Company Act Rel. No. 31,336 (Nov. 14, 2014) and Spruce ETF Trust, et al., Order Permitting Withdrawal of Application, Investment Company Act Rel. No. 31,337 (Nov. 14, 2014).

[2] *See* Eaton Vance Management, Eaton Vance ETMF Trust and Eaton Vance ETMF Trust II, Notice of Application, Investment Company Act Rel. No. 31,333 (Nov. 6, 2014). Currently, only a handful of ETMFs are actively trading in the market: the Eaton Vance Global Income Builder NextShares and the Eaton Vance Stock NextShares, each of which is a series of Eaton Vance NextShares Trust; and the Eaton Vance TABS 5-to-15 Year Laddered Municipal Bond NextShares, which is a series of Eaton Vance NextShares Trust II.

[3] *See* Figure 4.2 of 2021 ICI Factbook and surrounding text. More recent data suggests that the active-managed ETF market is now slightly above $200 billion.

[4] *Precidian ETFs Tr., et al.*, Inv. Co. Act Rel. Nos. 33,440 (Apr. 8, 2019) (notice) and 33,477 (May 20, 2019) (order).

[5] *Am. Century ETF Tr., et al.*, Inv. Co. Act Rel. Nos. 33,590 (Aug. 14, 2019) and 33,620 (Sept. 10, 2019) (order).

[6] *Gabelli ETFs Tr., et al.*, Inv. Co. Act Rel. Nos. 33,681 (Nov. 5, 2019) and 33,708 (Dec. 3, 2019) (order).

[7] *The Alger ETF Tr., et al.*, Inv. Co. Act Rel. Nos. 33,852 (Apr. 23, 2020) (notice) and 33,869 (May 19, 2020) (order).

[8] *J.P. Morgan Exchange-Traded Fund Tr., et al.*, Inv. Co. Act Rel. Nos. 33,923 (Jul. 10, 2020) (notice) and 33,965 (Aug. 5, 2020) (order).

[9] *Blackrock ETF Tr. III, et al.*, Inv. Co. Act Rel. Nos. 34,000 (Aug. 31, 2020) (notice) and 34,030 (Sept. 28, 2020) (order).

[10] *ActiveShares ETF Tr., et al.*, Inv. Co. Act Rel. Nos. 34172 (Jan. 12, 2021) (notice) and 34191 (Feb. 9, 2021) (order).

[11] *AdvisorShares Tr., et al.*, File No. 812-15146.

[12] *The Advisors' Inner Circle Fund, Cambiar Inv'rs, LLC and Sei Invs. Distribution Co.*, Inv. Co. Act Rel. Nos. 34,244 (Apr. 13, 2021) (notice) and 34,268 (May 11, 2021) (order).

[13] Danielle Walker, *Legg Mason to pay $25 million to take majority stake in Precidian Investments*, Pensions & Investments (Jan. 31, 2020) (https://www.pionline.com/money-management/legg-mason-pay-25-million-take-majority-stake-precidian-investments). The applicants that had not yet received formal notice from the SEC as of the time of publication are Goldman Sachs ETF Trust, Nationwide Fund Advisors, Keeley Teton ETF Trust, Columbia ETF Trust I, IndexIQ Active ETF Trust, and Collaborative Investment Series Trust.

[14] *T. Rowe Price Assocs., Inc. and T. Rowe Price Equity Series, Inc.*, Inv. Co. Act Release No. 33,685 (Nov. 14, 2019) (notice) and 33,713 (Dec. 10, 2019) (order). T. Rowe Price obtained its order after more than six years and eight amendments to its initial application.

[15] *Natixis ETF Tr. II, et al.*, Inv. Co. Act Rel. Nos. 33,684 (Nov. 14, 2019) (notice) and 33,711 (Dec. 10, 2019) (order). Natixis obtained its order in just under two years since filing its initial exemptive application, following seven amendments.

[16] *Am. Century ETF Tr., et al.*, Inv. Co. Act Rel. Nos. 33,841 (Apr. 16, 2020) (notice) and 33,862 (May 12, 2020) (order).

[17] *Spinnaker ETF Series, et al.*, Inv. Co. Act Rel. Nos. 33,998 (Aug. 28, 2020) (notice) and 34,018 (Sept. 23, 2020) (order).

[18]*Nuveen Fund Advisors, LLC, et al.*, Inv. Co. Act Rel. Nos. 34,243 (Apr. 8, 2021) (notice) and 34,265 (May 4, 2021) (order).

[19]*Blue Tractor ETF Tr. and Blue Tractor Group, LLC*, Inv. Co. Act Rel. Nos. 33,682 (Nov. 14, 2019) (notice) and 33,710 (Dec. 10, 2019) (order). Blue Tractor amended its initial exemptive application 11 times and obtained its exemptive order in under four years.

[20]*Spinnaker ETF Series, et al.*, Inv. Co. Act Rel. Nos. 33,929 (Jul. 17, 2020) (notice) and 33,969 (Aug. 12, 2020) (order).

[21]*Alps ETF Tr., et al.*, Inv. Co. Act Rel. Nos. 34,149 (Dec. 22, 2020) (notice) and 34,181 (Jan. 21, 2021) (order).

[22]*The RBB Fund, Inc., et al.*, Inv. Co. Act Rel. Nos. 34,189 (Feb. 5, 2021) (notice) and 34,215 (Feb. 26, 2021) (order).

[23]*Fidelity Beach St. Tr., et al.*, Inv. Co. Act Rel. Nos. 33,683 (Nov. 14, 2019) (notice) and 33,712 (Dec. 10, 2019) (order). Fidelity amended its initial exemptive application nine times (likely in response to several rounds of Staff comments) and obtained its exemptive order in just over five years.

[24]Rheaa Rao, *Hartford Funds Licenses Fidelity's ETF Structure*, Ignites (May 26, 2021) (https://www.ignites.com/c/3189044/402994/hartford_funds_licenses_fidelity_structure). *See also Putnam ETF Tr., et al.*, Inv. Co. Act Rel. Nos. 34,245 (Apr. 15, 2021) (notice) and 34,266 (May 10, 2021) (order).

[25]*Putnam ETF Tr.*

[26]*Invesco Capital Mgmt. LLC, et al.*, Inv. Co. Act Rel. No. 34,087 (notice).

[27]*Invesco Capital Mgmt. LLC, et al.*, Inv. Co. Act Rel. Nos. 34,170 (Jan. 12, 2021) (notice) and 34,193 (Feb. 9, 2021) (order).

[28]*Blue Tractor ETF Tr. and Blue Tractor Group, LLC*, Inv. Co. Act Rel. Nos. 34,194 (Feb. 10, 2021) (notice) and 34,221 (Mar. 9, 2021) (order).

[29]*Precidian ETFs Tr.*, Application for an Order to Amend a Prior Order (Nov. 24, 2020).

[30]*T. Rowe Price Assocs., Inc., et al.*, Inv. Co. Act Rel. No. 34,248 (Apr. 22, 2021) (notice).

[31]Conceivably, there could also be amendments to Rule 6c-11 under the 1940 Act one day, which would remove the need for semi-transparent ETF structures to obtain an exemptive application at all. The SEC has already amended the Rule to bring leveraged and inverse ETFs into the Rule, despite initially carving them out.

[32]*See* Greg Saitz, *Boards Tapped to Respond if Nontransparent ETFs Stumble*, BoardIQ (May 18, 2021) (citing FactSet data as of April 22, 2021).

[33]*See* Carmen Germaine, *Non-transparent ETFs pass their first test-spreads are tight*, Financial Times (Sep. 11, 2020).

[34]Todd Rosenbluth, *Possible Changes in Tax Policy Could Further Drive ETF Use: CRFA*, ETF Trends (Apr. 26, 2021).

INSTITUTIONAL INVESTORS AS VANGUARDS OF CHANGE?

Morrow Sodali recently published its sixth annual Institutional Investor Survey, which canvassed the opinions of 42 global institutional investors, managing about $29 trillion in assets under management. (You can read it here: https://morrowsodali.com/insights/institutional-investor-survey-2021.)

Among the findings: Environmental, Social and Governance (ESG) issues "have been propelled to the forefront of investors' minds as they assess the management of risks and opportunities, operational resilience, and shareholder value creation through a period of unprecedented market uncertainty and turbulence." A vast majority of respondents said they were giving more focus to ESG topics when engaging and making investment decisions (98% and 96% respectively).

In late May, ***Wall Street Lawyer*** *spoke to Morrow Sodali's Chairman Emeritus John Wilcox, who is also a member of WSL's editorial board, for his thoughts on some of the survey's findings.*

Wall Street Lawyer*: It's striking how dominant ESG issues are in this year's survey. As you note, this is something that's only come to the forefront in the last two or so years.*

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