



Cynthia Lo Bessette

Chief Legal Officer

Fidelity Management & Research Company

245 Summer Street V13E, Boston MA 02210

617.392.2211 cynthia.lo.bessette@fmr.com

December 17, 2019

Mr. Ted Yu, Chief
Mr. Perry Hindin, Special Counsel
Office of Mergers and Acquisitions
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Request for Exemptive Relief from Rule 14e-5 under the Securities Exchange Act of 1934

Dear Messrs. Yu and Hindin:

I am writing on behalf of Fidelity Covington Trust (the "Trust"). The Trust is a Massachusetts business trust registered as an open-end management investment company under the Investment Company Act of 1940, as amended (the "1940 Act"). The Trust requests exemptive relief from Rule 14e-5 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), on behalf of itself, its series, the Fidelity Opportunistic ETF, Fidelity Growth ETF, and Fidelity Value ETF (each a "Fund" and collectively the "Funds"),¹ and persons or entities engaging in transactions in shares of the Funds ("Shares"), including Authorized Participants (as defined below). The Funds will operate as exchange-traded funds ("ETFs"), in reliance on exemptive relief from the Securities and Exchange Commission ("Commission"), and each Fund's Shares will be listed on a national securities exchange, as defined in Section 2(a)(26) of the 1940 Act, such as NYSE Arca, Cboe BZX, or Nasdaq (an "Exchange").

Each Fund will continuously issue and redeem Shares in specified aggregations (each aggregation of Shares, a "Creation Unit").² Each Fund will issue and redeem Shares in Creation Units through a broker-dealer registered under the Exchange Act ("Distributor") acting on an agency basis and serving as the Funds' "principal underwriter" as defined in Section 2(a)(29) of the 1940 Act. As described below, consistent with other ETFs, transactions in Creation Units for the Fund will occur between the Trust and persons, referred to as "Authorized Participants," who create and redeem Shares in Creation Units pursuant

¹ The Funds' names and strategies are subject to change prior to launch. The Funds will otherwise operate in the manner described herein.

² Redeemability of Creation Units is attributable to the fact that the Trust is an open-end management investment company. The term "open-end company" is defined in Section 5(a)(1) of the 1940 Act as a management company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the 1940 Act defines a "redeemable security" as any security, other than short-term paper, under the terms of which the holder, 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. Creation Units are redeemable at net asset value ("NAV"). Shares, however, are not individually redeemable. The Trust, like certain other ETFs, will rely on exemptive relief obtained from the Commission permitting it, among other things, to register as an open-end management investment company notwithstanding that Shares are redeemable only in Creation Unit sizes. The relief addresses the possible question that arises as to whether the definitional requirements of a "redeemable security" or an "open-end company" under the 1940 Act have been met.

to contractual arrangements pertaining to the Trust and the Fund.³ Additionally, as indicated below, Authorized Participants may engage in secondary market transactions in Shares. The Funds described herein operate in a manner similar to other ETFs, except that the Funds will not disclose the identities and quantities of the securities and other assets held by a Fund that will form the basis for each Fund's calculation of NAV at the end of each Business Day (as defined below).⁴

Authorized Participants are typically broker-dealers and, as discussed below, may act as dealer-managers of tender offers. The Trust, on behalf of itself, the Funds and Authorized Participants that act as dealer-managers of tender offers, as applicable, requests that the Commission grant exemptive relief from Rule 14e-5 under the Exchange Act in connection with transactions that involve "subject securities" and "related securities" (as defined in Rule 14e-5(c)(6) and (7)) that are included in a "Creation Basket" or a "Redemption Basket," as described and discussed below. Without such relief, in situations where an Authorized Participant is also a dealer-manager of a tender offer, and therefore a "covered person," as defined in Rule 14e-5(c)(3)(ii), subject to the Rule, the Rule's restrictions could impede the ability of a Fund to operate as intended and as disclosed in publicly filed documents, which could be detrimental to investors.⁵

On September 25, 2019, the Commission issued an exemptive order granting relief substantially similar to that requested herein to ETFs (including actively managed ETFs) eligible to rely on Rule 6c-11 under 1940 Act ("6c-11 ETFs"),⁶ subject to certain conditions ("Order").⁷ Prior to the adoption of Rule

³ All orders to purchase Creation Units must be placed with the Distributor by or through an "Authorized Participant," which is a member or participant of a clearing agency registered with the Commission, which has a written agreement with the Fund or one of its service providers that allows the Authorized Participant to place orders for the purchase and redemption of Creation Units ("AP Agreement").

⁴ As described in greater detail below, the Funds will instead disclose other information that the Trust and the Adviser (as defined below) believe will be sufficient on its own to enable market participants' intraday arbitrage in Shares, including hedging their positions in Shares.

⁵ Consistent with the applicable precedent (see notes 8, 9, and 10, infra), the Trust is the party that is requesting relief from the Commission. Although there is no guarantee of future results, the Trust believes that the "in-kind" purchase and redemption features of ETFs help facilitate the close correspondence between an ETF's NAV and market price to the benefit of the ETF and its shareholders. The Trust and its series, the Funds, therefore have a strong interest in, and are beneficiaries of, the requested relief as it helps ensure that market participants are able to effect creations and redemptions, thereby permitting a Fund to operate as intended. The Trust further believes that the arbitrage activity described below is facilitated when more market participants are able to participate in the purchase and redemption of Creation Units. Additionally, the Trust is seeking relief on behalf of itself and the Funds in the event that the Trust and/or a Fund is deemed to be a "covered person" under Rule 14e-5(c)(3)(iv), as discussed in Part III below.

⁶ See Rule 6c-11 under the 1940 Act (effective December 23, 2019); Exchange-Traded Funds, SEC Rel. No. IC-33646 (September 25, 2019) (adopting Rule 6c-11) ("Rule 6c-11 Adopting Release").

⁷ See Order granting a conditional exemption from Exchange Act Section 11(d)(1) and Exchange Act Rules 10b-10, 15c1-5, 15c1-6, and 14e-5 for Certain Exchange-Traded Funds, SEC Rel. No. 34-87110 (September 25, 2019). For the relief under the Order to be available, an ETF must be relying on Rule 6c-11, which requires daily disclosure of portfolio holdings. In addition, the Rule 14e-5 relief specifically requires compliance with certain

6c-11 and issuance of the Order, the Commission had previously issued relief substantially similar to that requested herein to both index-based ETFs (providing class relief) and actively managed ETFs that satisfy certain conditions.⁸ In addition, the Commission has issued similar relief to actively managed ETFs that do not disclose their portfolio holdings daily,⁹ as well as to certain exchange-traded managed funds.¹⁰

This letter is divided into four parts. Part I describes the Funds; Part II describes Fund operations; Part III contains the legal analysis under Rule 14e-5; and Part IV sets forth the request for exemptive relief.

I. The Funds

The investment adviser to the Funds will be Fidelity Management & Research Company, FMR Co., Inc., or an entity controlling, controlled by, or under common control with Fidelity Management & Research Company or FMR Co., Inc. (Fidelity Management & Research Company, FMR Co., Inc., and each such other entity and any successor thereto included in the terms, “FMR” and the “Adviser”). The Trust intends to offer the following Funds that would be subject to the requested relief:¹¹

A. Fidelity Opportunistic ETF

The Fidelity Opportunistic ETF seeks long-term growth of capital. The Adviser normally invests the Fund’s assets primarily in equity securities. The Adviser may invest the Fund’s assets in securities of

conditions designed to ensure that parties relying on the relief do not engage in transactions for purposes of facilitating a tender offer. These conditions are described in greater detail in Part III.

⁸ See, e.g., Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Jack P. Drogin, Esq. regarding WisdomTree U.S. Quality Shareholder Yield Fund (February 6, 2018); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Suzanne M. Russell, Esq. regarding First Trust Exchange-Traded Fund III (August 23, 2017); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Suzanne M. Russell, Esq. regarding First Trust Exchange-Traded Fund VIII (April 11, 2017); and Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Suzanne M. Russell, Esq. regarding First Trust Exchange-Traded Fund III (September 6, 2016). Prior relief, like the Order, requires compliance with conditions designed to ensure that transactions are not effected for purposes of facilitating a tender offer.

⁹ See Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to W. John McGuire, Esq. regarding Precidian ETF Trust II (May 22, 2019) (“Precidian Relief”). The actively managed ETFs that are the subject of the Precidian Relief (the “Precidian ETFs”) use an alternative arbitrage mechanism based on a verified intraday indicative value (“VIIV”) calculated and disseminated every second throughout the trading day, together with the ability to create and redeem shares in exchange for a basket that is a pro rata slice of the ETF’s holdings through a confidential brokerage account (“Confidential Account”) with an unaffiliated broker-dealer acting on an agency basis (“AP Representative”). As discussed below, the Trust and the Adviser are proposing a different alternative arbitrage mechanism for the Funds.

¹⁰ See, e.g., Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Maureen A. Gemma regarding Eaton Vance NextShares Trust II (November 15, 2017); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Vadim Avdeychik, Esq. regarding Gabelli NextShares Trust (November 30, 2016); and Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Philip A. Shipp, Esq. regarding Ivy NextShares (October 20, 2016).

¹¹ As explained in note 1, the Funds’ names and strategies are subject to change prior to launch, but the Funds will otherwise operate in the manner described herein. The Funds’ strategies are described in general terms in this section.

foreign issuers in addition to securities of domestic issuers. The Adviser is not constrained by any particular investment style. At any given time, the Adviser may tend to buy “growth” stocks or “value” stocks, or a combination of both types.

B. Fidelity Growth ETF

The Fidelity Growth ETF seeks long-term growth of capital. The Adviser normally invests the Fund’s assets primarily in equity securities. The Adviser may invest the Fund’s assets in securities of foreign issuers in addition to securities of domestic issuers. The Adviser invests the Fund’s assets in companies it believes have above-average growth potential.

C. Fidelity Value ETF

The Fidelity Value ETF seeks long-term growth of capital. The Adviser normally invests the Fund’s assets primarily in equity securities. The Adviser may invest the Fund’s assets in securities of foreign issuers in addition to securities of domestic issuers. The Adviser invests in securities of companies that it believes are undervalued in the marketplace in relation to factors such as the company’s assets, sales, earnings, growth potential, or cash flow, or in relation to securities of other companies in the same industry.

II. Fund Operations

A. Operational Differences Between the Funds and 6c-11 ETFs

The principal difference between the Funds and 6c-11 ETFs is that the Funds will not publicly disclose their complete portfolio holdings on a daily basis. Instead, as discussed in further detail below, on any day the Trust is open, including any day when the Trust satisfies redemption requests as required by Section 22(e) of the 1940 Act (“Business Day”), before commencement of trading of Shares, each Fund will publish on its website: (1) a basket of securities and cash that is designed to closely track the daily performance of the Fund (“Tracking Basket”), and (2) the percentage weight overlap between the holdings of the prior Business Day’s Tracking Basket compared to the holdings of the Fund that formed the basis for the Fund’s calculation of NAV at the end of the prior Business Day (“Tracking Basket Weight Overlap”).¹²

1. Tracking Basket

A Fund’s Tracking Basket will be comprised of: (i) select recently disclosed portfolio holdings (“Strategy Components”); (ii) liquid U.S. exchange-traded ETFs that convey information about the types

¹² As noted above, the Precidian ETFs similarly do not disclose their full portfolio holdings on a daily basis, but instead rely on disclosure of VIIV every second throughout the trading day. Market participants therefore receive information about the value of the ETF’s shares, but do not receive security-specific information that would allow market participants to estimate the value of shares on their own. This differs from the Funds’ approach, which involves disclosure of the components of a Tracking Basket that market participants can then use to estimate the value of Shares throughout the trading day on their own. See Rule 6c-11 Adopting Release (acknowledging that market makers and Authorized Participants “typically calculate their own intraday value of an ETF’s portfolio with proprietary algorithms that use an ETF’s daily portfolio disclosure and available pricing”).

of instruments (that are not otherwise fully represented by the Strategy Components) in which the Fund invests (“Representative ETFs”); and (iii) cash and cash equivalents. The optimization process described below is applied to select the Strategy Components from among the most recently disclosed portfolio holdings. Representative ETFs are selected for inclusion in the Tracking Basket such that, when aggregated with the other Tracking Basket components, the Tracking Basket corresponds to the Fund’s overall holdings exposures. The Adviser will not hold Representative ETFs in a Fund’s portfolio, except for purposes of effecting transactions in Creation Units.¹³ Representative ETFs may constitute no more than 50% of the Tracking Basket’s assets on each Business Day at the time the Tracking Basket is published.

The Tracking Basket will be constructed utilizing an optimization process to minimize daily deviations in return of the Tracking Basket relative to the Fund and will be used to facilitate the creation/redemption process and arbitrage. The proprietary optimization process mathematically seeks to minimize three key parameters that the Trust and the Adviser believe are important to the effectiveness of the Tracking Basket as a hedge: Tracking Error,¹⁴ turnover cost, and basket creation cost.¹⁵ Typically, the Tracking Basket is expected to be rebalanced on schedule with the public disclosure of the Fund’s holdings;¹⁶ however, a new Tracking Basket may be generated as frequently as daily. In determining whether to rebalance the Tracking Basket, the Adviser will consider various factors, including liquidity of the securities in the Tracking Basket, Tracking Error, and the cost to create and trade the Tracking Basket. For example, if the Adviser determines that a new Tracking Basket may reduce the variability of return differentials between the Tracking Basket and the Fund when balanced against the cost to trade the new Tracking Basket, rebalancing may be appropriate.

2. Tracking Basket Weight Overlap

Tracking Basket Weight Overlap will be calculated by taking the lesser weight of each asset held in common between a Fund’s portfolio and the Tracking Basket, and adding the totals.¹⁷ The Tracking Basket Weight Overlap will help market participants evaluate the risk that the performance of the Tracking Basket may deviate from the performance of the portfolio holdings of a Fund. In addition, by providing information to investors about the overlap between a Fund’s holdings and the Tracking Basket, the Tracking

¹³ Given that the Tracking Basket would normally serve as a Fund’s Creation Basket and Redemption Basket (each as defined below), a Fund may acquire Representative ETFs to create or redeem Shares.

¹⁴ “Tracking Error” is the standard deviation over the past three months of the daily proxy spread (i.e., the difference, in percentage terms, between the Tracking Basket per share NAV and that of the Fund at the end of the trading day).

¹⁵ Turnover cost and basket creation cost are measures of the cost to create and maintain the Tracking Basket as a hedge.

¹⁶ Every day, however, a cash amount could be added to or subtracted from the Tracking Basket to account for differences in value between a Fund’s Tracking Basket and portfolio that result from different relative returns. In addition to accounting for cash in these circumstances, the Fund’s Tracking Basket may also include cash to represent the Fund’s holdings of cash or cash equivalents.

¹⁷ The Fund’s website will note that the Tracking Basket Weight Overlap is calculated based on the Tracking Basket and portfolio holdings as of the prior Business Day.

Basket Weight Overlap will help minimize investor confusion about the Fund's investments and how they differ from the disclosed Tracking Basket.

B. Purchases and Redemptions of Shares

In order to keep costs low and permit each Fund to be as fully invested as possible, Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Accordingly, except where the purchase or redemption will include cash, a purchasing Authorized Participant will be required to make an in-kind deposit of the instruments specified by the Fund for purchases ("Creation Basket") and redeeming Authorized Participants will receive an in-kind transfer of the instruments specified by the Fund for redemptions ("Redemption Basket"). The names and quantities of the instruments that constitute the Creation Basket and Redemption Basket will be the same as the Fund's Tracking Basket, except to the extent purchases and redemptions are made entirely or in part on a cash basis.¹⁸ If there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Creation Basket or Redemption Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference.¹⁹

C. Information Available to Investors

As described above, the principal difference between the Funds and 6c-11 ETFs is that the Funds will not publicly disclose their complete portfolio holdings on a daily basis. Instead, on each Business Day, before the commencement of trading of Shares, each Fund will disclose on its website: (1) the contents of the Tracking Basket, and (2) the Tracking Basket Weight Overlap. The Tracking Basket published on the Fund's website each Business Day will include the following information for each portfolio holding in the Tracking Basket: (1) ticker symbol; (2) CUSIP or other identifier; (3) description of holding; (4) quantity of each security or other asset held; and (5) percentage weight of the holding in the Tracking Basket.

Each Fund anticipates disclosing its portfolio holdings, including the name, identifier, market value and weight of each security and instrument in the portfolio, on its website on a monthly basis with a 30 day lag.²⁰

D. Pricing of Shares

The price of Shares will be based on a current bid/offer in the secondary market. The price of Shares of any Fund, like the price of all traded securities, is subject to factors such as supply and demand, and it is also subject to the current value of the portfolio holdings held by the Fund. Shares of a Fund, available for purchase or sale on an intraday basis, do not have a fixed relationship to the previous day's NAV or the current day's NAV. Therefore, prices on the Exchange may be below, at or above the most recently

¹⁸ Unlike in the case of the Precidian ETFs, creations and redemptions will not be effected through a Confidential Account with an AP Representative. Instead, as is the case with other ETFs in operation today, Authorized Participants will have knowledge of the components of the Creation Basket and Redemption Basket.

¹⁹ Terms and provisions governing sales and redemptions of Shares by a Fund are set forth in the applicable prospectus and statement of additional information; the application for the 1940 Act exemptive relief; and the Trust's Declaration of Trust.

²⁰ The Adviser reserves the right to apply other portfolio holdings disclosure policies in the future.

calculated NAV of such Shares. No secondary sales will be made to broker-dealers at a concession by the Distributor or a Fund. Transactions involving the purchase or sale of Shares on an Exchange will be subject to customary brokerage fees and charges, if applicable.

The Trust and the Adviser believe that disclosure of the Tracking Basket and Tracking Basket Weight Overlap will provide arbitrageurs with adequate information to estimate the value of and hedge positions in a Fund's Shares, which will facilitate the arbitrage process that permits the shares of an ETF to trade at market prices that are at or close to NAV. In the view of the Trust and the Adviser, an efficient ETF arbitrage mechanism is a result of arbitrageurs being able to execute low-risk arbitrage trades in an ETF's shares. This view is based on the fact that, in their experience, as the risk of a trade increases, so must the profit potential for the trade to be undertaken by a trader or arbitrageur. In the ETF context, this means that, the profit potential needed for an arbitrageur to undertake an arbitrage trade in an ETF's shares depends on the risk magnitude of the trade. The greater the risk, therefore, the wider the spread would need to be for the arbitrageurs to engage in a trade. Overall, reducing the risk of an arbitrage trade should encourage market activity that is designed to drive the market price of an ETF's shares toward NAV and reduce any spread and premium/discount between such market price and NAV.

Actively managed ETFs currently offered in the market seek to facilitate low-risk arbitrage trades by providing full portfolio holdings transparency daily. Because FMR is an active manager that uses proprietary research and expertise to manage client portfolios, FMR has determined that, in many circumstances, it may not be appropriate for it to make its portfolios or strategies "transparent." By revealing holdings daily, actively managed ETFs risk signaling to the market their investment intent with respect to certain securities, leading other market participants to "front run" and trade and establish sizable positions in anticipation of activity. The Trust and the Adviser recognize that publication of the Tracking Basket is not equivalent to publication of the complete portfolio holdings of a traditional actively managed ETF, and could potentially cause a Fund's Shares to have wider spreads and larger premiums/discounts than traditional actively managed ETFs.²¹ However, as described in further detail below, the Trust and the Adviser have concluded that low-risk arbitrage trades in Shares can also be facilitated by disclosing on a daily basis a Tracking Basket comprised of Strategy Components, Representative ETFs, and cash and cash equivalents, which can be used as a pricing and hedging vehicle by Authorized Participants and market makers.

The Trust and the Adviser believe that the Tracking Basket will enable arbitrageurs to understand the value and risk of a Fund's actual portfolio and to create effective hedging strategies to allow for efficient arbitrage of Fund Shares. As noted above, the Tracking Basket will be constructed utilizing a mathematical optimization process to minimize deviations in the daily returns of the Tracking Basket relative to the daily returns of the Fund. Market participants should have sufficient information available to them about the Tracking Basket and its historical performance versus that of the Fund such that they should be able to anticipate deviations in such performance. Additionally, the daily returns of the Tracking Basket should

²¹ A variety of factors may contribute to wider spreads and larger premiums/discounts, including severe market disruption, diminished liquidity of the portfolio, and less portfolio transparency. In these circumstances, investors may pay more or less than NAV when they purchase Shares, or receive more or less than NAV when they sell Shares, in the secondary market. The Trust and the Adviser believe that the potential for wider spreads and larger premiums/discounts will be mitigated over time as a result of increasing secondary market volume, Authorized Participant activity, and marketplace acceptance of the Funds.

have sufficiently small deviation from the daily returns of the Fund. Taken together, these factors should allow market participants to have confidence, and be able, to trade effectively, as well as hedge their positions accurately. Moreover, these factors should result in narrow bid/ask spreads, as arbitrageurs will be able to anticipate the implied risk of arbitrage trades and reduce arbitrage trade costs. Furthermore, the Trust and the Adviser believe that active two-way markets will develop for Fund Shares and competition for trade flow will also drive market participants to maintain narrow bid/ask spreads. As is the case with existing ETFs, arbitrageurs would be able to assess whether the market price of a Fund's Shares is higher or lower than the approximate intraday value of the Fund's actual portfolio (as represented by the intraday price of the Tracking Basket), and to make arbitrage and hedging decisions using the Tracking Basket.²² For example, if a Fund's Shares are trading on an Exchange at a discount to the value of the Tracking Basket, arbitrageurs would purchase the number of Shares needed to assemble a Creation Unit and then redeem the Creation Unit from the Fund in exchange for the more valuable securities in the Tracking Basket. In addition, an arbitrageur could hedge its intraday risk by selling short the securities in the Tracking Basket. The arbitrageur would use securities in the Tracking Basket it obtained when redeeming the Creation Unit to cover its short positions. The arbitrageur's purchases of Shares would have the effect of reducing the supply of Shares in the market, causing the market price of the Shares to increase, thereby bringing the market price of the Shares closer to the NAV of the Tracking Basket.

The Trust and the Adviser believe the Funds' arbitrage process would operate similarly to the arbitrage process in place today for existing ETFs that use in-kind baskets for creations and redemptions that do not reflect the ETF's complete holdings but nonetheless produce performance that is highly correlated to the performance of the ETF's actual portfolio. The Trust and the Adviser have observed highly efficient trading of ETFs that invest in markets where security values are not fully known at the time of ETF trading, and where a perfect hedge is not possible, such as international stock and bond ETFs, and certain ETFs that seek to track the (price and yield) performance of an underlying index. While the ability to value and hedge many of these ETFs in the market may be limited, the majority of these ETFs have maintained an effective arbitrage mechanism and traded efficiently.

III. Legal Analysis Under Rule 14e-5

Rule 14e-5 was originally promulgated as Rule 10b-13 under the Exchange Act to safeguard the interests of persons who sell their securities in response to a tender offer.²³ Rule 14e-5 prohibits a "covered person" from directly or indirectly purchasing or arranging to purchase any equity securities that are the subject of a tender offer ("subject securities") or any securities immediately convertible into, exchangeable for, or exercisable for subject securities ("related securities") except as part of such tender offer. The term "covered person" includes, among others, a dealer-manager of a tender offer. The fact that most Authorized Participants are broker-dealers implicates Rule 14e-5 because the term "covered person" includes a dealer-manager of a tender offer. The term "covered person" also includes any person acting, directly or indirectly,

²² As noted above, while a VIIV will not be provided with respect to the Funds, market participants will instead be able to estimate the value of a Fund's Shares throughout the day on their own utilizing information about the Tracking Basket components.

²³ Exchange Act Rel. No. 8712 (October 8, 1969) (the "1969 Adopting Release"). In this regard, the 1969 Adopting Release noted that "[w]hen securities are purchased for a consideration greater than that of the tender offer price, this operates to the disadvantage of the security holders who have already deposited their securities and who are unable to withdraw them in order to obtain the advantage of possible resulting higher market prices."

in concert with other covered persons in connection with any purchase or arrangement to purchase any subject securities or any related securities. Therefore, the Trust also is seeking relief in the event it or a Fund may be deemed to be a “covered person” by virtue of the AP Agreements pertaining to the Trust and the Fund.

In light of the above, and consistent with the Order, the Trust seeks a conditional exemption from Rule 14e-5 for the Trust, the Funds, and Authorized Participants and any other persons who create and redeem Shares of the Funds in Creation Units pursuant to contractual arrangements pertaining to the Trust and the Funds, and who are covered persons with respect to a tender offer involving components of the Tracking Basket. The conditional exemption will allow such persons (i) to redeem Fund Shares in Creation Unit sizes for a Redemption Basket that may include a subject security or related security, (ii) to engage in secondary market transactions with respect to the Fund’s Shares after the first public announcement of the tender offer and during such tender offer given that such transactions could include, or be deemed to include, purchases of, or arrangements to purchase, subject securities or related securities, and (iii) to make purchases of, or arrangements to purchase, subject securities or related securities in the secondary market for the purpose of transferring such securities to purchase one or more Creation Units of Fund Shares.

Consistent with the Order, the relief would be subject to the following conditions:

- (1) 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;
- (2) if there is a change in the composition of a Fund’s Tracking Basket and a broker-dealer acting as a dealer-manager of a tender offer is unable to rely on the exception found in Rule 14e-5(b)(5) for basket transactions (the “Basket Exception”) because (i) the basket of subject securities or related securities contains fewer than 20 securities or (ii) the subject securities and related securities make up more than 5% of the value of the Tracking Basket, then any purchases of a Tracking Basket component by such dealer-manager during a tender offer will be effected for the purpose of adjusting a basket of securities in the ordinary course of its business and not for the purpose of facilitating a tender offer; and
- (3) except for the relief specifically granted herein, any broker-dealer acting as a dealer-manager of a tender offer will comply with Rule 14e-5.

Although the Funds differ from the 6c-11 ETFs to which the Order relates in that the Funds will not disclose their complete portfolio holdings on a daily basis, the Trust does not believe that this distinction is significant for purposes of the relief requested from Rule 14e-5. The Trust notes that the creation and redemption process for the Funds is effectively the same as that for 6c-11 ETFs, as the Funds will transact with Authorized Participants in Creation Unit aggregations in exchange for a basket of securities and/or cash in lieu of such securities.²⁴ While the Creation Basket and Redemption Basket will not reflect a *pro*

²⁴ Because creations and redemptions will not be effected through a Confidential Account with an AP Representative, Authorized Participants will have knowledge of the components of the Creation Basket and Redemption Basket (as is the case with respect to 6c-11 ETFs).

rata representation of Fund holdings, this is consistent with 6c-11 ETFs, which are permitted to utilize “custom baskets” for creation and redemption transactions.²⁵ In addition, as described above, the Trust and the Adviser believe that disclosure of the Tracking Basket and Tracking Basket Weight Overlap will provide arbitrageurs with adequate information to estimate the value of and hedge positions in a Fund’s Shares, which will facilitate the arbitrage process that permits the shares of an ETF to trade at market prices that are at or close to NAV. Accordingly, the Trust does not believe that the relief requested raises any significant new regulatory issues.

With respect to redemptions, as in the case of 6c-11 ETFs, the Trust notes that the acquisition of individual securities held by a Fund by means of redemptions of Shares would be impractical and extremely inefficient in view of the relatively small number of shares of any one security included in a Redemption Basket and the requirement that a minimum number of Shares (i.e., a Creation Unit) be redeemed. Redemptions of, and secondary market transactions in, Shares under the circumstances described would not appear to result in the abuses at which Rule 14e-5 is directed.

With respect to purchases, the Trust acknowledges that the Basket Exception provides an exception to the Rule 14e-5 prohibition for purchases or arrangements to purchase a basket of securities containing a subject security or a related security if: (i) the purchase or arrangement is made in the ordinary course of business and not to facilitate the tender offer; (ii) the basket contains 20 or more securities; and (iii) covered securities and related securities do not comprise more than 5% of the value of the basket. As indicated by the Commission in the release replacing former Rule 10b-13 with Rule 14e-5,²⁶ transactions in baskets in accordance with the Basket Exception provide little opportunity for a covered person to facilitate an offer²⁷ or for a security holder to exact a premium from the offeror. Given that the purchases and redemptions of Creation Units of the Funds typically involve baskets of securities, Authorized Participants acting as dealer-managers of tender offers for relevant securities may, in certain cases, be able to rely on the Basket Exception in purchasing Creation Units of Shares. From time to time, however, a change in the composition of the Tracking Basket may result in a change in the basket that has been established for purposes of purchasing its Creation Units. As a consequence, the basket could contain less than 20 securities and/or covered securities and related securities could comprise more than 5% of the value of the basket. For example, a liquidation of the issuer of one of the securities or a merger involving the acquisition of the issuer of one of the securities could cause the number of securities in the basket to fall below 20 and/or could cause covered securities and related securities to comprise more than 5% of the value of the basket. Additionally, as a result of fluctuations in the market value of the securities held in the basket, covered securities and related securities could, at times, comprise more than 5% of the value of the basket. This composition would result in the unavailability of the Basket Exception for an Authorized Participant

²⁵ See Rule 6c-11 under the 1940 Act. In order to utilize custom baskets, a 6c-11 ETF must adopt certain policies and procedures. The 1940 Act exemptive relief on which the Funds rely similarly requires adoption of policies and procedures with respect to basket construction.

²⁶ See Exchange Act Rel. No. 42055 (October 22, 1999) (the “1999 Release”).

²⁷ As discussed in the 1999 Release, “facilitation of an offer” includes purchases intended to bid up the market price of the covered or related security, and includes buying a basket to strip out the covered security in an effort to get the offeror the number of shares it is seeking. In this regard, the Trust believes that it would be inefficient to facilitate a tender offer in a particular security by means of purchasing all of the securities in a Creation Basket.

acting as a dealer-manager of a tender offer for the applicable securities and, in particular, may preclude an Authorized Participant from being able to rely on the Basket Exception.

In order to address situations (including but not limited to the foregoing examples) where the basket contains less than 20 securities and/or covered securities and related securities comprise more than 5% of the value of the basket, as noted above, the Trust respectfully requests that the Commission provide an exemption under Rule 14e-5 if an Authorized Participant acting as a dealer-manager of a tender offer purchases or arranges to purchase subject securities or related securities in the secondary market for the purpose of transferring such securities to purchase one or more Creation Units of Shares, if such purchases are not effected for the purpose of facilitating such tender offer and are made in the ordinary course of business. Relief would be necessary in order to permit such Authorized Participants to effect purchases of subject and related securities under such circumstances given that the Basket Exception would not be available. This extension of the Basket Exception would accommodate a potential factual circumstance associated with the operation of the Funds (similar to 6c-11 ETFs) and would be consistent with the rationale underlying the adoption of the Basket Exception. The Trust notes, in particular, that purchases would not be effected for the purpose of facilitating a tender offer.²⁸

For the reasons set forth above, the Trust believes that the requested relief will, like the relief granted to 6c-11 ETFs, “facilitate the ability of authorized participants and others to engage in creation or redemption transactions between the public announcement of a tender offer and its expiration, thereby permitting the ETF to operate as intended for the benefit of its holders and as disclosed in publicly filed documents.”²⁹ In addition, consistent with that relief, the conditions set forth herein will prevent those relying on the relief from effecting creation or redemption transactions for purposes of facilitating a tender offer.³⁰

IV. Request for Exemptive Relief

Based on the foregoing, the Trust, on behalf of itself, the Funds, and Authorized Participants that act as dealer-managers of tender offers,³¹ respectfully requests that the Commission grant the exemptive relief from Rule 14e-5 under the Exchange Act requested herein in connection with purchases of, and arrangements to purchase, subject securities and related securities outside of a tender offer. As more fully discussed above, the Trust is requesting that the Commission grant exemptions from Rule 14e-5 to permit any Authorized Participant acting as a dealer-manager of a tender offer, under the circumstances described herein, (1) to execute transactions that include, or are deemed to include, purchases of, or arrangements to purchase, subject securities or related securities in connection with (a) redeeming Shares of a Fund in Creation Unit size aggregations and (b) engaging in secondary market transactions in Shares and (2) to purchase or arrange to purchase subject securities and related securities in the secondary market for the purpose of transferring such securities to purchase Creation Units. As a related matter, the Trust is requesting that, in light of the relevance of the activities contemplated by the AP Agreements described

²⁸ See supra note 27.

²⁹ See Order.

³⁰ See id.

³¹ As indicated above, the Trust also requests that the relief extend to any other persons who create and redeem Shares of the Funds in Creation Units pursuant to contractual arrangements pertaining to the Trust and the Funds.

Mr. Ted Yu, Chief
Mr. Perry Hindin, Special Counsel
December 17, 2019
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above to the Trust and the Funds, the Trust and the Funds be permitted to rely on any exemptive relief that is granted. The Trust believes that granting the requested exemptions is consistent with precedent and will not result in the abuses that Rule 14e-5 was designed to address, and that it will facilitate the ability of Authorized Participants to engage in transactions in Creation Units, thereby permitting a Fund to operate as intended to the benefit of its shareholders.

Thank you for your consideration of this request. Should you have any questions or require additional information, please do not hesitate to call the undersigned at 617.392.2211.

Sincerely,

A handwritten signature in black ink, appearing to read "Cym", with a long horizontal flourish extending to the right.

Cynthia Lo Bessette

25820655