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September 28, 2018

VIA ELECTRONIC DELIVERY

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Investment Company Act Release No. 33140 (File No. S7-15-18) Exchange-Traded Funds

Dear Mr. Fields:

We appreciate the opportunity to respond to the request by the U.S. Securities and Exchange Commission ("***SEC***" or "***Commission***") for comments regarding the above-referenced release (the "***Proposing Release***").[1] The Proposing Release proposes a new rule as well as amendments to existing rules and forms to simplify and modernize the regulatory framework governing exchange-traded funds ("***ETFs***") and enhance information provided to investors about the costs of purchasing ETF shares. The intent of this rulemaking initiative is to simplify and modernize the regulatory framework governing ETFs and enhance information provided to investors about the cost of purchasing ETF shares. We endorse these goals and respectfully offer certain comments and suggestions to help effectuate the Commission's intent.

Dechert LLP is an international law firm with a wide-ranging financial services practice that serves clients in the United States and abroad. We have a large diversified ETF practice. We also represent a substantial number of mutual funds, closed-end funds, fund boards, fund independent directors, fund advisers and fund service providers. Our ETF lawyers represent more than twenty ETF sponsors, comprising a significant percentage of the universe of sponsors competing in the marketplace. In developing these comments, we have drawn on our extensive experience in the financial services industry generally, and with respect to ETFs specifically. Although we have discussed certain matters addressed in the Proposing Release with some of our clients, the comments that follow reflect only the views of a group of attorneys in our financial services practice, and do not necessarily reflect the views of our clients, other members of our financial services group or the firm generally.

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1 *See* Exchange-Traded Funds, SEC Rel. No. IC-33140, 83 Fed. Reg. 37332 (Jul. 31, 2018) ("***Proposing Release***").

We acknowledge the obvious care and thoughtfulness that the Commission and its staff ("***Staff***") put into the preparation of the Proposing Release and appreciate the opportunity to offer comments. As the primary regulator of the fund industry, we believe the SEC is uniquely positioned and most qualified to address the modernization of the regulatory framework for ETFs.

We support the SEC's efforts to employ standardized conditions "designed to level the playing field among most ETFs"[2], including the equal treatment of index-based ETFs and actively managed ETFs and, therefore, we strongly support the Commission's goal of modernizing the regulatory framework for ETFs. We acknowledge and appreciate the SEC's determination to revisit from its 2008 rule proposal the codification of many of the conditions imposed on ETFs through individual exemptive orders.[3] However, we believe that certain enhancements to proposed Rule 6c-11 under the Investment Company Act of 1940, as amended (the "***1940 Act***"), and other suggestions for Commission action, each set forth below, would help achieve the Commission's objectives.

I. OPERATIONAL CONSIDERATIONS

A. Rule 6c-11 Should Explicitly Permit "T-1 Orders"

Proposed Rule 6c-11 would require each ETF to disclose each business day on its website, among other things, "a basket applicable to orders for the purchase or redemption of creation units to be priced based on the next calculation of current net asset value" ("***NAV***") before the ETF starts accepting orders for the purchase or redemption of creation units for that business day.[4] For many ETFs which invest in non-U.S. securities in local markets where in-kind transfers are not possible, there is a widespread practice for authorized participants to submit creation or redemption orders after market close the day prior to the transmittal date (referred to as a "T-1" order). For example, an ETF may permit an order for shares at Tuesday's NAV to be placed after 4:00 PM ET on Monday until 5:00 PM ET on Monday. This practice enables orders for the purchase or sale of portfolio securities (on the part of the fund, as well as the authorized participant making corresponding trades for hedging purposes) to be placed in the non-U.S. markets while those markets are open. If this T-1 order process is unavailable and if the order is placed when the U.S. business day begins on Tuesday, the corresponding orders in non-U.S. markets might not be placed until Wednesday in those markets. We understand from conversations with ETF clients that, due

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2 Fact Sheet, Exchange-Traded Funds, SEC Open Meeting (June 28, 2018).

3 Exchange-Traded Funds, SEC Rel. No. IC-28193 (Mar. 11, 2008) ("***2008 Proposal***").

4 *See* Proposing Release at 37405 (proposed Rule 6c-11(c)(1)(i)(B)).

to operational concerns, it is not possible to calculate and post the ETF basket until approximately 6:00 or 7:00 PM ET (or later) the evening before the day for which the basket would be used. Such T-1 orders are therefore placed before the creation basket for Tuesday is posted on the ETF's website.

Rule 6c-11(c)(1)(i)(B) as drafted, might be interpreted to forbid this practice. Under the terms of authorized participant agreements, T-1 orders may be deemed "accepted" or "received" immediately, before the market opens the following day and before the creation basket is posted on the ETF's website. We are concerned that the prohibition of T-1 orders would have unintended effects on the ETFs which invest in the applicable international markets. Specifically, without the ability to place T-1 orders, the following undesirable consequences could ensue: (i) ETFs would have cash received in a creation order remain uninvested for a day, thus hampering the ETFs ability to achieve its investment objective (and increasing index tracking error for index-based ETFs) for that day; (ii) even if the ETF is eventually made whole due to the authorized participant bearing the cost (via the variable transaction fees charged for creation orders) of "slippage" in the market price of the portfolio securities during the day between when the creation order is placed and when the ETF can acquire the portfolio securities, the ETF's trading spreads will likely be higher during that day due to market makers attempting to protect themselves against the costs of such slippage; and (iii) authorized participants would need to hedge their exposures for longer than usual due to the delay between when the creation order is placed and when the ETF acquires the portfolio securities, which also could result in wider spreads during that day due to the additional risk incurred by the authorized participant.

We recognize that, during the very limited T-1 order period, the authorized participants would be placing orders without full transparency into the ETF's portfolio or basket for the day in which the order will apply. However, for the reasons noted above, the ability of an authorized participant to place trades during the period the local market is open results in a better, more efficient trading market than could be achieved by insisting upon full transparency at all times and eliminating the ability of authorized participants to execute trades in the local market.

In view of the foregoing, we therefore request that Rule 6c-11 be amended to clarify that T-1 orders are permitted.

B. Rule 6c-11 Should be Clarified to Ensure ETF Sponsors Have Certain Additional Flexibilities With Respect to Their Use of Custom Baskets

With respect to custom baskets, we encourage the Commission to build in certain additional flexibilities for the use of such baskets in Rule 6c-11. First, we believe that the definition of "custom basket" is too broad, particularly with respect to the statement in the Proposing Release that "if an ETF substitutes cash in lieu of a portion of basket assets for a single authorized

participant, that basket would be a custom basket."[5] We recommend that the Commission clarify in Rule 6c-11 that cash in lieu substitutions effected by an authorized participant at the behest of an ETF, or at the behest of an authorized participant that the ETF determines are in the best interests of the ETF and its shareholders, are not required to be subject to the ETF's custom basket policies and procedures as outlined in proposed Rule 6c-11. This clarification would be appropriate, as such cash in lieu substitutions do not give rise to the conflicts of interest with respect to the use of custom baskets that are contemplated in the Proposing Release. We acknowledge the Commission's concerns that "an authorized participant holding less liquid or less desirable securities potentially could pressure an ETF into accepting those securities in its basket in exchange for liquid ETF shares (i.e., dumping). An authorized participant also could pressure the ETF into including in its basket certain desirable securities in exchange for ETF shares tendered for redemption (i.e., cherry-picking). In either case, the ETF's other investors would be disadvantaged and would be left holding shares of an ETF with a less liquid or less desirable portfolio of securities."[6] However, even if those concerns represent realistic scenarios in practice (which we do not believe to be the case), they presume that, in either case, the ETF is being induced to transact in securities that are more or less desirable; cash substitutions do not carry the same potential for disadvantaging the ETF.[7]

We also note that the Commission stated in the Proposing Release that "[a]n ETF may want to consider whether employees outside of portfolio management should review the components of custom baskets before approving a creation or redemption."[8] We believe that custom baskets should be treated like other portfolio transactions, wherein portfolio managers typically are required to attest that portfolio trades are being effected in compliance with the ETF's applicable regulatory requirements and afterwards, compliance personnel determine in the course of their compliance review whether those trades did in fact comply with applicable requirements (and whether proper processes were followed). Pre-trade review by non-investment personnel is not generally required by rule or regulatory guidance. Requiring non-investment personnel (whether or not such personnel are based in compliance) to review the components of custom baskets before approving a creation or redemption would add extra steps to the use of custom baskets and detract from the flexibility that led the Commission to propose allowing their use, thus adding

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5 Proposing Release at 37356.

6 Proposing Release at 37355-56.

7 Any execution costs incurred by the ETF in connection with a cash substitution may be covered by the creation or redemption transaction fee, thus putting the ETF in a substantively equivalent position to if the substituted-for security had been exchanged in-kind.

8 Proposing Release at 37357.

extra cost without corresponding benefit. It would also hamper the ETF's ability to effect creations and redemptions in a timely fashion, which in turn could reduce the effectiveness of the arbitrage process.

Finally, we endorse an approach that affords ETF sponsors flexibility in their processes governing the use of custom baskets. We understand that certain ETF sponsors may use quantitative screens to determine when to use a custom basket, while others may use multiple pre-trade portfolio manager approvals based on individual order circumstances. We believe either approach, or other combinations or alternatives thereof, should be acceptable as long as they are consistent with the best interests of the ETF and its shareholders. Accordingly, we do not believe further guidance regarding the content of custom basket policies and procedures, beyond the principles-based approach already set forth in the Proposing Release, is necessary or appropriate.

C. Certain Prospectus and Website Disclosure Requirements in the Proposing Release are Not Appropriate or Necessary

The proposed amendments to Form N-1A include several significant changes to Item 3, including a series of six Questions and Answers that would be added below the fee and expense table. The proposed amendments to Form N-1A include instructions regarding calculation of the median bid-ask spread, mid-range spread cost, and high-end spread cost. We endorse the Commission's goals of providing ETF investors with more information regarding ETF transaction costs.

However, we have concerns regarding the requirements for an ETF to (i) calculate and disclose in its prospectus its median bid-ask spread over the most recently completed fiscal year, and (ii) reflect the impact on returns of a hypothetical $10,000 investment based on data from the ETF's prior fiscal year.

First, there is no uniform standard methodology for calculating bid-ask spreads. As a result, ETF sponsors are likely to differ in the methodology they use, thereby limiting the utility of the data for purposes of comparisons among ETFs offered by different complexes.

Second, bid-ask spreads are affected by a variety of factors, such as liquidity, trading volume and the size of the ETF, which can change dramatically throughout the trading day and over time. Therefore, any bid-ask spread data which looks back any length of time is stale and potentially misleading. This is particularly problematic to the extent the bid-ask spread data is required to be included in the prospectus and therefore subject to potential liability for material misstatements or omissions in the prospectus. For example, to the extent an investor's bid-ask costs differ materially from the bid-ask spread in the prospectus, an ETF could be exposed to the risk of litigation based on factors beyond its control.

In view of the foregoing, we suggest that the Commission focus on enhanced narrative disclosures in the prospectus regarding transaction costs associated with purchasing and selling ETF shares in the secondary market, including the bid-ask spread. Should the Commission nevertheless require disclosure of bid-ask spreads specific to each ETF, the requirement should be limited to the ETF's website and not extended to the prospectus. The inclusion of bid-ask spread information on an ETF's website would make it easier for the ETF to update the information and provide more accurate bid-ask calculations to investors, without raising the possibility of unnecessary prospectus liability.

We also encourage the Commission to remove the requirement that an ETF publish its basket on its website from Rule 6c-11. The current practice for ETFs is to send a file containing its basket components to the National Securities Clearing Corporation ("***NSCC***") each business day. Because authorized participants, market makers and other liquidity providers are members of the NSCC and thus have access to the basket data, they do not need the separate website disclosure of the basket. Further, it is unlikely that the publication of an ETF's basket on the ETF's website will be of relevance to secondary market investors, who cannot place creation or redemption orders. Moreover, there is a concern that investors will mistake the basket for the ETF's portfolio holdings, which are also disclosed on the ETF's website. Accordingly, we believe that the disclosure of an ETF's basket on its website is not necessary or appropriate.[9]

II. PROPOSED RULE 6c-11 AND UNIFORMITY

A. Fund Of Funds Relief Would Be Consistent with the SEC's Goal to Obviate the Need for Routine Exemptive Relief

Neither Rule 6c-11 nor the Proposing Release includes a proposed rule to permit an investment company to invest in another investment company beyond the limits of Section 12(d)(1) of the 1940 Act, subject to certain conditions (the "***fund of funds relief***"). We note that it is a near-universal feature of standard ETF exemptive relief to include fund of funds relief, and the 2008 Proposal would have included such relief in proposed rule 12d1-4.

We recognize that the Commission's spring 2018 regulatory agenda[10] indicates that the SEC's Division of Investment Management is considering recommending the Commission propose a rule and rule amendments permitting funds of funds arrangements, including those involving ETFs, without the need to obtain exemptive relief. We urge the Commission to propose and adopt such a rule. However, we recognize that it may take significant time for such a rule to be adopted.

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9 *See* Comment Letter of the Investment Company Institute (Sep. 21, 2018).

10 Regulatory Flexibility Agenda, SEC Rel. No. IC-33045 (Mar. 14, 2018).

Therefore we recommend that, for an interim period until such rule is adopted, new ETFs be permitted to rely on the terms and conditions of fund of funds relief previously granted to existing ETFs (the "***interim fund of funds relief***"). Interim fund of funds relief could be accomplished either by including such relief in Rule 6c-11 or by a no-action letter issued by the Staff. Otherwise, if Rule 6c-11 is adopted as proposed and if funds of funds relief is not available to new ETFs at the time Rule 6c-11 becomes effective, existing ETFs would be permitted to rely on funds of funds relief granted in their exemptive orders[11] but new entrants that otherwise could rely on Rule 6c-11 to begin operating as ETFs would still need to go through the exemptive relief process in order to operate in the same manner as existing ETFs with respect to their ability to utilize funds of funds relief. In effect, failure to enact fund of funds relief (whether of new or interim variety) concurrently with the effectiveness of Rule 6c-11 would frustrate the Commission's purpose of facilitating entry by new ETFs into the market by obviating the need for routine exemptive relief and implementing uniform requirements for all ETFs.

In addition, we encourage the Commission to permit funds relying on Sections 3(c)(1) and 3(c)(7) under the 1940 Act to be acquiring funds under any future fund of funds relief. We note that proposed rule 12d1-4 in the 2008 Proposal may have extended this flexibility, as the proposed text would have defined an "acquiring fund" as an "investment company" without the word "registered" preceding that term. We believe that, assuming fund of funds relief contains conditions similar to those included in current fund of funds relief and/or proposed rule 12d1-4 from the 2008 Proposal, those conditions should provide sufficient investor protections regarding the concerns raised by the Commission in amending Section 12(d)(1)[12] with respect to investments made by funds relying on Sections 3(c)(1) or 3(c)(7). We also note that permitting funds relying on Sections 3(c)(1) and 3(c)(7) to be acquiring funds would increase the level of investments by private funds in the ETF marketplace and thus create additional liquidity in the ETF marketplace.

B. The Commission Should Create Uniformity For Existing Relief Under the Securities Exchange Act Of 1934

The structure of ETFs implicates certain provisions of the Securities Exchange Act of 1934, as amended (the "***Exchange Act***"). However, the ETF structure – in which ETFs simultaneously issue new shares on a continuous basis while the ETF's shares trade on an exchange – is not specifically contemplated by the Exchange Act. Accordingly, ETFs generally seek relief from certain

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11 Please note that the Proposing Release explicitly contemplates that existing funds of funds relief would not be rescinded following the adoption of Rule 6c-11 unlike other ETF exemptive relief that would be rescinded. *See* Proposing Release at 37368.

12 *See* Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth, H.R Rep. No. 2337, 89th Cong., 2d Sess., 311-324 (1966).

Exchange Act sections and rules, described below. This relief has evolved piecemeal and has largely been provided in a series of "class" letters and other Commission releases[13] (collectively, "***Exchange Act Relief***"), meaning the letters can be relied on by ETFs meeting the requirements set forth therein without the need for separate relief. ETFs that do not meet the requirements of the applicable class letters or guidance may apply for separate relief.

The Exchange Act Relief provides an exception from Section 11(d)(1) of the Exchange Act and Rules 11d1-2, 10b-10, 15c1-5, 15c1-6, 10b-17 and 14e-5 thereunder, as well as Rules 101 and 102 of Regulation M:

- The relief from Section 11(d)(1) permits broker-dealers, including broker-dealers that are also authorized participants, to extend credit with respect to ETF shares, subject to certain conditions.

- The relief from Rule 11d1-2 allows broker-dealers to treat ETF shares as "securities issued by a registered open-end investment company or unit investment trust as defined in the [1940 Act]," thereby providing an exemption from Section 11(d)(1) to permit extension of credit on shares of the ETFs, even if they have not been held for more than 30 days.

- The relief from Rule 10b-10 permits broker-dealers to omit specific information about an ETF's component securities from confirmations relating to ETF trades.

- The relief from Rules 15c1-5 and 15c1-6 allows broker-dealers to effect transactions in ETF shares without disclosing a control relationship with an issuer of an ETF's component securities or its participation or interest in a distribution of a component security.

- Rules 101 and 102 of Regulation M are anti-manipulation provisions that generally prohibit distribution participants and affiliated purchasers from purchasing ETF shares during the "restricted period," which is ongoing for an ETF in light of its continuous distribution. The relief from Regulation M permits treatment of ETF shares as "redeemable securities issued

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13 *See, e.g.,* Securities Industry Association (pub. avail. Nov. 21, 2005) ("***SIA Letter***"); Class Relief for Exchange Traded Index Funds (pub. avail. Oct. 24, 2006) (providing class relief for equity index-based ETFs) ("***Equity Class Letter***"); Class Relief for Fixed Income Exchange-Traded Funds (pub. avail. Apr. 9, 2007) (providing class relief for fixed-income index-based ETFs) ("***Fixed Income Class Letter***"); Frequently Asked Questions About Regulation M (last revised Sep. 10, 2010) (providing Regulation M relief for actively managed ETFs) ("***Regulation M FAQ***"); WisdomTree Trust (pub. avail. May 9, 2008); PIMCO ETF Trust, SEC Rel. No. 34-67215 (Jun. 19, 2012) ("***PIMCO Order").***

by an open-end management investment company or a unit investment trust," and therefore as "excepted securities" for purposes of Rules 101 and 102.

- Given that ETFs are unable to predict the amount of a dividend 10 days in advance, the Exchange Act Relief provides relief from Rule 10b-17 with respect to certain notice requirements regarding dividend amounts. The relief from 10b-17 permits ETFs to rely on Rule 10b-17's exception for "redeemable securities issued by open-end investment companies and unit investment trusts registered with the Commission under the [1940 Act]."

- Finally, relief from Rule 14e-5 permits "covered persons" with respect to a tender offer involving an ETF's component securities to engage in secondary market transactions in the ETF's shares and redeem ETF shares in creation unit aggregations during the existence of such tender offer.

Relief with respect to these provisions is subject to various conditions, including conditions relating to creation unit size; number of component securities and/or issuers held by the ETF; maximum percentage weighting of holdings; and intraday indicative value ("***IIV***") disclosure. Importantly, these conditions differ based on the letter or series of letters or guidance on which the ETF relies, which depends on whether the ETF is index-based or actively managed, as well as on its investments. Given these inconsistencies across the class letters and guidance that make up the Exchange Act Relief, we believe that the Commission should rationalize the relief from the Exchange Act sections and rules described above and conform such relief to the requirements of proposed Rule 6c-11 to the maximum extent possible.

Proposed Rule 6c-11 would eliminate inconsistencies between Rule 6c-11 and Exchange Act Relief in part through its treatment of shares of ETFs relying on proposed Rule 6c-11 as "redeemable securities." Based on such classification, these ETFs would become eligible for: (i) the Rule 11d1-2 exemption for "securities issued by a registered open-end investment company;" and (ii) the exceptions provided in Rules 101 and 102 of Regulation M[14] and Rule 10b-17 for "redeemable securities" issued by open-end funds. Proposed Rule 6c-11, however, does not address the relief from Section 11(d)(1) of the Exchange Act and Rules 10b-10, 15c1-5, 15c1-6 and 14e-5 thereunder.

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[14] Currently, index-based ETFs rely on the Equity Class Letter or the Fixed Income Class Letter for relief from Rules 101 and 102 of Regulation M, while actively managed ETFs rely on the Regulation M FAQ for the same relief.

To the extent Section 11(d)(1) of the Exchange Act and Rules 10b-10, 15c1-5, 15c1-6 and 14e-5 thereunder are not addressed by the Commission, ETFs would continue to be required to comply with certain conditions to rely on existing Exchange Act Relief with respect to these provisions:

- For relief from Section 11(d)(1), ETFs would need to continue to rely on the SIA Letter, which extends relief from these rules to "Qualifying ETFs."[15]
    - In order for an ETF to be a Qualifying ETF, it must meet the following conditions, in relevant part:
        - The ETF shares are issued by an open-end investment company or unit investment trust registered with the Commission under the 1940 Act;
        - The ETF shares are listed and trade on a market that has obtained approval from the Commission pursuant to Section 19(b) of the Exchange Act of a rule change regarding the listing and trading of the ETF shares on the market (or that is relying on Rule 19b-4(e) thereunder to list and trade the ETF shares); and
        - The ETF consists of a basket of twenty or more component securities, with no one component security constituting more than 25% of the total value of the ETF,[16] and (for an index-based ETF) is managed to track a particular index all of the components of which are publicly available.
- For relief from Rule 10b-10, 15c1-5 and 15c1-6, an ETF would also be required to be a Qualifying ETF as defined in the SIA Letter, and as described above.
- For relief from Rule 14e-5, an equity index-based ETF[17] would need to rely on the Equity Class Letter, which contains the following relevant conditions:

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15 Section 11(d)(1) relief would continue to be subject to the condition that the selling broker-dealer not receive from the ETF (or an affiliated person of the ETF) any payment, compensation or other economic incentive to promote the sale of the ETF.

16 A fixed income index-based ETF may instead need to meet the various requirements of the Fixed Income Class Letter including a creation unit size requirement that mirrors the Equity Class Letter (discussed below). *See* Ameristock Fixed-Income ETF Trust (pub. avail. June 29, 2007).

17 Rule 14e-5 is not applicable to fixed-income ETFs.

- The ETF consists of a basket of twenty or more component securities, with no one component security constituting more than 25% of the total value of the ETF;

- At least 70% of the ETF must be comprised of component securities that meet the minimum public float and minimum average daily trading volume thresholds under the "actively-traded securities" definition in Regulation M for excepted securities during each of the previous two months of trading prior to formation of the relevant ETF; provided, however, that if the ETF has 200 or more component securities, then 50% of the component securities must meet the actively-traded securities thresholds;

- ETF shares are to be issued and redeemed in creation unit aggregations of 50,000 shares or such other amount where the value of a creation unit is at least $1 million at the time of issuance; and

- The ETF must be managed to track a particular index all of the components of which have publicly available last sale trade information. The IIV of the ETF per share and the value of the "benchmark" index must be publicly disseminated by a major market data vendor throughout the trading day.

- Actively managed ETFs have not been issued class relief from Rule 14e-5, and must individually request relief from the Staff. In recent letters[18] where the Staff has granted relief from Rule 14e-5 to actively managed ETFs, such ETFs have been subject to the following conditions:

  - No purchases of subject securities or related securities made by broker-dealers acting as dealer-managers of a tender offer would be effected for the purpose of facilitating a tender offer;

  - Any purchases of a portfolio security by a dealer-manager during a tender offer will be effected as adjustments to a basket of securities in the ordinary course of business as a result of a change in the composition of an ETF's portfolio; and

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18 *See, e.g.,* Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Jack P. Drogin, Esq. (pub. avail. Feb. 6, 2018). *See also* Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Suzanne M. Russell, Esq. (pub. avail. Aug. 23, 2017); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Suzanne M. Russell, Esq. (pub. avail. Apr. 11, 2017).

- Except for the relief specifically granted in such no-action letters, any broker-dealer acting as a dealer-manager of a tender offer will comply with Exchange Act Rule 14e-5.

- Proposed Rule 6c-11 does not impose many of these conditions on ETFs, and to require ETFs relying on the Exchange Act Relief to continue to comply with these conditions would limit the flexibility otherwise afforded by proposed Rule 6c-11 and compromise the Commission's stated goal of uniformity among requirements applicable to ETFs.

We believe there are bases for the Commission to act with respect to Section 11(d)(1) of the Exchange Act and Rules 10b-10, 15c1-5, 15c1-6 and 14e-5 thereunder to further rationalize the Exchange Act Relief with the provisions of proposed Rule 6c-11:

- The Commission could grant an exemption from Section 11(d)(1) in accordance with that granted in the SIA Letter by defining ETFs issued under proposed Rule 6c-11 as "Qualifying ETFs."

  - We recognize that the existing relief from Section 11(d)(1) applies to "Qualifying ETFs," the existing definition of which is in the SIA Letter and in part requires the ETF to consist of a basket of twenty or more component securities, with no such security constituting more than 25% of the total value of the ETF. We urge the Commission to reconsider the need for these concentration and diversification requirements, which are not imposed under Rule 6c-11. We note that Section 11(d)(1) was intended to address conflicts of interest in circumstances in which a person acts as both a broker and a dealer and was designed to protect investors "by assuring that [a broker-dealer] will not induce his customers to buy on credit securities which he has undertaken to distribute to the public."[19] We believe that it would be impractical and inefficient for a broker-dealer to utilize an ETF as a mechanism for distribution of a particular security, and therefore a minimum basket size of twenty securities is not necessary to address the concerns underlying Section 11(d)(1). Moreover, the need for almost all ETFs to comply with diversification requirements under Subchapter M of the Internal Revenue Code of

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[19] H.R. Rep. No. 1383, 73rd Cong., 22d Sess. at 22 (1934). *See also, e.g.,* Letter from Georgia Bullitt, et al., on behalf of SIA Derivative Products Committee, to Catherine McGuire (pub. avail. Aug. 26, 2005) (incoming no-action request letter); Letter from George T. Simon, on behalf of Bear Stearns Active ETF Trust, to Paula Jenson & Josephine Tao (pub. avail. Mar. 14, 2008) (incoming no-action request letter).

1986, as amended, and the 1940 Act (if the ETF intends to operate in a diversified manner) imposes a practical limit on the concentration of an ETF's portfolio.

- With respect to Rules 10b-10, 15c1-5 and 15c1-6 under the Exchange Act, we believe that the rationales used for providing Exchange Act Relief for these provisions is equally applicable to ETFs issued under proposed Rule 6c-11.
    - Specifically, the rationale for granting the exemption for Rule 10b-10 in the SIA Letter was that such exemption is in the "public interest and consistent with the protection of investors" because of "the institutional nature of the market for ETF shares in Creation Unit ... size aggregations and the public availability of information regarding the identity of the securities to be tendered or received by customers for purposes of ETF share issuance and redemption transactions."
    - The Commission granted the relief for Rules 15c1-5 and 15c1-6 in the SIA Letter "[p]rimarily because of the composite nature of ETF shares and the relatively small proportionate share of any Component Security in an ETF share."
        - For the same reasons noted above with respect to the relief from Section 11(d)(1), we believe that ETFs are an impractical and inefficient means for accumulating substantial positions in one or more of an ETF's underlying securities in a magnitude that would trigger the disclosure requirements of these rules if those securities were held directly.
    - Proposed Rule 6c-11 does not alter the structure of ETFs or the ETF market in a way that would make these rationales inapplicable to ETFs issued under proposed Rule 6c-11.
- Finally, the existing exemption from Rule 14e-5 under the Exchange Act for equity index-based ETFs was based on the rationale that purchases or redemptions of ETF shares "do not appear to result in the abuses at which Rule 14e-5 is directed."[20] Similar to Rules 10b-10, 15c1-5 and 15c1-6, we believe that same rationale would apply to ETF shares issued pursuant to proposed Rule 6c-11. We also note that, absent action by the Staff, equity index-based ETFs will continue to be required to comply with the conditions of the Equity Class Letter cited above, which appear to be more aimed at Regulation M concerns rather than those specific to Rule 14e-5. Therefore we believe that the Commission should issue

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20 *See* Equity Class Letter.

an exemption covering such ETF shares. We note that there is precedent for the Commission issuing an exemption, rather than a no-action letter, that is applicable to a class of ETFs rather than only an individual ETF.[21] In addition, Rule 14e-5 explicitly grants the Commission the right to grant an exemption on a class basis.[22]

C. Exchange Listing Standards and the 19b-4 Process Should Be Applied in a Consistent Manner

We recognize that proposed Rule 6c-11 does not address exchange listing standards and we acknowledge and appreciate the Staff's efforts in working with the exchanges to adopt generic listing standards for actively managed ETFs in 2016.[23] Nevertheless, we note that the current listing standards impose certain requirements which the Commission chose not to impose as conditions for relying on proposed Rule 6c-11, such as a minimum creation unit size and IIV disclosure. We encourage the Commission to permit or require the exchanges to amend the generic listing standards so as to create consistency with proposed Rule 6c-11 to the extent feasible and thus avoid undermining the Commission's intent for proposed Rule 6c-11 to implement uniform requirements for ETFs.

In addition, we note that the current system requires an ETF not meeting the generic listing standards to apply for a proposed rule change with individualized requirements under Exchange Act Rule 19b-4 ("***19b-4 process***"). As part of the 19b-4 process, restrictions and limitations on specific investments may be imposed by the Division of Trading and Markets. The guidelines utilized by the Division of Trading and Markets in making these determinations are opaque and may vary over time.[24] As a result, ETFs pursuing the same or similar investment strategies may be

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21 *See* PIMCO Order; *see also* First Trust Dorsey Wright DALI 1 ETF, SEC Rel. No. 34-83216 (May 11, 2018) (providing class relief for index-based ETFs of ETFs).

22 Rule 14e-5(d) states that "Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms or conditions, to any transaction or class of transactions or any security or class of security, or any person or class of persons."

23 *See* SEC Rel. No. 34-78397 (Jul. 22, 2016) ("***NYSE Arca Order***"); SEC Rel. No. 34-78396 (Jul. 22, 2016) ("***Cboe BZX (formerly Bats BZX) Order***"); SEC Rel. No. 34-78918 (Sep. 23, 2016) ("***Nasdaq Order***").

24 *See* Henry C.T. Hu & John D. Morley, A Regulatory Framework for Exchange-Traded Funds, 91 S. Cal. L. Rev. (forthcoming 2018) (manuscript at 25-28) (draft of August 16, 2018) (available for download at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3137918).

subject to differing restrictions and limitations, dependent upon the date of the 19b-4 filing. This is contrary to one of the principal goals articulated by the Commission in proposing Rule 6c-11, which is to establish a uniform playing field among ETFs pursuing the same or similar strategies.[25] The evolving nature of the requirements also introduces uncertainty into the ETF product development process and can result in protracted negotiations and delays. We urge the Commission to seek ways for the Division of Investment Management and Division of Trading and Markets to work together to enhance transparency of the 19b-4 process and to ensure that all ETFs pursuing the same or similar strategies are treated equally.

D. All ETF Shares Should Be "Redeemable Securities"

We believe that shares of all ETFs, including those ETFs that could not rely on proposed Rule 6c-11, should be considered redeemable securities. We acknowledge the Commission's rationale[26] for excluding certain ETFs from the scope of proposed Rule 6c-11, but to the extent such shares are issued and traded in the same manner, they should not be treated differently. If shares of ETFs not relying on proposed Rule 6c-11 are considered redeemable securities, the ramifications for relief from the provisions of the Exchange Act described above would therefore apply to those ETF shares as well. We believe this is appropriate because of the substantive similarities between the shares of ETFs relying on proposed Rule 6c-11 and the shares of ETFs not relying on proposed Rule 6c-11.

III. ADDITIONAL ISSUES RELATING TO RELIEF GRANTED BY RULE 6c-11

A. A "Sunset Provision" Relating To The Relief From Section 22(e) Is Unnecessary

Under proposed Rule 6c-11, ETFs would be provided an exemption from Section 22(e) of the 1940 Act, whereby ETFs would be permitted to pay authorized participants redemption proceeds in more than seven days after the tender of ETF shares for redemption. The exemption set forth in proposed Rule 6c-11 would apply where local market holidays, a series of consecutive holidays and/or extended delivery cycles for transferring foreign investments to redeeming authorized participants prevent an ETF from delivering a foreign investment to an authorized participant within seven days.

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25 Proposing Release at 37333 ("[P]roposed rule 6c-11 would level the playing field for ETFs that are organized as open-end funds and pursue the same or similar investment strategies. The proposed rule also would assist the Commission with regulating ETFs, as funds covered by the rule would no longer be subject to the varying provisions of exemptive orders granted over time, and instead would be subject to a consistent regulatory framework.").

26 *See* Proposing Release at 37336-37.

This exemption would largely track the exemption included in current ETF exemptive relief, with two exceptions. First, as discussed in greater detail below, under proposed Rule 6c-11, the extension for delivery would be extended solely for the particular foreign investment and not to the entire basket.

Second, proposed Rule 6c-11 would also include a "sunset provision," whereby the exemption from Section 22(e) for postponement of delivering redemption proceeds would expire ten years from proposed Rule 6c-11's effective date. The Proposing Release cites technological advancements and "changes in market infrastructures" that will result in additional shortening of settlement cycles as the basis for the proposed sunset provision.[27] The Proposing Release requests comment on whether the proposed sunset provision should be included as part of Section 22(e) relief.

We disagree with the inclusion of a sunset provision in the relief from Section 22(e) provided by proposed Rule 6c-11. While it is true that technological advancements increase with time, we believe that inclusion of the sunset provision is too speculative; it is impossible to predict how settlement cycles will operate in ten years and the impact that any technological advancements will have on settlement cycles. Proposed Rule 6c-11 itself notes that any developments impacting settlement cycles "may be gradual."[28] With this in mind, we recommend that the Commission not limit the relief from Section 22(e) to a duration of ten years, but rather adopt a wait-and-see approach whereby, for example, the Commission can monitor developments as they occur over time and propose rescission of Section 22(e) relief if it becomes clear that settlement cycles have indeed shortened. We also note that if settlement cycles indeed become shorter during this ten-year period, the relief from Section 22(e) provided by proposed Rule 6c-11 will in practice be unnecessary if the shortened settlement cycles are less than seven days.

B. Exemptive Relief Permitting ETFs To Operate In A Master-Feeder Structure Should Not Be Rescinded

In the Proposing Release, the SEC states that, due to the lack of interest in master-feeder ETFs, as well as its concerns that ETFs transacting in kind will bear costs associated with cash transactions by other feeder funds, it is proposing to rescind the master-feeder relief granted to ETFs that do not rely on such relief as of June 28, 2018. The SEC further proposes to grandfather existing master-feeder arrangements involving ETF feeder funds, but prevent the formation of new ETF feeder funds.

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27 Proposing Release at 37346.

28 *Id.*

We believe that Rule 6c-11 should include master-feeder relief. We recognize that to the extent that an ETF feeder fund transacts in kind and a non-ETF feeder transacts in cash, the ETF feeder may bear some portion of the costs associated with cash transactions at the master fund level. We believe, however, that concerns in this regard are an issue for the ETF board to consider in evaluating whether the overall benefits of a master-feeder structure, such as potential economies of scale, outweigh these costs, and are not an appropriate basis for omitting relief from proposed Rule 6c-11. We note that it is not uncommon for one category of shareholders to benefit from transactions by another category of shareholders. For example, in structures where mutual funds pay a fixed per account transfer agency fee and each shareholder bears a pro rata share of the expenses of the fund, large shareholders are effectively subsidizing smaller shareholders.

We also note that the Commission has previously granted exemptive relief for master-feeder structures, and therefore has effectively concluded that the structure is consistent with the protection of investors and the purposes of the 1940 Act. The mere fact that the master-feeder structure has not been utilized to date should not serve as a basis for omitting the relief from Rule 6c-11. The ETF industry is dynamic, and it may well be that existing or future sponsors change their view as to the utility of the structure.

C. Affiliated Broker-Dealers Of An ETF's Adviser Should Be Allowed To Transact In Kind With The ETF

Proposed Rule 6c-11 would exempt ETFs from Sections 17(a)(1) and (2) of the 1940 Act and would permit ETFs to engage in in-kind transactions with persons who are first- or second-tier affiliates of an ETF solely by reason of holding with the power to vote 5% or more of (i) the ETF's shares; or (ii) any investment company that is an affiliated person of the ETF ("***5% Affiliates***"). The Commission requests comment regarding whether the relief from Sections 17(a)(1) and (2) should be extended to parties that are affiliated persons of an ETF for other reasons, such as broker-dealers who are affiliated with the ETF's investment adviser ("***Adviser Affiliates***").

We recommend that relief from Sections 17(a)(1) and (2) be expanded to encompass broker-dealers that are Adviser Affiliates. As the Proposing Release notes, in response to the 2008 Proposal, several commenters requested that relief from Sections 17(a)(1) and (2) relating to 5% Affiliates be extended to cover broker-dealers who are Adviser Affiliates.[29] These commenters recognized the Commission's concerns regarding an affiliated broker-dealer attempting to influence the ETF's selection of securities for its portfolio or creation/redemption baskets, but argued that any attempt to do so would violate the federal securities laws and applicable regulations prohibiting

[29] *See* Comment Letter of the Investment Company Institute (May 19, 2008).

manipulative practices.[30] Commenters further emphasized that an ETF and its shareholders would benefit from permitting affiliated broker-dealers to transact in kind with an ETF because it would increase the number of authorized participants able to create or redeem shares, and as a result, improve the arbitrage mechanism central to the success and operation of ETFs.[31] While the Proposing Release acknowledges the potential benefits of permitting affiliated broker-dealers to transact in-kind with the ETF, the Commission nonetheless does not believe it is appropriate to expand the scope of affiliated persons to include Adviser Affiliates at the same time that it is proposing additional flexibility for custom baskets.

While we acknowledge the Commission's concerns with respect to the potential for abusive practices that may arise when an ETF exchanges a custom basket with an affiliate, we strongly urge the Commission to expand the relief from Sections 17(a)(1) and (2) to include broker-dealers that are Adviser Affiliates. We believe that the concerns set forth by the Commission could be addressed by requiring custom basket procedures to include heightened scrutiny and oversight when an Adviser Affiliate is involved in the transaction.

D. The Two Percent Cap On ETF Redemption Transaction Fees Should Be Eliminated

We believe that elimination of the two percent cap on ETF redemption transaction fees would be desirable and consistent with the policies and purposes underlying Rule 22c-2, the rule from which the currently applicable cap is drawn. The purpose of Rule 22c-2 is to reimburse mutual funds for the costs of short-term trading and to discourage short-term trading of fund shares by reducing the profitability of the trades.[32] The two percent limit is "designed to strike a balance between two competing goals of the Commission – preserving the redeemability of mutual fund shares while reducing or eliminating the ability of shareholders who rapidly trade their shares to profit at the expense of their fellow shareholders."[33]

It is clear that Rule 22c-2 did not contemplate the unique structure of ETFs and the role of transaction fees in protecting ETF shareholders. To offset certain costs incurred when authorized participants purchase or redeem creation units, including processing and/or brokerage costs, ETFs

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30 *Id.*

31 *Id.*

32 *See* Mutual Fund Redemption Fees, SEC Rel. No. IC-26782, 70 Fed. Reg. 13328 (Mar. 18, 2005).

33 *Id.* at 13331.

typically impose fees on the authorized participant for each transaction. Such fees typically include a fixed dollar amount for in-kind transactions (normally payable to the ETF's custodian), and a variable percentage amount of cash transactions (payable to the ETF). These transaction fees, which are borne by authorized participants, are primarily designed to cover costs associated with cash creations and redemptions, rather than in-kind transactions, particularly when portfolio securities must be purchased or sold.[34] In contrast to the redemption fees which are the focus of Rule 22c-2, the redemption fees charged by an ETF are not intended to inhibit frequent trading. To the contrary, an ETF encourages short-term and frequent trading of its shares, including through redemptions of creation units by authorized participants, in order to permit an arbitrage mechanism that will keep the secondary market trading price of the ETF's shares at or close to their NAV. An ETF has an incentive to ensure that the transaction fees that it charges are not regarded by authorized participants as excessive, otherwise it risks hindering redemptions and disrupting the arbitrage process.

In adopting Rule 22c-2, the SEC expressed concern that a fee higher than two percent "could harm ordinary shareholders."[35] The transaction fees charged by ETFs are designed to protect shareholders against the costs of cash redemptions, when cash redemptions are necessary or appropriate in the best interests of the ETF and its shareholders, and to put the ETF essentially in the same economic position as it would have been in had redemptions been effected in kind. Certain ETFs which effect redemptions in cash may incur varying levels of shareholder dilution from redemptions, especially in markets that are experiencing substantial volatility. To the extent an ETF is unable to pass through the incremental costs of a cash redemption to an authorized participant by virtue of a two percent cap, the performance of the ETF could be adversely impacted and the interests of the ETF's remaining shareholders may potentially be diluted. This result would be inconsistent with the underlying purpose of Rule 22c-2, which is to prevent the dilution of shareholder value.

In view of the foregoing, we believe the Commission should eliminate the two percent cap on redemption transaction fees for ETFs.[36]

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34 *See* Comment Letter of the Investment Company Institute (Jan. 13, 2016).

35 *See* Mutual Fund Redemption Fees at 13331.

36 The Commission could impose certain safeguards to ensure that ETF transaction fees would not be set inappropriately high, such as by requiring the fee level to be determined with reference to specific factors and/or by requiring approval of the fee level by the ETF board, which has an obligation to act in the best interests of the ETF and its shareholders.

E. The Commission Should Consider Moving To a More Uniform, Standardized Approach in Determining Whether to Grant Exemptive Relief For Non-Fully Transparent ETFs

The Commission has not yet granted exemptive relief for any non-fully transparent actively managed ETF ("***non-fully transparent ETFs***"), so it is too soon to consider including non-fully transparent relief within the scope of Rule 6c-11. However, as discussed below, we do believe that the time is right for the Commission to consider moving to a more uniform, standardized approach in determining whether to grant exemptive relief for non-fully transparent ETFs.

In evaluating applications for exemptive relief for non-fully transparent ETFs, the Commission has focused on whether the applicant has proposed an effective substitute for portfolio transparency to keep market prices of ETF shares at or close to NAV. As a result, applicants for non-fully transparent ETF relief have the burden of proving to the Commission that the nature and scope of the information the applicant intends to disseminate to the marketplace (the "***Methodology***") will be an effective substitute for portfolio transparency without any actual trading experience under the Methodology to point to. The Commission must in turn evaluate, on a case by case basis, the Methodology proposed by an applicant and make difficult subjective judgments as to the efficacy of that Methodology without any actual trading data to analyze. At best the Commission may be provided backtested hypothetical data.

The Commission's current approach has had the unfortunate effect of transforming the Commission into a merit regulator of the ETF market and stifling the launch of new and innovative products and limiting the investing public's access to a wide variety of active trading strategies in an ETF structure. As discussed below, we suggest that it would now be appropriate for the Commission to consider a different approach for non-fully transparent relief, one rooted largely in enhanced disclosures intended to insure that investors understand the key distinctions between non-fully transparent and transparent ETFs and the manner in which they can be expected to trade in the marketplace. A disclosure oriented approach would take the Commission out of the awkward and time consuming role of arbiter of the merits of specific investment products and allow the marketplace, rather than a regulator's judgment, to determine how well a non-fully transparent ETF product has been designed.

We recognize that in order to grant exemptive relief under Section 6(c) of the 1940 Act, the Commission must find that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the 1940 Act. Each of these elements is evaluated below in the context of our proposed alternative to the current approach.

1. Exemptive Relief Must Be Necessary or Appropriate in the Public Interest. The market for fully transparent actively managed ETFs has been slow to develop, in large part due to the fact that

many active managers are reluctant to disclose their portfolios because of concerns that this will open up the possibility for others to replicate, and possibly undermine, the portfolios' trading strategy.

Because non-fully transparent ETFs do not raise these concerns, active managers are likely to be more receptive to making available in the non-fully transparent ETF structure their active trading strategies. As a result, to the extent that ETF sponsors are enabled to offer non-fully transparent ETFs to investors, the number of active strategies available to investors in the form of an ETF should increase. Investors would thereby benefit in the form of a greater variety of investment choices.

It is understandable that the Commission initially proceeded cautiously with respect to actively managed ETFs and required full portfolio transparency as a condition of exemptive relief. This approach has afforded the Commission the opportunity to evaluate how actively managed ETFs trade in the marketplace and whether any opportunities for abuse exist or the products otherwise raise regulatory concerns. We now have had ten years of trading experience since the first actively managed ETFs began operations,[37] and no material regulatory concerns unique to actively managed ETFs have arisen.[38] In addition, the ETF market has grown substantially, and ETFs are now more widely understood by investors. Given the maturation of the ETF market, it seems that progression to the next stage of development, that is, non-fully transparent ETFs, can be facilitated without concerns about disruption of the current ETF market.

2. Exemptive Relief Must Be Consistent with the Protection of Investors. Sponsors of non-fully transparent ETFs have an economic incentive to ensure that their Methodology provides sufficient information to the marketplace to facilitate an effective and efficient trading market for their product, since any non-fully transparent ETF that trades at wide discounts and premiums and/or bid-ask spreads will likely not succeed. As a result, sponsors can be expected to carefully vet with authorized participants and market makers their proposed Methodology to ensure that authorized participants and market makers believe the Methodology will support an effective arbitrage process.

The Commission's principal investor protection concern appears to be that, despite the best efforts of sponsors, the arbitrage process could break down and a product could trade at wide discounts

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37 PowerShares Actively Managed Exchange-Traded Fund Trust, SEC Rel. No. IC-28171 (Feb. 27, 2008).

38 The Commission states in the Proposing Release that it "has observed how actively managed ETFs operate during this time, and has not identified any operational issues that suggest additional conditions for actively managed ETFs are warranted." Proposing Release at 37338.

and premiums and/or bid-ask spreads. It would seem, however, that these concerns can be readily addressed through disclosure requirements designed to insure that investors understand the nature of the product they are purchasing and selling and the risks related thereto. The risks of non-fully transparent ETFs are related to the manner in which they may trade in the marketplace. Risks of this nature can be effectively addressed in clear, plain English risk disclosures readily understandable by retail investors.

For example, the ETF prospectus could be required, among other things, to clearly and prominently disclose (a) on the cover page that—(i) the ETF is a non-fully transparent ETF, (ii) non-fully transparent ETFs are likely to trade at higher premiums and discounts to NAV and wider bid-ask spreads than fully transparent ETFs, and (iii) as a result of higher premiums and discounts investors may pay significantly more or receive significantly less than the underlying value of the shares purchased or sold, and (b) in the summary—the key distinctions between transparent and non-fully transparent ETFs. The foregoing suggested disclosure requirements are by no means intended to be exhaustive. Different or additional requirements may be appropriate. Relief could also be conditioned upon additional board oversight requirements, such as a requirement for ongoing review of premiums and discounts and obligations to take certain action(s) if premiums or discounts exceed prescribed thresholds.[39]

3. Exemptive Relief Must Be Consistent with the Purposes Fairly Intended by the Policies and Provisions of the 1940 Act. There is no provision of the 1940 Act which requires the Commission to limit premiums or discounts, nor do we believe that the Commission is required to make findings with respect to the efficacy of a particular Methodology in order to determine that exemptive relief is consistent with the purposes fairly intended by the policies and provisions of the 1940 Act. While the Commission has in the past suggested that in order to grant exemptive relief under Section 22(d) of the 1940 Act, the Commission must find that there will be a close tie between NAV and market price, we believe that it would be reasonable for the Commission to conclude that all ETFs, including non-fully transparent ETFs, are structured in a manner consistent with Section 22(d), regardless of the level of premiums and discounts. The principal purpose of Section 22(d) is to prevent unjust discrimination among investors. While it is true that investors who purchase and sell ETF shares in the secondary market pay or receive a different price than authorized participants in the primary market who create and redeem at NAV (plus a transaction fee), the structure is intended to benefit purchasers and sellers in the secondary market in the form of lower premiums or discounts than would exist absent the ability of arbitrageurs and other market

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[39] *See, e.g.,* the proposed disclosure and board oversight requirements included in exemptive applications filed by (i) T. Rowe Price Associates, Inc., *et al.*, File No. 812-14214 (most recently amended June 18, 2018); (ii) Fidelity Beach Street Trust, *et al.*, File No. 812-14364 (most recently amended August 8, 2018); and (iii) Precidian ETFs Trust, *et al.*, File No. 812-14405 (most recently amended May 29, 2018).

participants to create and redeem shares at NAV. Therefore, regardless of how closely tied market prices are to NAV, there is no unjust discrimination among investors. Accordingly, in our view, an inquiry into the magnitude of premiums and discounts likely to result from a particular Methodology is not required in order to grant Section 6(c) relief for a non-fully transparent ETF.[40]

We recognize that an approach along the lines we suggest would represent a departure from the Commission's historical focus on the effectiveness of the ETF arbitrage process in determining whether to grant ETF exemptive relief. Nevertheless, for the reasons described above, we hope the Commission will at least be willing to consider the potential benefits of a new and different approach for this category of proposed products.

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We appreciate the opportunity to comment on the Proposing Release. Please feel free to contact Jeremy I. Senderowicz at [redacted], Stuart Strauss at [redacted], Allison M. Fumai at [redacted], Adam T. Teufel [redacted] or Stephanie A. Capistron at [redacted] with any questions about this submission.

Very truly yours,

Dechert LLP

Dechert LLP

cc: The Honorable Jay Clayton
The Honorable Kara M. Stein
The Honorable Robert J. Jackson Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman

Dalia Blass
Director, Division of Investment Management

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40 For a detailed legal analysis respecting these matters, please see Stuart M. Strauss, *Non-Transparent Actively Managed ETFs, Time for an Alternative Approach to Evaluating the Case for Exemptive Relief?*, The Investment Lawyer, Vol. 24, No. 9 (September 2017) .