Speech

# A Quarter Century of Exchange-Traded Fun!

Commissioner Hester M. Peirce

**New York, NY**

**May 21, 2019**

## *Remarks at the ETFs Global Markets Roundtable*

Since the first exchange-traded fund ("ETF") launched in 1993, ETFs have proven to be one of the most useful and successful innovations in the registered fund space under the Investment Company Act ("Act") of 1940. The innovation did not stop with that first ETF. Besides being one of the fund industry's most successful financial innovations, ETFs have been, and have the potential to continue being, the wrapper within which future financial innovations occur. Today, I want to share my thoughts on how ETFs can be used to facilitate further financial experimentation and innovations and how the SEC can fulfill its role of protecting investors, facilitating capital formation, and fostering fair, orderly, and efficient markets without unnecessarily slowing this innovation. Before I begin, I must give the standard disclaimer: The views I represent are my own and do not necessarily represent those of the Commission or my fellow Commissioners.

People who call me "CryptoMom" often ask me how long it will be before a bitcoin-based exchange-traded product ("ETP") is approved by the SEC. My typical answer is: I do not know, particularly because the initial decisions are made at the staff level, but it may be a long time. To provide some context, it is helpful to think about how the SEC has dealt with ETFs—one category of ETP—in their twenty-five year history. As I mentioned, ETFs have been around since 1993 after getting the green light from the Commission in 1992.[1] 1993 was a momentous one for me because it was in that year that my oldest niece was born. Just the other day, I found a picture of her at less than one year old sitting on the living room floor with a happy, toothless smile. She now has teeth, her master's degree, and a successful career. In short, regardless of her aunt's nostalgia for that pudgy, smiley baby, she is all grown up.

ETFs as an asset class also have grown up since the first one was launched in 1993, but the SEC is still smothering them with personalized attention as if they were infants. ETFs registered with the Commission now have approximately $3.8 trillion in total net assets.[2] All of this stunning growth has occurred through our exemptive application process. Would-be ETF sponsors have applied for exemptive orders, which have afforded them the necessary flexibility under our securities laws. The Commission has granted more than 300 such orders, each a separately negotiated permission slip for operation.

Last year, we proposed a rule to codify the exemptive relief we had been doling out for the past quarter century.[3] A rule would not only standardize the conditions on the relief, but would make it easier for fund sponsors to get their ETFs to market. A level playing field without long approval queues makes for better competition, which is good for investors, capital formation, and the health of our markets. We are grateful for the helpful comments, and I hope that we will be able to finalize a rule this year. It is remarkable to think an innovation that was launched in 1993 is just now getting its own rule. To be fair, we did propose a rule ten years ago, but it was one of the casualties of the financial crisis.[4] Since the 2008 proposal, ETF assets have

continued to grow and have done so at a rate that outpaced the total growth in mutual fund assets. From 2008 through 2017, ETF assets grew from approximately $530 billion to $3.4 trillion.[5] Over the same period of time, mutual fund assets increased from approximately $9.6 trillion to $18.7 trillion.[6]

Perhaps the length of time it has taken to wend our way toward an ETF rule is not particularly noteworthy, but it is cautionary. We like to see a little grey around the product's temples before we grant it formal recognition. When we are confronted with a new product, it takes us some time to get comfortable with it. We explore its many aspects, worry about its potential to harm investors and the markets, and analyze how best to condition the relief. Twenty-five years to work through our issues with plain vanilla ETFs does not bode well for ETFs and other ETPs that we believe to be something other than plain vanilla, including those with a cryptocurrency angle.

The popularity of ETFs is not hard to understand. ETFs provide investors with a vast and diverse range of investment options, which are easy to enter and exit with low transaction costs. Among the benefits that ETFs offer are operating expenses that are lower than comparable mutual funds' expenses, tax efficiencies, and intra-day trading on the secondary market. It is not surprising then that many investors view ETFs as an expedient and cost effective option for their portfolios.

ETF assets are concentrated in index-based funds.[7] Part of the reason for the concentration in index-based funds is that the Commission has been slow in providing the relief necessary for non-indexed based ETFs to operate. Despite the Commission's lack of speed in issuing actively managed ETF exemptive orders, it is interesting to contrast the outflows that actively managed mutual funds have experienced in recent years with the inflows that actively managed ETFs have enjoyed since 2008.[8] From January 2008 through March 2019, actively managed ETFs registered with the Commission had inflows of approximately $79 billion.[9]

The Commission has proceeded cautiously with approving new types of ETFs. For example, the Commission only just yesterday authorized its first non-fully transparent actively managed ETF.[10] In addition, while the Commission years ago issued a few orders allowing leveraged and inverse ETFs to operate, it has not issued any additional orders since then.[11] Our failure or prolonged delay in approving orders sometimes carries with it a tinge of merit regulation. Are we substituting our own judgment for that of the market? It seems that in at least some cases the Commission is overly concerned about the potential worthiness of the investment, which contributes, at the very least, to significant delays in the issuance of exemptive orders. It is extremely difficult for a fund sponsor to plan the launch of a new product with the great unknown of Commission timing lurking in the background. What investors want today might not be what investors want ten years from now.

The SEC granted the first actively managed ETF orders in 2008—fifteen years after the introduction of index-based ETFs.[12] Since then, we have issued approximately 100 exemptive orders for fully transparent actively managed ETFs.[13] Until yesterday, non-fully transparent ETFs remained nothing more than a glimmer of hope in several sponsors' eyes.[14] Fully transparent, actively managed ETFs obviously reveal what they invest in and to what degree. Despite having to give away their secret sauce, these funds have flourished. As I mentioned, the outflows that have characterized actively managed mutual funds since 2008 have not manifested themselves for fully transparent actively managed ETFs, which have grown to, by one measure, approximately $85 billion in assets.[15] Especially now that the Commission has given the green light to the first non-fully transparent actively managed ETF, actively managed ETFs likely will continue to grow, perhaps even at a faster pace. I am, of course, not weighing in on the merits of these ETFs, but the potential to guard the recipe for the secret sauce a bit more closely may be attractive to ETF sponsors, who may in turn create products that investors want.

It has taken us a while to get to this point. The first applicant for exemptive relief to allow anon-fully transparent actively managed ETF publicly filed its application in September 2011.[16] Eight years sounds like a long time, but it is deceptively short when you consider that discussions regarding an exemptive application can begin years before the filing of the initial public notice of the application. Admittedly, the issues presented by a non-fully transparent ETF are more difficult than those in previous ETF applications, but the delay nevertheless seems unreasonable.

I understand the concerns about ensuring that the arbitrage mechanism would work to keep the NAV and market price of these ETFs close. An effective arbitrage mechanism has been a key consideration in the Commission's exemptive orders for ETFs. As Henry Hu and John Morley argue in their thoughtful article on

ETFs, "[t]he most distinctive feature of the ETF is its arbitrage mechanism."[17] If the arbitrage mechanism works properly, the creation and redemption process, along with secondary market trading in ETF shares, keeps the market price of ETF shares at or close to the net asset value per share of the ETF.[18]

In the case of the recently issued non-fully transparent actively managed ETF order, the ETF sponsor, market makers, authorized participants, and several economists thought that the arbitrage mechanism would work and were willing to offer and make markets in these ETFs.[19] Yet it still took a considerable amount of time for the Commission to get comfortable. Ironically, at one point late in the process, questions even were raised within the Commission as to whether these ETFs would be *too* transparent under the conditions then being considered for relief, thus allowing others not invested in these ETFs to reverse engineer their secret sauce.

I hope that the Commission moves expeditiously on the remaining outstanding requests for exemptive relief for non-fully transparent actively managed ETFs. It might be considered odd coming from a government regulator, but I believe in the premise that *markets* are good at merit regulation. Investors deciding where to invest their hard-earned money can be tough critics and can kill a product that took regulators years to approve in a matter of months or even less.

Another example of Commission indecision in the ETF space is the Commission's treatment of leveraged and inverse ETFs, which are also called geared ETFs. Leveraged ETFs seek to provide returns that exceed the performance of a market index by a specified multiple over a period of time. Inverse ETFs seek to provide returns that have an inverse relationship to, or provide returns that are an inverse multiple of, the performance of a market index over a fixed period of time. The Commission issued an order to ProShares in 2006 allowing it to operate the first leveraged and inverse ETFs.[20] After the ProShares order, the Commission issued similar orders to Rydex in 2007 and Rafferty Asset Management in 2008 (the funds offered pursuant to this order are known as the Direxion ETFs).[21] After that bold set of moves, the Commission got cold feet; since then, it has not issued orders to any other sponsors allowing for the operation of leveraged and inverse ETFs.[22]

The Commission staff offered a reason for timidity in 2010, when it announced a review to evaluate the use of derivatives by registered investment companies, including ETFs.[23] Pending completion of this review, the staff would defer consideration of exemptive requests under the Investment Company Act relating to ETFs that would make significant investments in derivatives, including certain actively-managed and leveraged ETFs.[24] The moratorium still continues for new exemptive relief for leveraged and inverse ETFs.[25]

The fact that the moratorium is not dead likely reflects deeper concerns about these products. There are reasonable ways to address these concerns, but refusing to allow new geared ETFs to come to market is not one of them. One concern relates to the use of derivatives. Leveraged and inverse ETFs that operate under exemptive orders from the Commission did not seek or receive relief from the Investment Company Act's limits on borrowing (use of derivatives).[26] The relief was simply the same relief all other ETFs have obtained. This standard relief allows an ETF to operate even though only authorized participants may purchase and redeem shares from the fund and all other investors must purchase and redeem their shares either through the authorized participant or, as is the case for retail investors, purchase and sell their shares on the secondary market.

These funds did not require an exemption in relation to the amount of leverage they sought to use, which is not surprising given the reality that there were and still are mutual funds that pursue similar leverage strategies.[27] These mutual funds did not seek an exemptive order from the Commission to pursue their leverage strategies because such use does not contravene the borrowing limits set forth in section 18 of the Act, at least as understood by the fund industry (and the Commission and Commission staff) prior to the Commission's 2015 proposal of rule 18f-4 under the Act.[28] Therefore, the use of derivatives by leveraged ETFs within the limits of section 18 of the Act does not warrant a moratorium. As we consider whether to take action with respect more generally to funds' use of derivatives, we can address any concerns about geared ETFs' use of derivatives.

The moratorium seems also to reflect the Commission staff's understandable concerns, particularly following the 2007-2009 financial crisis, about retail investors investing in leveraged and inverse ETFs. Prior to the 2010 moratorium, Commission staff, in conjunction with FINRA, issued an investor alert regarding leveraged and inverse ETFs because they believed "individual investors may be confused about the performance objectives

of leveraged and inverse exchange-traded funds (ETFs)."[29] Commission staff's main concern was that retail investors did not understand that most of these products "reset" daily and are designed to achieve their stated objectives on a daily basis. "Their performance over longer periods of time . . . can differ significantly from the performance (or inverse of the performance) of their underlying index or benchmark during the same period of time."[30]

While I appreciate the concern for retail investors, our fund regulatory regime is based on disclosure of material information so that investors can make an informed decision. The disclosures being made by leveraged or inverse funds to inform investors about the issue have been pretty unvarnished. In fact, as noted in the release for proposed rule 18f-4, following the financial crisis one lawsuit was brought against one of the sponsors of leveraged ETFs, alleging that the funds' registration statements contained material misstatements or omissions.[31] The Court of Appeals for the Second Circuit, in affirming the district court's dismissal of the plaintiffs' claims, explained that:

The earliest relevant prospectuses make absolutely clear that the ETFs operated pursuant to daily investment objectives, that they utilized leveraged investment techniques to achieve those objectives, and that mathematical compounding combined with leveraging prevented the ETFs from achieving their stated objectives over a period of time greater than one day. [The] prospectuses make clear that ETFs used aggressive financial instruments and investment techniques that exposed the ETFs to potentially "dramatic" losses "in the value of its portfolio holdings and imperfect correlation to the index underlying."[32]

As I read them, leveraged and inverse ETF prospectus disclosures clearly lay out their investment objective, strategy, risks, and target audience—which they underscore is not your typical buy and hold retail investor.[33]

Denying new fund sponsors the ability to offer leveraged and inverse ETFs has created an oligopoly for the ETF sponsors that obtained a leveraged or inverse ETF order before the moratorium took effect. New sponsors cannot enter the market and thus investors seeking to invest in leveraged and inverse fund products must choose among the suite offered by the two remaining ETF sponsors[34] or from among the mutual funds that offer similar investment strategies. Given the advantages of easy entry and exit that the ETF structure offers, the leveraged and inverse space is one in which investors might particularly welcome additional ETF options.

Our unwillingness to allow more competitors to offer geared ETFs seems to be another example of our denying or curtailing access to an investment product that would be useful to some investors. The combined effect of the investor alert and moratorium has caused many investment professionals to refuse to offer leveraged and inverse ETF investments to retail investors. The same "protect them from their wild selves" logic courses through our accredited investor definition,[35] which keeps most investors out of the private markets through which they could diversify their portfolios and gain exposure to companies during their early growth phases. Our urge to protect investors is laudable, but protecting them by limiting their options for portfolio diversification and risk mitigation is not the approach Congress directed us to take.

Last year's ETF proposal omitted geared funds, although it did ask questions about whether they should be included in the final rule.[36] The proposal also failed to address an important aspect of the ETF approval process. After going through the Division of Investment Management, a sponsor, working with the listing exchange, has to get the product listed. Because ETFs trade on exchanges, part of the ETF process involves the relevant exchange getting its listing standards approved by the Commission under Exchange Act Rule 19b-4. The exchange works with the Division of Trading and Markets during this process, and the fund sponsor is one step removed, which can be frustrating; sponsors have to work through the listing exchange, rather than directly with our Trading and Markets staff. The proposal would have been more meaningful if it had taken a cross-divisional approach. Even with these limitations, I commend Dalia Blass for her hard work on the ETF proposal and other projects. With unflagging energy and great care, she has tackled issues that have long needed attention.

One issue that I would like to see the Division of Investment Management add to its agenda is the marketplace's interest in gaining exposure to bitcoin and other cryptocurrencies through a registered investment company. Despite interest from sponsors and investors, the Commission has yet to entertain an exemptive application for an ETF or approve an exchange rule allowing for the operation of crypto ETFs or other ETPs. The Commission has expressed a number of concerns from market manipulation to custody to

retail investor protection. We need to do a better job of fostering open dialogue about the first two topics.[37] On the third issue—retail investor protection—the reality is that retail investors will get access to these products, even if we do not allow them to do so through SEC regulated products and venues. Again, it is not the Commission's role to be the arbiter of what constitutes an appropriate investment or to act as an investment adviser.

In disapproving a proposed rule change to list and trade shares of the Winklevoss Bitcoin Trust, the Commission focused on the underlying characteristics of bitcoin and the spot markets in which it trades.[38] Instead of focusing on the merits of bitcoin as an investment, the Commission should have considered how the exchange-traded wrapper would work and how increased participation by institutional investors in the bitcoin market could have led to bolstered defenses against theft, greater investment in custody solutions, and lower likelihood of market manipulation.[39]

While the Winklevoss Bitcoin Trust would have been an ETP and not an ETF, in reviewing possible applications for an ETF that invests in crypto assets, I would focus on the same factors that I discussed in my dissent to the Commission's rejection of the proposed listing of the Winklevoss Bitcoin Trust. The ETF wrapper provides ease of investor movement into and out of the investment throughout each trading day, improved price arbitrage, and the possibility of increased participation by institutional investors with the attendant benefits their participation would provide. In addition, an ETF wrapper ensures that the Commission and its staff would directly regulate the entity, as it would be registered as an investment company with the Commission. This would provide Commission staff with the ability to examine the entity and keep abreast of any issues that might arise in the operation of the fund.

All that said, it is important to remember that, if the SEC were to permit a cryptocurrency ETP to trade in our markets, it would not be a seal of approval. In other words, investors would still have to do their own homework, study the product disclosures, assess their own appetites for risk, determine how much of a loss they could stomach, and—if those losses materialize—learn from them and refrain from coming to the SEC asking to be made whole.

Thank you for the chance to talk with you today. Since their introduction twenty-five years ago, ETFs have developed into an interesting and important market phenomenon. Investors have found that the ETF wrapper minimizes the costs they pay and hassles they incur in connection with their investments. I know we are all looking forward to the next quarter century of exchange-traded fun! I hope that the next twenty-five years will be characterized by well-calibrated rules, lots of innovation, and many investors whose portfolios have benefited from that innovation.

---

[1] *See* The History of Exchange-Traded Funds, etfguide, https://www.etfguide.com/the-history-of-exchange-traded-funds

[2] *See* ETF Assets and Net Issuance March 2019, Investment Company Institute (Apr. 29, 2019), https://www.ici.org/research/stats/etf/etfs_03_19.

[3] Exchange-Traded Funds, Investment Company Act Release No. 33140 (June 28, 2018) [hereinafter ETF Proposing Release], https://www.sec.gov/rules/proposed/2018/33-10515.pdf.

[4] Exchange-Traded Funds, SEC Release No. 33-8901 (Mar. 11, 2008), https://www.sec.gov/rules/proposed/2008/33-8901.pdf.

[5] *See* Investment Company Institute ("ICI"), 2018 Investment Company Fact Book 34 (58th ed. 2018), https://www.ici.org/pdf/2018_factbook.pdf.

[6] *See Id.* at 34.

[7] At the end of December 2017, there were approximately 1,900 registered ETFs with approximately $3.4 trillion in assets. Of those assets, approximately $3.36 trillion were in index-based ETFs. Actively managed ETFs accounted for approximately $48.5 billion in total assets. Leveraged and inverse ETFs accounted for approximately $35.26 billion in assets. These estimates are based on SEC staff analysis of Bloomberg data. *See* ETF Proposing Release, *supra* note 2, at 185-7.

[8] *See* ICI, *supra* note 5, at 77, 218.

[9] This data was provided by ICI.

[10] *See* Precidian ETFs Trust, et al., Investment Company Act Release No. 33440 (Apr. 8, 2019), https://www.sec.gov/rules/ic/2019/ic-33440.pdf.

[11] *See, e.g.*, ProShares Trust, et al., Investment Company Act Release Nos. 27323 (May 18, 2006) (notice) & 27394 (June 13, 2006) (order) and related application.

[12] *See* ETF Proposing Release, *supra* note 3, at n.58 and accompanying text.

[13] *Id.*

[14] *See* Precidian ETFs Trust, et al., *supra* note 10.

[15] Cinthia Murphy, Behind Active ETFs' Small Victories, ETF.com (May 20, 2019), https://www.etf.com/sections/features-and-news/behind-active-etfs-small-victories?nopaging=1.

[16] *See* Spruce ETF Trust, Application for an Order under Section6(c) of the Investment Company Act of 1940 (the "Act") Granting an Exemption From Sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and Rule 22c-1 Under the Act, Under Sections 6(c) and 17(b) of the Act for an Exemption From Sections 17(a)(1) and 17(a)(2) of the Act and Under Section12(d)(1)(J) of the Act Granting an Exemption From Sections 12(d)(1)(A) and 12(d)(1)(B) of the Act (2011), https://www.sec.gov/Archives/edgar/data/1006249/000119312511239094/d40app.htm.

[17] Henry T.C. Hu & John Morley, *A Regulatory Framework for Exchange-Traded Funds*, 91 Southern Cal. L. Rev. 839, 845 (2018).

[18] For example, if ETF shares are trading on national securities exchanges at a ''discount'' (a price below the NAV per share of the ETF), an authorized participant can purchase ETF shares in secondary market transactions and, after accumulating enough shares to compose a creation unit, redeem them from the ETF in exchange for the more valuable securities in the ETF's redemption basket. The authorized participant's purchase of an ETF's shares on the secondary market, combined with the sale of the ETF's basket assets, may create upward pressure on the price of the ETF shares, downward pressure on the price of the basket assets, or both, bringing the market price of ETF shares and the value of the ETF's portfolio holdings closer together. Alternatively, if ETF shares are trading at a ''premium'' (a price above the NAV per share of the ETF), the transactions in the arbitrage process are reversed and, when arbitrage is working effectively, keep the market price of the ETF's shares close to its NAV. Market participants also can engage in arbitrage activity without using the creation or redemption processes. For example, if a market participant believes that an ETF is overvalued relative to its underlying or reference assets (i.e., trading at a premium), the market participant may sell ETF shares short and buy the underlying or reference assets, wait for the trading prices to move toward parity, and then close out the positions in both the ETF shares and the underlying or reference assets to realize a profit from the relative movement of their trading prices. Similarly, a market participant could buy ETF shares and sell the underlying or reference assets short in an attempt to profit when an ETF's shares are trading at a discount to the ETF's underlying or reference assets. As with the creation and redemption process, the trading of an ETF's shares and the ETF's underlying or reference assets may bring the prices of the ETF's shares and its portfolio assets closer together through market pressure. *See* ETF Proposing Release. *See also* *What Is the Creation/Redemption Mechanism*, ETF.com, https://www.etf.com/etf-education-center/7540-what-is-the-etf-creationredemption-mechanism.html?nopaging=1 ; *see also* Kristina Zucchi, *How ETF Arbitrage Works*, Investopedia (May 23, 2018), https://www.investopedia.com/articles/investing/032615/how-etf-arbitrage-works.asp.

[19] *See* Spruce ETF Trust, *supra* note 16.

[20] ProShares Trust, et al., *supra* note 11.

[21] Rydex ETF Trust, et al., Investment Company Act Release Nos. 27703 (Feb. 20, 2007) [72 FR 8810 (Feb. 27, 2007)] (notice) & 27754 (Mar. 20, 2007) (order) and related application; Rafferty Asset Management, LLC, et al., Investment Company Act Release Nos. 28379 (Sept. 12, 2008) [73 FR 54179 (Sept. 18, 2008)] (notice) & 28434 (Oct. 6, 2008) (order) and related application.

[22] The Commission did issue two orders in 2009, one to ProShares and one to Rafferty Asset Management amending their prior leveraged and inverse ETF orders. ProShares Trust, et al., Investment Company Act Release No. 28724 (May 12, 2009); Rafferty Asset Management, LLC, Investment Company Act Release No. 28905 (Sep. 22, 2009).

[23] *See* Press Release, SEC, SEC Staff Evaluating the Use of Derivatives by Funds (Mar. 25, 2010), https://www.sec.gov/news/press/2010/2010-45.htm.

[24] *Id*.

[25] The staff, however, lifted the moratorium for exemptive requests under the Act relating to actively-managed ETFs. *See* Derivatives Use by Actively-Managed ETFs (Dec. 6, 2012), https://www.sec.gov/divisions/investment/noaction/2012/moratorium-lift-120612-etf.pdf (announcing that the staff "will no longer defer consideration of exemptive requests under the Act relating to actively-managed ETFs that make use of derivatives provided that they include representations to address some of the concerns expressed in the March 2010 press release").

[26] The applicants did not seek, and their orders do not provide, any exemption from the requirements of section 18 of the Act.

[27] *See, e.g.,* UltraShort Dow 30 ProFund, ProFunds, https://www.profunds.com/funds/ultrashort_dow_30.html; *see also* Daniel Deli et al., *Use of Derivatives by Registered Investment Companies*, SEC Div. of Econ. & Risk Analysis (2015), https://www.sec.gov/files/derivatives12-2015.pdf.

[28] In 2015, the Commission proposed an "exemptive" rule that would place limits on funds' use of derivatives. The centerpiece of the proposed rule is the imposition of a limit on the amount of leverage a fund may obtain through derivatives transactions and other senior securities transactions. The as-yet-unadopted proposal includes a limit of 150% of a fund's net assets for most funds, and a limit of 300% of a fund's net assets for funds where the derivatives transactions, in aggregate, result in an investment portfolio that is subject to less market risk than if the fund did not use such derivatives. *See* Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 31933 (Dec. 11, 2015), https://www.sec.gov/rules/proposed/2015/ic-31933.pdf.

[29] *See* Investor Alert and Bulletins, *Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors*, SEC (Aug. 1, 2009), https://www.sec.gov/investor/pubs/leveragedetfs-alert.htm.

[30] *Id.*

[31] *See* Use of Derivatives by Registered Investment Companies and Business Development Companies, *supra* note 28, at n.230.

[32] In re ProShares Trust Securities Litigation, 728 F.3d 96, 103-4 (2d Cir. 2013).

[33] *See, e.g.,* Direxion Shares ETF Trust Prospectus (Feb. 28, 2019), http://direxioninvestments.onlineprospectus.net/DirexionInvestments//MUTE/index.html?open=Statutory%20Prospectus. The first page of the prospectus states the following in bold print

The Funds seek *daily leveraged* investment results and are intended to be used as short-term trading vehicles. … The Funds are not intended to be used by, and are not appropriate for, investors who do not intend to actively monitor and manage their portfolios. The Funds are very different from most mutual funds and exchange-traded funds. Investors should note that:

(1) The Funds pursue *daily leveraged* investment objectives, which means that the Funds are riskier than alternatives that do not use leverage because the Funds magnify the performance of their underlying index.

…

(3) … During periods of high volatility, the Funds may not perform as expected and the Funds may have losses when an investor may have expected gains if the Funds are held for a period that is different than one trading day. The Funds are not suitable for all investors. The Funds are designed to be utilized only by sophisticated investors, such as traders and active investors employing dynamic strategies.

[34] Although three sponsors were issued leveraged and inverse ETF exemptive orders, one sponsor, Rydex, no longer offers these products. *See* Ron Rowland, *Guggenheim Exits Leveraged and Inverse ETF Business*, TheStreet (Mar. 12, 2013), https://www.thestreet.com/story/11867129/1/guggenheim-exits-leveraged-and-inverse-etf-business.html. Rydex still offers leveraged and inverse mutual funds.

[35] *See* 17 C.F.R. § 230.501(a) (2019).

[36]*See* ETF Proposing Release, *supra* note 3, at 31-36.

[37] We have taken some positive steps in this area, but can do a better job of fostering open dialogue by posting our questions and concerns in an easy-to-locate spot on our website and adding links for comments. *See, e.g.*, Paul Cellupica, Engaging on Non-DVP Custodial Practices and Digital Assets, SEC Div. of Inv. Mgmt. (Mar. 12, 2019), https://www.sec.gov/investment/non-dvp-and-custody-digital-assets-031219-206 (needs to be linked at www.sec.gov/finhub, where responses also should be posted); FinTech Forum, https://www.sec.gov/news/upcoming-events/fintech-forum-2019 (needs a comment box where people can post and read comments).

[38] Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to List and Trade Shares of the Winklevoss Bitcoin Trust, Release No. 34-83723 (July 26, 2018), https://www.sec.gov/rules/other/2018/34-83723.pdf.

[39] Dissent of Commissioner Hester M. Peirce to Release No. 34-83723; File No. SR-BatsBZX-2016-30 (July 26, 2018), https://www.sec.gov/news/public-statement/peirce-dissent-34-83723.