

May 8, 2019

Eaton Vance Management  
Two International Place  
Suite 1400  
Boston, MA 02110



*By Email and Hand Delivery*

Jay Clayton, Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20850

Robert J. Jackson, Jr., Commissioner  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20850

Hester M. Peirce, Commissioner  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20850

Elad L. Roisman, Commissioner  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20850

Re: Precidian ETFs Trust, et. al.; Notice of Application

Dear Chairman Clayton and Commissioners Jackson, Peirce and Roisman:

I am writing on behalf of Eaton Vance Management in response to the letter dated May 5, 2019 from W. John McGuire of Morgan Lewis (the "Morgan Lewis Letter") to Chairman Clayton regarding the noticed application by Precidian ETFs Trust and related parties ("Applicants") to operate actively managed exchange-traded funds that, different from existing active ETFs, would not publicly disclose their portfolio holdings on a daily basis ("Precidian ETFs" or "Funds").<sup>1</sup> Although it is not our intention to go back and forth with Applicants' counsel on this matter, inaccuracies and misstatements in the Morgan Lewis Letter demand that we respond, and reiterate, that the operation of the Precidian ETFs would violate Section 10(b) and Rule 10b-5 under the Securities Exchange Act of 1934 (the "1934 Act").

As a threshold matter, the Morgan Lewis Letter fails to acknowledge the context within which the rules and regulations governing issuer selective disclosure and the use of material non-

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<sup>1</sup> Precidian ETFs Trust, et. al., Notice of Application, Investment Company Act Release No. 33440 (April 8, 2019) (the "Notice").

public information (“MNPI”) were promulgated. In short, it is the underlying policy of these provisions that no one should be able to gain an informational edge supplied by an issuer and, in turn, engage in trading on the basis of that disclosed information. Here, we have a scheme whereby a representative of an authorized participant to a Fund (“AP Representative”) would be provided with MNPI by the Fund in the form of knowledge of the Fund’s current portfolio holdings. In turn, an authorized participant (“AP”) would use that information (acting indirectly through the artifice of the AP Representative) to direct that trades be effected in the Funds’ underlying securities, *i.e.*, the very subject of the MNPI. The AP and its market maker customers would be enabled to use selectively disclosed MNPI for their own profit, where other market participants could not.

In many respects, the Morgan Lewis Letter only strengthens our case, as it makes clear that the purported legality of the Precidian ETFs’ proposed operating model rests on a series of questionable assertions and twists of logic, including that:

- the buying and selling of securities in market transactions does not constitute “trading” if executed in connection with orders to purchase or redeem ETF shares;
- trading on the basis of MNPI external to the transaction itself is “consistent with ordinary brokerage practice” and therefore “clearly lawful,” equivalent to trades in which the only non-public information known to the executing broker is the existence of the order being executed;
- trading in securities the identity of which is known to the executing broker only through the dissemination of MNPI does not constitute “use” of such information so long as the information at issue “is not a factor in the investment decision;”
- an AP’s agreement with a Precidian ETF to purchase and redeem creation units and buy and sell the Fund’s underlying securities in the manner provided constitutes a “binding contract” for purposes of Rule 10b5-1, even though an AP would have complete latitude to determine the dates on which it enters into, and the amounts of, its creation unit transactions and associated trading in the underlying securities; and
- the proposed transactions are “similar to” in-kind redemptions as effected by mutual funds (including certain Eaton Vance funds), ignoring, among other critical differences, the distinctions that (i) mutual funds are not required to distribute, and therefore disclose, a pro rata slice of their entire holdings in such transactions, whereas Precidian ETFs are required to distribute a pro rata slice of their entire portfolio, and therefore disclose their entire holdings (and, indirectly, their current buying and selling activity), to the AP Representative each day and (ii) as non-traded securities, mutual fund shares are not subject to the arbitrage trading through which ETF APs and other market makers seek to profit.

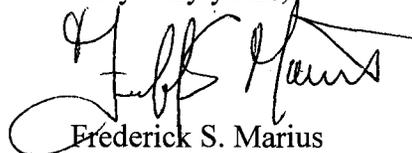
The Morgan Lewis Letter also asserts that the issues raised in my letter have been “fully considered by the Commission and its staff.” That contention is belied by the fact that no

mention of how Section 10(b), Rule 10b-5 and Rule 10b5-1 would apply in this novel circumstance is included among the 29 pages of discussion in the Notice. Moreover, as noted in my earlier letter, the Applicants have not requested, and the proposed order does not include, an exemption from these provisions of the federal securities laws.

Approval of the Applicants' proposal would certainly expand what is allowable in terms of issuer selective disclosure and insider trading beyond current understanding, and do so in a way that could potentially handicap the Commission and its staff from enforcing, or narrowing, its interpretation of applicable law. In closing, we amplify the conclusion of our earlier letter: that the disparate treatment of market participants central to the operation of the Precidian ETFs is antithetical to the protection of investors and a violation of the federal securities laws. Accordingly, we again respectfully request that you reconsider whether it is appropriate and in the public interest to issue the subject order.

As a final thought, we note that approval of new and novel products and the facilitation of capital formation can be achieved without weakening the foundation of policies and principles opposing selective disclosure and insider trading. Other applications to operate less-transparent actively managed ETFs submitted to the Commission, and under review by the Commission staff, do not appear to raise similar issues and concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "Fred S. Marius", written over a horizontal line.

Frédéric S. Marius  
Chief Legal Officer

cc: Dalia Blass, Director, Division of Investment