Morgan Lewis

David A. Sirignano
Partner
+1.202.739.5420
david.sirignano@morganlewis.com

January 15, 2020

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE Washington, DC 20549
Re: Securities Offering Reform for Closed-End Investment Companies,
File No. S7-03-19

Dear Ms. Countryman:

I am writing at the request of World Gold Trust Services, LLC ("WGTS") to supplement the comment letter ("Comment Letter") submitted by Joseph R. Cavatoni on WGTS's behalf to the Securities and Exchange Commission ("Commission") on June 10, 2019. The Comment Letter was in response to the Commission's March 29, 2019 *Securities Offering Reform for Closed-End Investment Companies* proposing release (Rel. no. 33-10619) (the "Proposed Rule"). We have been asked by WGTS to provide our analysis of the Commission's authority to implement the rule amendments suggested by WGTS in its Comment Letter.

WGTS and a number of other sponsors of commodity exchange-traded funds ("Commodity ETFs") have urged the Commission to harmonize the share registration rules that apply to Commodity ETFs, which are registered under the Securities Act of 1933 ("Securities Act") but not registered under the Investment Company Act of 1940 ("40 Act"), with the share registration rules that apply to securities ETFs, which are registered under the 40 Act ("Securities ETFs"). Harmonizing the share registration rules would allow Commodity ETFs to (1) register an indefinite amount of securities rather than a fixed number of securities, and (2) pay registration fees in arrears and on a net basis (that is, net sales of securities against redemptions of securities effected during the year). Harmonizing Commodity ETF share registration rules with Securities ETF share registration rules also would put Commodity ETFs in the same position with respect to share registration as the Proposed Rule puts interval funds.

Since submitting its Comment Letter, WGC and several sponsors of Commodity ETFs have met with the Commission staff and several of the Commissioners. At those meeting, we have been asked to discuss the authority of the Commission to adopt the industry's proposal.

We believe the Commission has authority under the Securities Act to adopt new rules or amendments to existing rules to create a mechanism similar to Section 24(f) of the 40 Act and Rule 24f-2 thereunder that would harmonize Commodity ETF share registration rules with those that apply to Securities ETFs, particularly pursuant to Sections 19(a) and 28 thereof. Although the Securities Act does not contain an express grant of authority similar to that in Section 24(f) of the 40 Act to permit the payment of net fees in arrears, like the proposed change for interval funds,

we believe our proposal falls under the "rules and regulations governing registration statements and prospectuses" contemplated in Section 19(a) of the Securities Act and under the general exemptive authority of Section 28 under that Act. The National Securities Markets Improvement Act of 1996 (NSMIA) (Pub.L. 104-290, 110 Stat. 3416 (Oct. 11, 1996)) provided the Commission with general authority to adopt exemptive rules under the Securities Act to the extent that such exemptive action is "necessary or appropriate in the public interest and consistent with the protection of investors." We note that the Commission is relying on this general exemptive authority to permit interval funds to register an indefinite number of shares and pay registration fees in arrears on a net basis, and not on Section 24(f) of the 40 Act, which expressly does not apply to closed-end investment companies.

The Commission's adoption in 2005 of Rule 456, which permits "pay-as-you-go" for well-known seasoned issuers ("WKSIs"), is an example of the Commission's use of its general exemptive authority under the Securities Act to exempt registrants from the statutory requirement in Section 6(c) of the Securities Act that the registration statement be accompanied by the payment of the registration fee. We believe that the suggested exemptive provision can be added to Rule 456 or adopted as a separate provision. A form modeled on Form 24F-2 would also be necessary to accompany the annual payment of fees and disclose the calculation.

We likewise believe the Commission has authority under the Administrative Procedure Act ("APA") to adopt the requested new rules or amendments to existing rules based on having published the Proposed Rule for comment and without having to propose a new rule. In determining whether the notice requirements of the APA are met, the courts have looked to whether the final rule was a "logical outgrowth" of the proposal and comments. *American Water Works Association v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994). As the D.C. Circuit noted in that decision, once an agency has complied with the notice requirements of the APA in connection with the initial rule proposal,

> [i]n most cases, if the agency then alters its course in response to the comments it receives, little purpose would be served by a second round of comment. The test we have developed for deciding whether a second round of comment is required in a particular case is whether the final rule promulgated by the agency is a "logical outgrowth" of the proposed rule. *See, e.g., Chemical Waste Management v. EPA*, 976 F.2d 2, 28 (D.C. Cir. 1992*); Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 546-47 (D.C. Cir. 1983). We apply that standard functionally by asking whether "the purposes of notice and comment have been adequately served," *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991), that is, whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.

The proposing release accompanying the Proposed Rule put interested parties on notice that the Commission intended to rationalize its fee structure by extending the benefits of Rule 24f-2 to entities that resemble mutual funds and ETFs (Proposing Release at pages 62-63).

> [W]e believe that interval funds would benefit from the ability to pay their registration fees in the same manner as mutual funds and ETFs, and that this approach is appropriate in light of interval funds' operations. In particular, interval funds—like mutual funds and unlike other affected funds—routinely repurchase shares at net asset value and are required to periodically offer to repurchase their shares.

Most importantly, the Commission clearly signaled that it contemplated extending the proposed amendments beyond interval funds when it asked for comment on whether it should "permit additional categories of issuers to pay registration statement fees on an annual net basis as under rule 24f-2 (or on a pay-as-you-go basis)?" Id. at page 65. We note that six sponsors of Commodity ETFs – virtually the entire industry – submitted comment letters on the proposal requesting the extension of the proposed amendments to their funds. In addition, Commodity ETFs more closely resemble Securities ETFs than interval funds do because Commodity ETFs and Securities ETFs both issue and redeem shares on a daily basis. So the rationale for harmonizing Commodity ETF and Securities ETF share registration rules is even stronger for Commodity ETFs than it is for interval funds. Finally, the costs and benefits of the rule change were fully explored in the Economic Analysis and Initial Regulatory Flexibility Act Analysis sections of the release in a manner that has equal application to Commodity ETFs, given the manner in which they must issue and redeem shares.

Accordingly, harmonizing Commodity ETF and Securities ETF share registration rules without a re-proposal would be a logical outgrowth of the Commission's initial proposal and requests for comment. A re-proposal also is not necessary to serve the purposes of notice and comment as all interested parties have had an adequate opportunity to address the proper scope of the fee proposal.

We would propose that any new rule or amendments to existing rules permitting (1) registration of an indefinite number of shares, and (2) payment of fees in arrears on an annual net basis be limited to Commodity ETFs, which the Commission could define as:

> Any person (i) making a continuous offering of its securities that is registered under the Securities Act of 1933, (ii) that undertakes to issue and redeem its securities at their net asset value each business day to and from authorized participants, and (iii) whose securities are listed for trading on a national securities exchange.

We are not aware of other issuers situated similarly to Commodity ETFs that would enjoy the benefits of the requested rule changes. Limiting any new rule to Commodity ETFs as defined will appropriately ensure that only the intended issuers will be eligible to rely on the requested rule changes.

Thank you for the opportunity to comment. I am available to answer any questions the Commissioners or staff may have. I can be reached at (202) 739-5420.

Sincerely,

David A. Sirignano