

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28379; 812-13483]

Rafferty Asset Management, LLC, et al.; Notice of Application

September 12, 2008

Agency: Securities and Exchange Commission (“Commission”).

Action: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from sections 2(a)(32), 5(a)(1), 22(d), 22(e), and 24(d) of the Act and rule 22c-1 under the Act, and 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.

Summary of Application: Applicants request an order that would permit (a) an open-end management investment company and its series to issue shares (“ETS”) that can be redeemed only in large aggregations (“Creation Units”); (b) secondary market transactions in ETS to occur at negotiated prices; (c) dealers to sell ETS to purchasers in the secondary market unaccompanied by a prospectus when prospectus delivery is not required by the Securities Act of 1933 (“Securities Act”); (d) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of ETS for redemption and; (e) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units.

Applicants: Rafferty Asset Management, LLC (“Adviser”) and Direxion Shares ETF Trust (“Trust”).

Filing Dates: The application was filed on January 23, 2008 and amended on May 8, 2008, August 21, 2008 and September 12, 2008.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 3, 2008, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants, 33 Whitehall Street, 10th Floor, New York, New York 10004.

For Further Information Contact: Emerson S. Davis, Sr., Senior Counsel at (202) 551-6868, or Julia Kim Gilmer, Branch Chief, at (202) 551-6821 (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a summary of the application. The complete application may be obtained for a fee at the Public Reference Branch, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549-1520, telephone (202) 551-5850.

Applicants' Representations:

1. The Trust is an open-end management investment company registered under the Act and organized as a Delaware statutory trust. The Trust is authorized to offer an unlimited number of series (the "Funds"). The Adviser is registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). The Trust will initially offer thirty-two series ("Initial Funds") with different types of investment objectives as further

described below.<sup>1</sup> Applicants may offer additional Funds in the future (“Future Funds” and included in the term Funds).<sup>2</sup> Each Fund will be advised by the Adviser. The Adviser may enter into subadvisory agreements with additional investment advisers to act as subadvisers to the Trust and any of the Funds. Any subadviser to the Trust or a Fund will be registered under the Advisers Act. A broker-dealer registered under the Securities Exchange Act of 1934 (“Exchange Act”) will act as the distributor and principal underwriter of each Fund’s Creation Units of ETS (“Distributor”).

2. The Funds will seek daily investment results, before fees and expenses, that:

- (a) correspond to the return of particular foreign equity indices (“Underlying Foreign Indices”), domestic equity indices (“Underlying Domestic Indices”) or fixed income securities indices (“Underlying Fixed Income Indices” together with the Underlying Foreign Indices and the Underlying Domestic Indices, the “Underlying Indices”)<sup>3</sup> (such Funds are referred to as the “Conventional Funds”);
- (b) provide up to 400% of the return of their Underlying Indices (“Leveraged Funds”);
- or (c) provide up to 400% of the inverse performance of their Underlying Indices (“Inverse Funds”).<sup>4</sup>

3. Conventional Funds and Leveraged Funds based on Underlying Domestic Indices will invest at least 95% and 80%, respectively, of their total assets in the equity securities contained in the relevant Underlying Domestic Index. Conventional Funds and Leveraged Funds based on Underlying Fixed Income Indices will invest at least 80% of their

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<sup>1</sup> The underlying indices for the Initial Funds are identified in the application.

<sup>2</sup> All existing entities that intend to rely on the requested order have been named as applicants. Any Future Fund that relies on the requested order will comply with the terms and conditions of the application.

<sup>3</sup> An entity that creates, compiles, sponsors or maintains an Underlying Index is not and will not be an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person of the Trust, a Fund, the Distributor, the Adviser, or any subadviser or promoter of any Fund.

<sup>4</sup> Sixteen of the Initial Funds are Leveraged Funds and the remainder are Inverse Funds.

total assets in the securities that comprise the relevant Underlying Fixed Income Index. Conventional Funds and Leveraged Funds based on Underlying Foreign Indices will invest at least 80% of their total assets in the equity securities contained in the relevant Underlying Foreign Index and depositary receipts representing such securities.<sup>5</sup>

4. Additionally, the Funds may invest in short-term debt instruments that meet the definition of “Eligible Security” in rule 2a-7 under the Act (“Money Market Instruments”), and in futures contracts, options, equity caps, collars and floors, swap agreements, forward contracts, and reverse repurchase agreements (collectively, “Financial Instruments”) in order to meet their investment objectives. The Inverse Funds will only invest in Financial Instruments and Money Market Instruments; they will not invest in the component securities of their Underlying Indices.

5. A Conventional Fund will utilize either a replication or representative sampling strategy. A Conventional Fund using a “replication” strategy will invest in substantially all of the Component Securities in its Underlying Index in approximately the same proportions as in the Underlying Index. A Conventional Fund using a representative sampling strategy will invest in some, but not all, of the relevant Component Securities. The Adviser will seek to achieve the investment objectives of the Leveraged Funds and the Inverse Funds by using a mathematical model that takes into account a variety of specified criteria, the most important of which are: (a) the net assets in each Fund’s portfolio at the end of each trading day; (b) the amount of required exposure to the Underlying Index; and (c) the positions in equity and fixed income securities, Financial Instruments and Money Market Instruments at the beginning of each trading day. On each day that a Fund is required to be

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<sup>5</sup> “Depositary Receipts” include American Depositary Receipts, Global Depositary Receipts and European Depositary Receipts.

open under section 22(e) of the Act (“Business Day”) the full portfolio holdings of each Fund will be disclosed on the website of the Trust and/or the Exchange on which ETS are primarily listed (“Primary Listing Exchange”). The portfolio holdings information disclosed each Business Day will form the basis for that Fund’s net asset value (“NAV”) calculation as of 4:00 pm Eastern Time that day and will reflect portfolio trades made on the immediately preceding Business Day. Intra-day values of each Underlying Domestic Index and Underlying Foreign Index will be disseminated every 15 seconds throughout the trading day. The value of Underlying Fixed Income Indices will be calculated and published once per day.

6. Applicants expect that each Conventional Fund will have an annual tracking error of less than 5% over the course of the year (excluding the impact of expenses and interest, if any) to the performance of its Underlying Index. For Leveraged Funds and Inverse Funds, applicants expect a tracking error of less than 5% over the course of a year (excluding the impact of expenses and interest, if any) to the specified multiple or inverse multiple, respectively, of the performance of the relevant Underlying Index.

7. Each Fund will issue Creation Units of approximately 25,000 to 100,000 ETS. Applicants expect the initial offering price of a Creation Unit to be a minimum of \$1 million. All orders to purchase Creation Units must be placed on a Business Day with the Distributor by or through a party that has entered into a participant agreement with the Distributor (an “Authorized Participant”). An Authorized Participant must be either (a) a broker-dealer or other participant in the continuous net settlement system of the National Securities Clearing Corporation, a clearing agency that is registered with the Commission, or (b) a participant in the Depository Trust Company (“DTC”) system. The Distributor also will be responsible for

delivering the Prospectus to those persons purchasing Creation Units and for maintaining records of the orders and acknowledgements of acceptance for orders.

8. Creation Units of Conventional and Leveraged Funds generally will be purchased and redeemed in exchange for an “in-kind” transfer of securities (“In-Kind Payment”) and cash. Inverse Funds will generally be purchased and redeemed entirely for cash because of the limited transferability of Financial Instruments.<sup>6</sup> An investor making an In-Kind Payment will be required to transfer to the Trust a “Deposit Basket” consisting of:

(a) a basket of securities consisting of some or all of the securities in the relevant Underlying Index or other securities selected by the Adviser to correspond to the performance of the Underlying Index (the “Deposit Securities”); and (b) a “Balancing Amount.” The Balancing Amount will be equal to the differential, if any, between the total aggregate market value of the Deposit Securities, or in the case of redemptions, the Redemption Securities (defined below), and the NAV per Creation Unit.<sup>7</sup> An investor purchasing or redeeming a Creation Unit from a Fund will be charged a fee (“Transaction Fee”) to prevent the dilution of the interests of the remaining shareholders resulting from the Fund incurring costs in connection

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<sup>6</sup> The Trust may also accept and deliver all-cash payments for the purchase and redemption of Creation Units of any Fund in certain limited circumstances.

<sup>7</sup> On each Business Day, prior to the opening of trading on the New York Stock Exchange, the Trust’s index receipt agent will make available the list of the names and the required number of shares of each security included in the current Deposit Basket and the Balancing Amount for each Fund. Such Deposit Basket will apply to all purchases of Creation Units until a new Deposit Basket for a Fund is announced. The Primary Listing Exchange will disseminate every 15 seconds during regular trading hours, through the facilities of the Consolidated Tape Association, an amount representing on a per ETS basis the sum of the current value of the Deposit Securities, and the estimated amount of cash and Money Market Instruments held in the portfolio of a Conventional or Leveraged Fund. For Leveraged Funds, the amount would also include, on a per share basis, the marked-to-market gains or losses of the Financial Instruments held by the Fund. For Inverse Funds, the Primary Listing Exchange will disseminate an amount representing, on a per share basis, the estimated amount of cash and Money Market Instruments, and the marked-to-market gains or losses of the Fund’s Financial Instruments.

with the purchase and redemption of the Creation Units.<sup>8</sup> The maximum Transaction Fee and any variations or waivers of the Transaction Fee will be disclosed in the prospectus for ETS (“Prospectus”) and the method of determining the Transaction Fees will be disclosed in the Prospectus and/or statement of additional information (“SAI”).

9. Persons purchasing Creation Units from a Fund may hold the ETS or sell some or all of them in the secondary market. ETS of the Funds will be listed on an Exchange and trade in the secondary market in the same manner as other exchange-traded funds. It is expected that one or more Exchange member firms will act as a specialist (“Exchange Specialist”) or market maker (“Market Maker”) and maintain a market on the Primary Listing Exchange for ETS. The price of ETS traded on an Exchange will be based on a current bid/offer market. The initial trading price for ETS of each Fund will fall in the range of \$50 to \$250. Transactions involving the sale of ETS in the secondary market will be subject to customary brokerage commissions and charges.

10. Applicants expect that purchasers of Creation Units will include institutional and retail investors, arbitrageurs, traders, financial advisors, portfolio managers and other market participants.<sup>9</sup> An Exchange Specialist or Market Maker, in providing for a fair and orderly secondary market for ETS, also may purchase or redeem Creation Units for use in its market-making activities. Applicants expect that the market price of ETS will be disciplined by arbitrage opportunities created by the ability to purchase or redeem Creation Units at their

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<sup>8</sup> A purchaser permitted to substitute cash for certain Deposit Securities may be assessed a higher Transaction Fee to cover the cost of purchasing such securities, including operational processing and brokerage costs, and part or all of the spread between the expected bid and offer side of the market relating to such securities.

<sup>9</sup> ETS will be registered in book-entry form only. DTC or its nominee will be the record or registered owner of all outstanding ETS. DTC or its participants will maintain records reflecting the beneficial owners of ETS.

NAV, which should ensure that the market price of ETS at or close to 4 p.m. stays close to the NAV on that Business Day.

11. ETS will not be individually redeemable. ETS will only be redeemable in Creation Units through the Distributor, which will act as the Trust's agent for redemption. To redeem, an investor must accumulate enough ETS to constitute a Creation Unit. An investor redeeming a Creation Unit of a Conventional or Leveraged Fund generally will receive an In-Kind Payment of securities published by the Trust's index receipt agent (the "Redemption Securities"), the Balancing Amount in effect on the date a request for redemption is made, minus any Transaction Fee.

12. Applicants state that in accepting Deposit Securities and satisfying redemptions with Redemption Securities,<sup>10</sup> the relevant Funds will comply with the federal securities laws, including that the Deposit Securities and Fund Securities are sold in transactions that would be exempt from registration under the Securities Act.<sup>11</sup> As a general matter, the Deposit Securities and Redemption Securities will correspond pro rata to the securities held by each Conventional Fund and Leveraged Fund, but Redemption Securities received on redemption may not always be identical to Deposit Securities deposited in connection with the purchase of Creation units for the same day.

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<sup>10</sup> Applicants state that a cash-in-lieu amount will replace any "to-be-announced" ("TBA") transaction that is listed as a Deposit Security or Redemption Security of any Fund. A TBA transaction is a method of trading mortgage-backed securities where the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount and price. The actual pools delivered generally are determined two days prior to the settlement date. The amount of substituted cash in the case of TBA transactions will be equivalent to the value of the TBA transaction listed as a Deposit Security or Redemption Security.

<sup>11</sup> In accepting Deposit Securities and satisfying redemptions with Redemption Securities that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, the relevant Funds will comply with the conditions of rule 144A, including in satisfying redemptions with such rule 144A eligible restricted Redemption Securities. The Prospectus will also state that an Authorized Participant that is not a "Qualified Institutional Buyer" as defined in rule 144A under the Securities Act will not be able to receive, as part of a redemption, restricted securities eligible for resale under rule 144A.

13. Applicants state that neither the Trust nor any Fund will be advertised, marketed or otherwise held out as a “mutual fund.” The term “mutual fund” will not be used in the Prospectus except to compare and contrast the Trust or a Fund with conventional mutual funds. In all marketing materials where the features or methods of obtaining, buying, or selling Creation Units are described or where there is reference to redeemability, applicants will include a prominent statement to the effect that individual ETS are not redeemable except in Creation Units. The same approach will be followed in connection with reports and other communications to shareholders, as well as any other investor education materials issued or circulated in connection with ETS. The Trust will provide copies of its annual and semi-annual shareholder reports to DTC participants for distribution to beneficial holders of ETS.

Applicants’ Legal Analysis:

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), 22(e), and 24(d) of the Act and rule 22c-1 under the Act, and 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.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Sections 5(a) (1) and 2(a) (32) of the Act

3. Section 5(a)(1) of the Act defines an “open-end company” as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer’s current net assets, or the cash equivalent. Because ETS will not be individually redeemable, applicants request an order that would permit the Trust to issue ETS that are redeemable in Creation Units only. Applicants state that investors may purchase ETS of a Fund in Creation Units and redeem Creation Units from the Trust. Applicants further state that because the market price of ETS will be disciplined by arbitrage opportunities, investors should be able to sell ETS in the secondary market at or close to 4:00 p.m. on a Business Day at prices that do not vary substantially from the NAV on that Business Day.

Section 22(d) of the Act and Rule 22c-1 under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in ETS will take place at negotiated prices, not at a current offering price described in a Fund’s Prospectus as required by section 22(d) of the Act, and not at a price based on NAV as required by rule 22c-1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing ETS. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been intended to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting ETS to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in ETS does not directly involve Trust assets and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand, not as a result of unjust or discriminatory manipulation. Therefore, applicants assert that secondary market transactions in ETS will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because competitive forces in the marketplace will ensure that the difference between the market price of ETS and their NAV remains narrow.

#### Section 24(d) of the Act

7. Section 24(d) of the Act provides, in relevant part, that the prospectus delivery exemption provided to dealer transactions by section 4(3) of the Securities Act does not apply to any transaction in a redeemable security issued by an open-end investment company.

Applicants seek relief from section 24(d) to permit dealers selling ETS in the secondary markets to rely on the prospectus delivery exemption provided by section 4(3) of the Securities Act.<sup>12</sup>

8. Applicants state that secondary market investors will regard ETS in a manner similar to other securities, including closed-end fund shares that are listed, bought and sold on an Exchange. Applicants note that shares of closed-end fund investment companies are sold in the secondary market unaccompanied by a prospectus.

9. Applicants contend that ETS, as a listed security, merit a reduction in the compliance costs and regulatory burdens resulting from the imposition of prospectus delivery obligations in the secondary market. Because ETS will be exchange-listed, prospective investors will have access to several types of market information about ETS. Applicants state that information regarding market price and volume will be continually available on a real-time basis throughout the day from the relevant Exchange, automated quotation systems, published or other public sources or on-line information services. Applicants expect that the previous day's closing price and volume information for ETS also will be published daily in the financial section of newspapers. In addition, the Trust expects to maintain a website that includes quantitative information updated on a daily basis, including, for each Fund, daily

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<sup>12</sup> Applicants state that they are not seeking relief from the prospectus delivery requirement for non-secondary market transactions, such as transactions in which an investor purchases ETS from the Funds or an underwriter. Applicants further state that each Fund's Prospectus will caution broker-dealers and others that some activities on their part, depending on the circumstances, may result in their being deemed statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. For example, a broker-dealer firm and/or its client may be deemed a statutory underwriter if it takes Creation Units after placing an order with the Distributor, breaks them down into the constituent ETS, and sells those ETS directly to customers, or if it chooses to couple the creation of a supply of new ETS with an active selling effort involving solicitation of secondary market demand for ETS. Each Fund's Prospectus will state that whether a person is an underwriter depends upon all of the facts and circumstances pertaining to that person's activities. The Prospectus also will state that dealers who are not "underwriters" but are participating in a distribution (as contrasted to ordinary secondary market trading transactions), and thus dealing with ETS that are part of an "unsold allotment" within the meaning of section 4(3)(C) of the Securities Act, would be unable to take advantage of the prospectus delivery exemption provided by section 4(3) of the Securities Act.

trading volume, the NAV and the reported closing price. The website will also include, for each Fund, a calculation of the premium or discount of the reported closing price against NAV, and data in chart format displaying the frequency distribution of discounts and premiums of the reported closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

10. Applicants will make available for distribution to secondary market purchasers of ETS a product description (“Product Description”) that describes, in plain English, the Trust, relevant Fund and its ETS. Applicants state that, while not intended as a substitute for a Prospectus, the Product Description will contain information about ETS that is tailored to meet the needs of investors purchasing ETS in the secondary market. The Product Description will also disclose the potential for deviation over time between the return of the Leveraged Funds or Inverse Funds and the multiple return of the corresponding Underlying Index and provide an example of this deviation in returns over time in the same manner as in the Prospectus.

#### Section 22(e)

11. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants state that settlement of redemptions for Funds based on Underlying Foreign Indices (“Foreign Funds”) is contingent not only on the settlement cycle of the United States market, but also on delivery cycles in local markets for underlying foreign securities held by the Foreign Funds. Applicants state that local market delivery cycles for transferring Redemption Securities to redeeming investors, coupled with local market holiday schedules,

will, under certain circumstances, require a delivery process longer than seven calendar days for Foreign Funds. Applicants request relief under section 6(c) of the Act from section 22(e) to allow Foreign Funds to pay redemption proceeds up to 14 calendar days after the tender of a Creation Unit for redemption. Except as disclosed in the relevant Foreign Fund's Prospectus, Product Description and/or SAI, applicants expect that each Foreign Fund will be able to deliver redemption proceeds within seven days.<sup>13</sup> With respect to future Foreign Funds, applicants seek the same relief from section 22(e) only to the extent that circumstances similar to those described in the application exist.

12. Applicants state that section 22(e) was designed to prevent unreasonable, undisclosed and unforeseen delays in the payment of redemption proceeds. Applicants assert that the requested relief will not lead to the problems that section 22(e) was designed to prevent. Applicants state that the SAI will disclose those local holidays (over the period of at least one year following the date of the SAI), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days, and the maximum number of days needed to deliver the proceeds for each Foreign Fund. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds that do not effect creations and redemptions of Creation Units in-kind.

#### Sections 17(a)(1) and 17(a)(2) of the Act

13. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person ("Second-Tier Affiliate"), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines "affiliated person" to include (a) any person directly or indirectly owning,

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<sup>13</sup> Rule 15c6-1 under the Exchange Act requires that most securities transactions be settled within three business days of the trade. Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations applicants may have under rule 15c6-1.

controlling or holding with power to vote 5% or more of the outstanding voting securities of the other person, (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with the power to vote by the other person, and (c) any person directly or indirectly controlling, controlled by or under common control with the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities.

14. Applicants request an exemption from section 17(a) of the Act pursuant to sections 17(b) and 6(c) of the Act to permit persons to effectuate in-kind purchases and redemptions with a Fund when they are affiliated persons of the Fund or Second-Tier Affiliates solely by virtue of one or more of the following : (a) holding 5% or more, or more than 25%, of the outstanding ETS of one or more Funds; (b) having an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25%, of the shares of one or more other registered investment companies (or series thereof) advised by the Adviser or an entity, controlling, controlled by or under common control with the Adviser.

15. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Applicants assert that no useful purpose would be served by prohibiting these types of affiliated persons from purchasing or redeeming Creation Units through "in-kind" transactions. The deposit procedures for both in-kind purchases and in-kind redemptions of

Creation Units will be the same for all purchases and redemptions. Deposit Securities and Redemption Securities will be valued in the same manner as the securities held by the Funds. Therefore, applicants state that in-kind purchases and redemptions will afford no opportunity for the affiliated persons described above to effect a transaction detrimental to other holders of ETS. Applicants also believe that in-kind purchases and redemptions will not result in self-dealing or overreaching of the Fund.

Applicants' Conditions:

Applicants agree that any order of granting the requested relief will be subject to the following conditions:

1. The Prospectus and Product Description will clearly disclose that, for purposes of the Act, ETS are issued by the Funds and the acquisition of ETS by investment companies is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits in section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into an agreement with the Fund regarding the terms of the investment.
2. As long as the Trust operates in reliance on the requested order, the ETS will be listed on an Exchange.
3. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. The Prospectus will prominently disclose that ETS are not individually redeemable shares and will disclose that the owners of ETS may acquire those ETS from a Fund and tender those ETS for redemption to a Fund in Creation Units only. Any advertising material that describes the purchase or sale of Creation Units or refers

to redeemability will prominently disclose that ETS are not individually redeemable, and that owners of ETS may acquire those ETS from a Fund and tender those ETS for redemption to a Fund in Creation Units only.

4. Before a Fund may rely on the order, the Commission will have approved, pursuant to rule 19b-4 under the Exchange Act, an Exchange rule or an amendment thereto, requiring Exchange members and member organizations effecting transactions in ETS to deliver a Product Description to purchasers of ETS.

5. The Trust's website, which will be publicly accessible at no charge, will contain the following information, on a per ETS basis, for each Fund: (a) the prior Business Day's NAV and the reported closing price, and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters (or the life of the Fund, if shorter). In addition, the Product Description for each Fund will state that the Trust's website has information about the premiums and discounts at which the ETS have traded.

6. The Prospectus and annual report for each Fund also will include: (a) the information listed in condition 5(b), (i) in the case of the Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years (or the life of the Fund, if shorter); and (b) the following data, calculated on a per ETS basis for one, five and ten year periods (or life of the Fund, if shorter), (i) the cumulative total return and the average annual total return based on NAV and closing price, and (ii) the cumulative total return of the relevant Underlying Index.

7. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of index-based exchange-traded funds and exchange-traded funds that seek to return a multiple, the inverse or an inverse multiple of an index.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon  
Acting Secretary