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June 2, 2021

Mr. Ted Yu, Chief  
Mr. Dan Duchovny, 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 Duchovny:

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"). To the extent the Trust or its series could be deemed to be a "person" within the meaning of Section 3(a)(9) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), at risk of being identified as a "covered person" within the meaning of Rule 14e-5(c)(3) under the Exchange Act, the Trust requests exemptive relief from Rule 14e-5 under the Exchange Act, on behalf of itself, its series, the Fidelity Women's Leadership ETF and the Fidelity Sustainability U.S. Equity ETF (each a "Fund" and collectively, the "Funds"),<sup>1</sup> 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").<sup>2</sup> 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

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

<sup>2</sup> 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.

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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 to contractual arrangements pertaining to the Trust and the Fund.<sup>3</sup> 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).<sup>4</sup>

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)(iv), 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.<sup>5</sup>

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"),<sup>6</sup> subject to certain conditions ("Order").<sup>7</sup> Because the Funds will not be

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<sup>3</sup> 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").

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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").

<sup>7</sup> 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 (Sept. 25, 2019). As

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eligible to rely on Rule 6c-11, which requires daily disclosure of portfolio holdings, the Funds will not be eligible to rely on the Order.

Prior to the adoption of Rule 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)<sup>8</sup> and traditional actively managed ETFs that satisfy certain conditions.<sup>9</sup> In addition, the Commission has issued the same relief requested herein to other series of the Trust that operate in substantially the same manner as the Funds (each a “Prior Fund” and collectively the “Prior Funds”) (“Prior Relief”).<sup>10</sup> The Commission has also issued similar relief to other actively managed ETFs that do not disclose their portfolio holdings daily.<sup>11</sup> The Trust does not believe that the relief requested herein raises any significant new regulatory issues.

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 LLC or an entity controlling, controlled by, or under common control with Fidelity Management & Research Company, LLC (Fidelity Management & Research Company LLC and each such other entity and any successor thereto

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described in greater detail in Part III, the Rule 14e-5 relief specifically requires compliance with certain conditions designed to ensure that parties relying on the relief do not engage in transactions for purposes of facilitating a tender offer.

<sup>8</sup> Letter from James A. Brigagliano to Stuart M. Strauss, Esq. regarding Class Relief for Exchange Traded Index Funds (Oct. 24, 2006) (providing class relief to index-based ETFs).

<sup>9</sup> See, e.g., Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Suzanne M. Russell, Esq. regarding First Trust Exchange-Traded Fund IV (Aug. 20, 2019) (providing Rule 14e-5 relief to traditional actively managed ETFs); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Adam T. Teufel, Esq. regarding FQF Trust (May 23, 2019) (providing Rule 14e-5 relief to traditional actively managed ETFs).

<sup>10</sup> See Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Cynthia Lo Bessette, Esq. regarding Fidelity Covington Trust (Jan. 14, 2021) (providing Rule 14e-5 relief to Prior Funds); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Cynthia Lo Bessette, Esq. regarding Fidelity Covington Trust (Dec. 18, 2019) (providing Rule 14e-5 relief to Prior Funds).

<sup>11</sup> See e.g., Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Adam T. Teufel, Esq. regarding ALPS ETF Trust (Feb. 3, 2021) (providing Rule 14e-5 relief to actively managed ETFs that do not disclose their portfolio holdings daily) (“ALPS Letter”); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Nathan D. Somogie, Esq. regarding Natixis ETF Trust II (Aug. 26, 2020) (providing Rule 14e-5 relief to actively managed ETFs that do not disclose their portfolio holdings daily) (“Natixis Letter”); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Ryan L. Blaine regarding American Century ETF Trust (July 16, 2020) (providing Rule 14e-5 relief to actively managed ETFs that do not disclose their portfolio holdings daily) (“American Century Letter”).

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included in the terms, “FMR” and the “Adviser”). The Trust intends to offer the following Funds that would be subject to the requested relief:<sup>12</sup>

**A. Fidelity Women’s Leadership ETF**

The Fidelity Women’s Leadership ETF seeks long-term growth of capital. The Adviser normally invests at least 80% of the Fund’s assets in equity securities of companies that prioritize and advance women’s leadership and development. Such companies include those that, at the time of initial purchase, (i) include a woman as a member of the senior management team, (ii) are governed by a board for which women represent at least one third of all directors, or (iii) in the Adviser’s opinion, have adopted policies designed to attract, retain and promote women. The Adviser may invest the Fund’s assets in securities of domestic and foreign issuers. The Adviser uses fundamental analysis of factors such as each issuer’s financial condition and industry position, as well as market and economic conditions, to select investments.

**B. Fidelity Sustainability U.S. Equity ETF**

The Fidelity Sustainability U.S. Equity ETF seeks long-term growth of capital. The Adviser normally invests at least 80% of the Fund’s assets in equity securities of U.S. companies that the Adviser believes have proven or improving sustainability practices based on an evaluation of such companies’ individual environmental, social, and governance (ESG) profile. The Adviser uses its proprietary ESG ratings process to evaluate the current state of a company’s sustainability practices using a data-driven framework that includes both proprietary and third party data, and also provide a qualitative forward looking assessment of a company’s sustainability outlook provided by the Adviser’s fundamental research analysts and ESG team. The Adviser may invest the Fund’s assets in securities of domestic and foreign issuers. In addition to the ESG ratings process, the Adviser uses fundamental analysis of factors such as each issuer’s financial condition and industry position, as well as market and economic conditions, to select investments.

**II. Fund Operations**

The Funds will operate in substantially the same manner as the Prior Funds.

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

Like the Prior Funds, 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 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) the contents of a basket of securities and cash that is designed to closely track the daily performance of the Fund (“Tracking Basket”),<sup>13</sup> and (2) the percentage weight overlap between the holdings

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<sup>12</sup> 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.

<sup>13</sup> 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.

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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").<sup>14</sup>

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.<sup>15</sup>

#### **B. Purchases and Redemptions of Shares**

Like the Prior Funds, 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 ("Creation Basket") and redeeming Authorized Participants will receive an in-kind transfer of the instruments ("Redemption Basket"). 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.<sup>16</sup>

#### **D. Pricing of Shares**

As is the case with the Prior Funds, 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 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.

As discussed in more detail in the request relating to the Prior Relief, 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,

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<sup>14</sup> Tracking Basket Weight Overlap will help: (1) market participants evaluate the risk that the performance of the Tracking Basket may deviate from the performance of the portfolio holdings of a Fund; and (2) help minimize investor confusion about the Fund's investments and how they differ from the disclosed Tracking Basket.

<sup>15</sup> The Adviser reserves the right to apply other portfolio holdings disclosure policies in the future.

<sup>16</sup> 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.

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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.

### 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.<sup>17</sup> 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, in concert with other covered persons in connection with any purchase or arrangement to purchase any subject securities or any related securities. To the extent the Trust or the Funds could be deemed to be both (i) a “person” within the meaning of Section 3(a)(9) of the Exchange Act<sup>18</sup> and (ii) acting in concert with other persons specified in Rule 14e-5(c)(3) in connection with a purchase of, or arrangement to purchase, subject securities or related securities,<sup>19</sup> the Trust is at risk of being deemed a “covered person” within the meaning of Rule 14e-5(c)(3) under the Exchange Act and therefore is seeking relief on behalf of itself and the Funds.

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

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<sup>17</sup> 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.”

<sup>18</sup> Section 3(a)(9) of the Exchange Act defines the term “person” as “a natural person, company, government, or political subdivision, agency, or instrumentality of a government.” Section 3(a)(19) further provides that the term “company” has the same meaning as in the 1940 Act. Section 2(a)(8) of the 1940 Act defines the term “company” as “a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not....”

<sup>19</sup> For example, the Trust or the Funds may be deemed to be acting in concert with Authorized Participants by virtue of the AP Agreements pertaining to the Trust and the Funds. See Order, *supra* note 7, at p. 18 (stating that “the prohibitions of rule 14e-5 may apply to authorized participants who are broker-dealers and acting as dealer-managers in tender offers, the ETF, and any legal entity of which the ETF is a series”).

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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. While the Creation Basket and Redemption Basket will not reflect a *pro rata* representation of Fund holdings, this is consistent with 6c-11 ETFs, which are permitted to utilize "custom baskets" for creation and redemption transactions.<sup>20</sup> In addition, the Trust notes that the Commission has issued similar relief to actively managed ETFs that do not disclose their portfolio holdings daily,<sup>21</sup> including other series of the Trust that operate in substantially the same manner as the Funds.<sup>22</sup> 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.

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<sup>20</sup> 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.

<sup>21</sup> See ALPs Letter, supra note 11; Natixis Letter, supra note 11; American Century Letter, supra note 11.

<sup>22</sup> See Prior Relief, supra note 10.

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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,<sup>23</sup> transactions in baskets in accordance with the Basket Exception provide little opportunity for a covered person to facilitate an offer<sup>24</sup> 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 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

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<sup>23</sup> See Exchange Act Rel. No. 42055 (October 22, 1999) (the “1999 Release”).

<sup>24</sup> 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.

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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.<sup>25</sup>

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.”<sup>26</sup> 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.<sup>27</sup>

#### 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,<sup>28</sup> 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 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,  
 DocuSigned by:  
  
 75740492542B40E  
 Cynthia Lo Bessette

<sup>25</sup> See id.

<sup>26</sup> See Order.

<sup>27</sup> See id.

<sup>28</sup> 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.