



1095 Avenue of the Americas  
New York, NY 10036-6797  
+1 212 698 3500 Main  
+1 212 698 3599 Fax  
www.dechert.com

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**STUART STRAUSS**

stuart.strauss@dechert.com  
+1 212 698 3529 Direct  
+1 212 698 0452 Fax

March 19, 2012

Elizabeth G. Osterman, Esq.  
Associate Director, Office of the Associate Director (Exemptive Applications and Special  
Projects)  
Division of Investment Management  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

**Re: Request of Market Vectors ETF Trust for No-Action Relief**

Dear Ms. Osterman:

SUMMARY OF REQUEST FOR RELIEF

We are writing on behalf of Market Vectors ETF Trust ("Trust") and Market Vectors Bank and Brokerage ETF ("Bank and Brokerage ETF"), Market Vectors Biotech ETF ("Biotech ETF"), Market Vectors Oil Services ETF ("Oil Services ETF"), Market Vectors Pharmaceutical ETF ("Pharmaceutical ETF"), Market Vectors Retail ETF ("Retail ETF") and Market Vectors Semiconductor ETF ("Semiconductor ETF"), each a separate investment portfolio of the Trust (each a "Fund" and, collectively, the "Funds" and, together with the Trust, "Applicants"). Applicants hereby seek your assurance that you will not recommend that the Securities and Exchange Commission ("Commission") take any enforcement action against the Funds or the Trust under Sections 2(a)(32), 5(a)(1), 17(a), 22(d) and 22(e) of the Investment Company Act of 1940, as amended ("1940 Act"), and Rule 22c-1 under the 1940 Act as a result of the Funds' exchange offers described herein (collectively, the "Offer").<sup>1</sup>

This letter is divided into six parts. Part I includes a description of the Offer, Part II is a description of the Trust and the Funds, Part III is a description of the HOLDERS Trusts (as defined

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<sup>1</sup> This letter has been prepared to confirm the oral no-action relief provided by Elizabeth G. Osterman, Esq. to Stuart M. Strauss, Esq. and Allison M. Fumai, Esq. of Dechert LLP on November 9, 2011. In addition, we have not requested, and we are not receiving, any assurances other than those expressly requested in this letter.

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herein), Part IV contains a discussion of the Trust's Prior Order (as defined herein)<sup>2</sup>, Part V contains Applicants' requests for relief and Part VI is the conclusion.

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<sup>2</sup> The Trust, together with Van Eck Associates Corporation ("Van Eck" or the "Adviser") and the Distributor, previously submitted an application with the Securities and Exchange Commission (the "Commission") (File No. 812-12947) on March 25, 2003, as amended (the "Domestic Application"), requesting relief with respect to the offering of funds based on indexes of domestic equity securities. The Domestic Application was noticed in Release No. IC-27283 dated April 7, 2006 and the order granting the relief requested was contained in Release No. IC-27311 dated May 2, 2006 (the "Domestic Order"). The Trust, the Adviser and the Distributor subsequently submitted an application with the Commission (File No. 812-13339) on November 1, 2006, as amended (the "Foreign Application"), requesting relief with respect to the offering of funds based on indexes of foreign equity securities and the elimination of Condition 1 from the Domestic Application. The Foreign Application was noticed in Release No. IC-27694 dated January 31, 2007 and the order granting the relief requested was contained in Release No. IC-27742 dated February 27, 2007 (the "Foreign Order"). The Trust, the Adviser and the Distributor subsequently submitted an application with the Commission (File No. 812-13426) on September 27, 2007, as amended (the "Fixed Income Application"), requesting relief with respect to the offering of funds based on indexes of fixed income securities. The Fixed Income Application was noticed in Release IC-28007 dated September 28, 2007 and the order granting the relief requested was contained in Release No. IC-28021 dated October 24, 2007 (the "Fixed Income Order"). The Trust, the Adviser and the Distributor subsequently submitted an application with the Commission (File No. 812-13507) on March 10, 2008, as amended (the "Hard Assets Application"), requesting relief with respect to the offering of funds based on equity securities indexes for which the investment adviser may be deemed a sponsor. The Hard Assets Application was noticed in Release IC-28349 dated July 31, 2008 and the order amending the Domestic Order, the Foreign Order and the Fixed Income Order granting the relief requested was contained in Release No. IC-28365 dated August 25, 2008 (the "Hard Assets Order"). The Trust, the Adviser and the Distributor subsequently submitted an application with the Commission (File No. 812-13624) on August 25, 2010, as amended (the "Self Indexing Application"), requesting relief with respect to the offering of funds based on securities indexes created and maintained by an affiliated index provider. The Self Indexing Application was noticed in Release IC-29455 dated October 1, 2010 and the order amending the Domestic Order, the Foreign Order, the Fixed Income Order and the Hard Assets Order granting the relief requested was contained in Release No. IC-29490 dated October 26, 2010 (the "Self Indexing Order"). The Domestic Application, Foreign Application, Fixed Income Application, Hard Assets Application and Self-Indexing Application are collectively referred to as the "Prior Application" and the Domestic Order, Foreign Order, Fixed Income Order, Hard Assets Order and Self-Indexing Order are collectively referred to as the "Prior Order."

**PART I**

**A. THE ASSET PURCHASE AGREEMENT**

On August 11, 2011, Merrill Lynch & Co., Inc. ("Merrill Lynch") and Van Eck entered into an Asset Purchase Agreement (the "Asset Purchase Agreement") pursuant to which Merrill Lynch agreed to sell or license to Van Eck, Merrill Lynch's right, title and interest to certain registered intellectual property, unregistered trademarks and copyrights, data, software and other materials as specified in the Asset Purchase Agreement that relate to the rights of Merrill Lynch, including with respect to Biotech HOLDRS<sup>SM</sup> Trust, Oil Services HOLDRS<sup>SM</sup> Trust, Pharmaceutical HOLDRS<sup>SM</sup> Trust, Regional Bank HOLDRS<sup>SM</sup> Trust, Retail HOLDRS<sup>SM</sup> Trust and Semiconductor HOLDRS<sup>SM</sup> Trust (each a "HOLDRS Trust" and, collectively, the "HOLDRS Trusts"), and the calculation, management and licensing of depositary trust receipts ("HOLDRS") of each HOLDRS Trust.

**B. THE EXCHANGE OFFERS**

Each Fund conducted an Offer for all of the outstanding HOLDRS issued by its corresponding HOLDRS Trust. Each Fund's Offer was only available to holders of HOLDRS ("HOLDRS Investors") of its corresponding HOLDRS Trust (i.e., the Offer was not available to persons who did not hold HOLDRS and HOLDRS Investors of Oil Services HOLDRS Trust were only able to tender for exchange their HOLDRS of Oil Services HOLDRS Trust to Oil Services ETF and not Biotech ETF).

The Offer commenced on November 10, 2011 and expired at 11:00 a.m., New York City time, on December 20, 2011 (the "Expiration Time"). Upon the commencement of the Offer, each HOLDRS Investor received the Offer to Exchange and related documents relating to the Offer (collectively, the "Offer to Exchange") from D.F. King & Co., Inc., the information agent for the Offer (the "Information Agent"), that described the terms and related details of the Offer. HOLDRS Investors were able to participate in the Offer by following the instructions set forth in the Offer to Exchange. If a HOLDRS Investor did not tender his or her HOLDRS by the Expiration Time, such HOLDRS Investor was not able to participate in the Offer. Such HOLDRS Investors that did not participate in the Offer were not able to trade their HOLDRS after the Expiration Time on NYSE Arca, Inc. ("NYSE Arca"), although we understand that there currently may be limited trading of HOLDRS in the pink sheets. Moreover, HOLDRS Investors that did not participate in the Offer retained the right to surrender their HOLDRS for the securities underlying them for four months following the closing of the Asset Purchase Agreement, which occurred on December 20, 2011, at which point any remaining securities will be sold and the proceeds distributed to the remaining HOLDRS Investors as described more fully below.

By tendering their HOLDRS, each HOLDRS Investor authorized BNY ConvergeX Execution Solutions LLC (the "Transition Manager") to sell certain of the securities underlying the tendered HOLDRS and purchase certain other securities in the open market such that securities purchased, together with the securities underlying the tendered HOLDRS that were not sold, conformed as closely as reasonably possible to the portfolio of securities then making up the Fund's respective Index (defined below).<sup>3</sup> The purchases and sales performed by the Transition Manager are hereinafter referred to as the "Rebalancing Transaction" and the securities formerly underlying the tendered HOLDRS, immediately after giving effect to the Rebalancing Transaction, are hereinafter referred to as the "Rebalanced HOLDRS Securities."<sup>4</sup> The Rebalancing Transaction was structured so that, assuming all trades were completed as planned, the aggregate value of the securities sold would be the same as the aggregate value of the securities purchased, and no commissions or fees would be charged in respect of those trades.<sup>5</sup> Therefore, Van Eck expected the value of the Rebalanced HOLDRS Securities (the "Rebalanced HOLDRS Securities Value") to be the same as the aggregate value of the securities formerly

<sup>3</sup> The six Funds and their respective indices (each, an "Index" and, collectively, the "Indexes") are as follows:

<u>Name of Fund</u>	<u>Name of Index</u>
Market Vectors Bank and Brokerage ETF	Market Vectors US Listed Bank and Brokerage 25 Index
Market Vectors Biotech ETF	Market Vectors US Listed Biotech 25 Index
Market Vectors Oil Services ETF	Market Vectors US Listed Oil Services 25 Index
Market Vectors Pharmaceutical ETF	Market Vectors US Listed Pharmaceutical 25 Index
Market Vectors Retail ETF	Market Vectors US Listed Retail 25 Index
Market Vectors Semiconductor ETF	Market Vectors US Listed Semiconductor 25 Index

<sup>4</sup> The percentage of the value of securities underlying the HOLDRS then expected to be sold by the Transition Manager in the Rebalancing Transaction that is disclosed in the Form N-14s for the Offer was calculated as of a recent date prior to the distribution of the Form N-14s to HOLDRS Investors and could have changed up to the day on which the Expiration Time occurred based on any changes in each Fund's Index and the number of HOLDRS Investors that tendered their HOLDRS for exchange in the Offer.

<sup>5</sup> The Transition Manager guaranteed that all purchases and sales made in connection with the Rebalancing Transaction would be effected at the closing price per share of the underlying securities on the day the Expiration Time occurred (the "market on close price"). The Transition Manager was not paid a fee, however, to the extent that the Transition Manager was able to effect such purchases and sales and generate a profit against the market on close price, the Transition Manager kept that profit, and to the extent that the Transition Manager was forced to effect such purchases and sales at a loss as compared to the market on close price, the Transition Manager bore such loss.

underlying the tendered HOLDRS, in each case measured as of the close of trading on NYSE Arca on the day on which the Expiration Time occurred.<sup>6</sup> The Rebalanced HOLDRS Securities were then exchanged into shares ("Shares") of the respective Fund, and the initial net asset value of Shares of each Fund was equal to the Rebalanced HOLDRS Securities Value. The value of the securities underlying the HOLDRS, which were exchanged for Shares of a Fund with an initial net asset value equal to the Rebalanced HOLDRS Securities Value, could have increased or decreased between the date of tender and 4:00 p.m., New York City time, on the day the Expiration Time occurred, when the initial net asset value was calculated and could have been more or less than the value of tendered HOLDRS at any time prior to 4:00 p.m., New York City time, on the day the Expiration Time occurred.

The Offer was not an attempt to publicly offer Shares of the Funds to retail investors. Rather, the Offer was targeted at a discrete universe of investors (i.e., HOLDRS Investors). In effect, the Offer was intended to afford HOLDRS Investors the opportunity to convert their investment at net asset value into an ETF which targets an industry sector similar to their current HOLDRS and allowed HOLDRS Investors the opportunity to gain uninterrupted exposure to a similar industry sector in which they had an investment. Van Eck believes that each Fund offers a more dynamic investment vehicle than its corresponding HOLDRS Trust because each Fund is better able to reflect changes in the composition of industry sectors that inevitably occur over time. Because the portfolio of securities in each HOLDRS Trust generally remained static over time, it may not have been representative of the current industry sector it purported to represent. By comparison, each Fund rebalances its portfolio to track its respective Index periodically (currently semi-annually), the composition of which changes in accordance with its rulebook.

The Offer was structured to include the Rebalancing Transaction for the following two purposes: to diversify the portfolio of securities that was transferred to each Fund so that the Rebalanced HOLDRS Securities would be transferred to the Fund on a tax-free basis and to create a portfolio of securities that matched the Fund's respective Index.<sup>7</sup> The Rebalancing

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<sup>6</sup> The Rebalanced HOLDRS Securities Value was the same as the aggregate value of the securities formerly underlying the tendered HOLDRS, in each case measured as of the close of trading on NYSE Arca on the day on which the Expiration Time occurred.

<sup>7</sup> Except with respect to the Rebalancing Transaction, the exchange of HOLDRS for Shares of a Fund was generally not a taxable transaction for U.S. federal income tax purposes. However, HOLDRS Investors who tendered their HOLDRS for exchange in the Offer will generally recognize taxable gains (or losses) in connection with sales of the securities underlying HOLDRS made by the Transition Manager in the Rebalancing Transaction. Furthermore, any unrealized gain (or loss) in respect of the securities underlying the HOLDRS that were not sold by the Transition Manager in the Rebalancing Transaction and were transferred to the Funds would generally not be currently taxable and, instead, would generally

Transaction occurred outside of each Fund at a time when the underlying securities, and thereafter the Rebalanced HOLDRS Securities, were beneficially owned by the HOLDRS Investors. The securities actually transferred to each Fund in exchange for Shares of each Fund were the Rebalanced HOLDRS Securities (i.e., the portfolio of securities after giving effect to the Rebalancing Transaction).<sup>8</sup> The Funds were newly formed and were not offered to the public until they began trading on the business day following the day on which the Expiration Time occurred. The Funds did not bear any costs of the transfer of securities from the Transition Manager or any costs relating to the Offer.<sup>9</sup>

Trading in HOLDRS was halted on NYSE Arca approximately 30 minutes prior to the Expiration Time. Trading in HOLDRS issued by each HOLDRS Trust was thereafter suspended and HOLDRS were delisted following termination of each HOLDRS Trust. Therefore, if HOLDRS Investors did not tender their HOLDRS for exchange in the Offer, they were not able to trade their HOLDRS after the Expiration Time. After the Expiration Time, HOLDRS issued by each HOLDRS Trust no longer traded on either NYSE Arca or any other national securities exchange and no longer used the HOLDRS ticker symbol.

On the day following the date the Expiration Time occurred, Shares of each Fund began trading on NYSE Arca under the prior symbol for HOLDRS of its respective HOLDRS Trust. In connection with the Offer, no Authorized Participants, other than the Transition Manager, placed creation unit orders with the Funds prior to the time that the Funds began trading on NYSE Arca.

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remain deferred until the Fund shares are sold by HOLDRS Investors or a Fund sells such underlying securities (in which case, such recognized gain (or loss) will impact the Fund's overall calculation of its income). In the case of the Offer, with respect to corporate HOLDRS Investors, other than S corporations, that participated in the Offer, a Fund may subsequently recognize taxable gain that is subject to tax at the Fund level to the extent of certain unrealized net gains (at the time of the delivery of the underlying securities to the ETF) in respect of the securities transferred by the corporate HOLDRS Investor to a Fund. Such Fund-level tax would be indirectly borne by all Fund shareholders.

<sup>8</sup> There was not a deposit basket of securities published prior to the time that the Transition Manager contributed securities and the Shares of the Funds were transferred to the Transition Manager in creation unit aggregation sizes. There was a small amount of cash contributed to the Funds by the Transition Manager.

<sup>9</sup> HOLDRS Investors did not bear any costs related to the Offer or the expenses of the Offer, including the cost of printing, filing and solicitation, and legal and accounting expenses, which were borne by Van Eck.

Following the termination of each HOLDRS Trust but prior to its liquidation, HOLDRS Investors will still be able to surrender their HOLDRS to The Bank of New York Mellon, as trustee of each HOLDRS Trust (the "Trustee"), pay applicable fees (up to \$10.00 per each round lot of 100 HOLDRS surrendered) and expenses and receive delivery of the securities underlying such HOLDRS, together with any dividends or other distributions or net proceeds from the sale of any rights or other property received prior to the Expiration Time with respect thereto. Pursuant to the provisions of each HOLDRS Trust, at any time after expiration of a four-month period following the closing under the Asset Purchase Agreement, the Trustee has the right to sell the securities underlying the remaining HOLDRS of each HOLDRS Trust. After any such liquidation, remaining HOLDRS Investors would be entitled to receive his or her proportionate share of the net proceeds of the sale, after deduction of applicable fees and expenses, upon surrender of HOLDRS to the Trustee.

## **PART II**

### **A. THE TRUST AND ITS FUNDS**

#### **I. General**

The Trust was organized as a Delaware statutory trust on March 15, 2001, is registered under the 1940 Act with the Commission as an open-end management investment company and is authorized to issue an unlimited number of series. The Trust has organized the six Funds identified and briefly described below, which are the subject of this request for relief. Each Fund seeks to replicate a particular Index that was established by Market Vectors Index Solutions GmbH ("Index Provider"), and is calculated, maintained and disseminated by the Index Provider in the manner and according to the rule book. The Trust currently consists of 53 investment portfolios, including the Funds.

The Trust offers and sells Shares pursuant to a "Registration Statement" filed with the Commission (Registration Nos. 333-123257 and 811-10325 on Form N-1A under the 1940 Act and the Securities Act of 1933, as amended ("1933 Act")), which went effective on October 31, 2011. Each Fund is an index fund that seeks to replicate as closely as possible, before fees and expenses, the price and yield performance of its stated Index by generally holding all of the securities comprising the Index in proportion to their weightings in the Index. Each Fund intends to qualify as a "regulated investment company" for purposes of the Internal Revenue Code of 1986, as amended.

The Index Provider to each Fund has designed a proprietary, rules-based process to create each Index. Each Index is "transparent" because the rule-book derived from such rules-based process and the composition of each such Index are freely available to the public on Van Eck's

website. Each Fund follows a stated Index primarily comprised of equity securities as briefly described below and uses a replication strategy to track its respective Index.

Each Index is newly formed and was developed and created by the Index Provider, a wholly owned subsidiary of Van Eck. The Indexes were launched publicly on August 12, 2011. The Indexes were not developed or created to advantage Van Eck or the Funds to the detriment of HOLDERS Investors or future shareholders of the Funds. The list of securities included in each Index is included in each Fund's Form N-14. While the weighting of the securities included in each Index could have changed as of the date on which the Expiration Time occurred as a result of market movements and/or corporate actions, the securities included in each Index were not expected to, and did not, change.

## II. The Funds and Their Respective Indexes

The Bank and Brokerage ETF seeks to replicate as closely as possible, before fees and expenses, the price and yield performance of the Market Vectors US Listed Bank and Brokerage 25 Index. The Market Vectors US Listed Bank and Brokerage 25 Index is comprised of common stocks and depositary receipts of U.S. exchange-listed companies engaged primarily on a global basis in the banking sector. These companies include foreign companies that are listed on a U.S. exchange. Companies are considered to be in the banking sector if they derive most of their revenues from banking, which includes a broad range of financial services such as investment banking, brokerage services and corporate lending to large institutions.

The Biotech ETF seeks to replicate as closely as possible, before fees and expenses, the price and yield performance of the Market Vectors US Listed Biotech 25 Index. The Market Vectors US Listed Biotech 25 Index is comprised of common stocks and depositary receipts of U.S. exchange-listed companies in the biotechnology sector. These companies may include foreign companies that are listed on a U.S. exchange. Companies are considered to be in the biotechnology sector if they derive most of their revenues from biotechnology, which includes biotechnology research and development as well as production, marketing and sales of drugs based on genetic analysis and diagnostic equipment.

The Oil Services ETF seeks to replicate as closely as possible, before fees and expenses, the price and yield performance of the Market Vectors US Listed Oil Services 25 Index. The Market Vectors US Listed Oil Services 25 Index is comprised of common stocks and depositary receipts of U.S. exchange-listed companies in the oil services sector. These companies may include foreign companies that are listed on a U.S. exchange. Companies are considered to be in the oil services sector if they derive most of their revenues from oil services, which include oil equipment, oil services or oil drilling.

The Pharmaceutical ETF seeks to replicate as closely as possible, before fees and expenses, the price and yield performance of the Market Vectors US Listed Pharmaceutical 25 Index. The Market Vectors US Listed Pharmaceutical 25 Index is comprised of common stocks and depositary receipts of U.S. exchange-listed companies in the pharmaceutical sector. These companies may include foreign companies that are listed on a U.S. exchange. Companies are considered to be in the pharmaceutical sector if they derive most of their revenues from pharmaceuticals, which includes pharmaceutical research and development as well as production, marketing and sales of pharmaceuticals.

The Retail ETF seeks to replicate as closely as possible, before fees and expenses, the price and yield performance of the Market Vectors US Listed Retail 25 Index. The Market Vectors US Listed Retail 25 Index is comprised of common stocks and depositary receipts of U.S. exchange-listed companies in the retail sector. These companies may include foreign companies that are listed on a U.S. exchange. Companies are considered to be in the retail sector if they derive most of their revenues from retail, which includes retail distribution; wholesalers; online, direct mail and TV retailers; multi-line retailers; specialty retailers, such as apparel, automotive, computer and electronics, drug, home improvement and home furnishing retailers; and food and other staples retailers.

The Semiconductor ETF seeks to replicate as closely as possible, before fees and expenses, the price and yield performance of the Market Vectors US Listed Semiconductor 25 Index. The Market Vectors US Listed Semiconductor 25 Index is comprised of common stocks and depositary receipts of U.S. exchange-listed companies in the semiconductor sector. These companies may include foreign companies that are listed on a U.S. exchange. Companies are considered to be in the semiconductor sector if they derive most of their revenues from semiconductors, which includes the production of semiconductors and semiconductor equipment.

Each Index is a rules based, modified capitalization weighted, float adjusted index intended to give investors a means of tracking the overall performance of the largest and the most liquid common stocks and depositary receipts of U.S. exchange-listed companies that derive the majority of their revenues from a specific sector. Of the largest 50 stocks in the sector by full market capitalization, the top 25 by free-float market capitalization (e.g., includes only shares that are readily available for trading in the market) and three month average daily trading volume are included in the Index.

**B. OTHER PARTIES**

**I. The Adviser**

Van Eck Associates Corporation is the investment adviser to each of the Funds. The Adviser, subject to the supervision of the Trust's Board of Trustees, is responsible for the day-to-day investment management of the Funds. As of September 30, 2011, the Adviser managed approximately \$31.3 billion in assets. The Adviser has been an investment adviser since 1955 and also acts as adviser or sub-adviser to other mutual funds, exchange-traded funds, other pooled investment vehicles and separate accounts. The Adviser's principal business address is 335 Madison Avenue, 19th Floor, New York, New York 10017. The Adviser is affiliated within the meaning of Section 2(a)(3) of the 1940 Act with the Index Provider.

**II. The Distributor and Authorized Participants**

Van Eck Securities Corporation, a broker-dealer registered under the Securities Exchange Act of 1934, as amended ("Exchange Act"), and a member of the Financial Industry Regulatory Authority, acts as the distributor and principal underwriter of Shares. The Distributor distributes Shares on an agency basis. The Distributor is not affiliated (within the meaning of Section 2(a)(3) of the 1940 Act) with NYSE Arca or any other exchange.

Entities that have entered into an agreement with the Distributor and the Trust's transfer agent ("Transfer Agent") to become "Authorized Participants" may place orders with the Distributor to directly purchase or redeem Creation Units, as described below. An Authorized Participant must be an entity that (i) is a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the NSCC, a clearing agency that is registered with the Commission, or a DTC Participant, and (ii) has executed an agreement with the Distributor with respect to creations and redemptions of Creation Units with the Distributor. Authorized Participants may be, but are not required to be, members of an Exchange. Authorized Participants are not affiliated (within the meaning of Section 2(a)(3) of the 1940 Act) with the Adviser, NYSE Arca, any other exchange or the Index Provider.

**III. The Index Provider**

Market Vectors Index Solutions GmbH is the owner and creator of the Indexes. The Index Provider is a wholly owned subsidiary of the Adviser. The Index Provider has appointed the calculation agent(s) for the Indexes, as an agent for this purpose. The Index Provider may appoint a different institution to serve as calculation agent from time to time.

### PART III

#### **A. THE HOLDERS TRUSTS**

Each HOLDERS Trust is a depositary trust governed by the laws of the State of New York, which issues depositary trust receipts, or HOLDERS. HOLDERS represent a HOLDERS Investor's undivided beneficial ownership in the common stock or American depositary shares representing common stock of a group of specified companies that are involved in various segments of certain industry sectors and whose securities are registered under Section 12 of the Exchange Act. Each HOLDERS Trust issues and cancels HOLDERS on a continuous basis. HOLDERS were listed and traded on NYSE Arca. Each HOLDERS Trust's principal executive offices are located at One Bryant Park, New York, New York 10036.

Each HOLDERS Trust is not a registered investment company under the 1940 Act,<sup>10</sup> but HOLDERS are registered under the Exchange Act and make certain filings thereunder, such as Form 8-Ks, but are not required to file quarterly or annual reports. The companies whose securities were included in each HOLDERS Trust at the time that the HOLDERS Trust was originally issued were generally considered to be among the largest and most liquid companies with U.S.-traded securities involved in a specified sector, as measured by market capitalization and trading volume around the time of the formation of the HOLDERS Trust. Except when a reconstitution event, distribution of securities by an underlying issuer or other event occurs, the group of companies included in each HOLDERS Trust does not change. Therefore, the HOLDERS Trusts may no longer consist exclusively of securities issued by companies involved in its corresponding sector or may no longer be a diversified investment in such sector.

#### **B. THE TRUST AGREEMENT**

Each HOLDERS Trust was formed pursuant to a depositary trust agreement, as amended (the "Trust Agreement"), among The Bank of New York Mellon, as trustee, Merrill Lynch, Pierce, Fenner & Smith Incorporated (the "Initial Depositor"), other depositors and HOLDERS Investors. HOLDERS Investors have the same rights and privileges as they would have if they beneficially owned the underlying securities in "street name" outside of the HOLDERS Trust. These include the right of investors to instruct the Trustee to vote the underlying securities, and to receive dividends and other distributions on the underlying securities, if any are declared and paid to the Trustee by an issuer of an underlying security, as well as the right to cancel HOLDERS to receive the underlying securities. HOLDERS do not change a HOLDERS Investor's beneficial

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<sup>10</sup> HOLDERS, SEC No-Action Letter (pub. avail. Sept. 3, 1999).

ownership in the underlying securities under U.S. federal securities laws. A HOLDRS Investor is not a registered owner of the underlying securities.

HOLDRS Investors are entitled to receive, net of Trustee fees, taxes or other charges, distributions of cash, including dividends, securities or property, if any, made with respect to the underlying securities. Any distributions of securities by an issuer of underlying securities will be deposited into the HOLDRS Trust and will become part of the HOLDRS Trust unless such securities are not listed for trading on a U.S. national securities exchange or through the Nasdaq National Market System or such distributed securities have a different Standard & Poor's GICS sector classification than any of the underlying securities represented in the HOLDRS Trust at the time of the distribution of such securities. In addition, HOLDRS Investors are not entitled to any interest on any distribution by reason of any delay in distribution by the Trustee. If any tax or other governmental charge becomes due with respect to HOLDRS or any underlying securities, HOLDRS Investors will be responsible for paying that tax or governmental charge. If a HOLDRS Investor wishes to participate in a tender offer for any of the underlying securities, or any form of stock repurchase program by an issuer of an underlying security, he or she must surrender his or her HOLDRS (and pay the applicable fees and expenses) and receive all of his or her underlying securities in exchange for HOLDRS.

The Trustee, a New York state-chartered banking organization, acts as the trustee to HOLDRS Trust and receives compensation as set forth in the Trust Agreement. The Trustee performs only administrative and ministerial acts. The Trustee is responsible for receiving deposits of underlying securities and delivering HOLDRS representing the underlying securities issued by HOLDRS Trust. The Trustee holds the underlying securities on behalf of HOLDRS Investors. The Trustee charges a quarterly custody fee of \$2.00 for each round-lot of 100 HOLDRS, to be deducted from any cash dividend or other cash distributions on underlying securities received by HOLDRS Trust. The Trustee waives that portion of the fee which exceeds the total cash dividends and other cash distributions received, or to be received, and payable with respect to such calendar year.

Prospective investors may acquire HOLDRS either (i) through an in-kind deposit of the required number of securities of the underlying issuers with the Trustee; or (ii) through a cash purchase in the secondary trading market. Each HOLDRS Trust will only issue and cancel, and shareholders may only obtain, hold, trade or surrender, HOLDRS in round-lots of 100 HOLDRS and round-lot multiples. Each HOLDRS Trust will only issue HOLDRS upon the deposit of the whole shares represented by a round-lot of 100 HOLDRS. The number of outstanding HOLDRS will increase and decrease as a result of in-kind deposits and withdrawals of the underlying securities. Each HOLDRS Trust issues HOLDRS on a continuous basis when an investor deposits the required securities with the Trustee. The Trustee charges an issuance fee of up to \$10.00 for

each round-lot of 100 HOLDRS and a cancellation fee of up to \$10.00 for each round-lot of 100 HOLDRS.

HOLDRS Investors have the right to withdraw the underlying securities upon request by delivering a round-lot or integral multiple of a round-lot of HOLDRS to the Trustee, during the Trustee's business hours, and paying the cancellation fees, taxes and other charges. Withdrawing HOLDRS Investors are expected to receive the underlying securities no later than the business day after the Trustee receives a proper notice of cancellation. The Trustee does not deliver fractional shares of underlying securities. To the extent that any cancellation of HOLDRS otherwise requires the delivery of a fractional share, the Trustee will sell the fractional share in the market and HOLDRS Trust, in turn, will deliver cash in lieu of such fractional share. Except with respect to the right to vote for dissolution of the trust, HOLDRS themselves do not have voting rights.

The Trustee and the Initial Depositor may amend any provisions of the Trust Agreement without the consent of any other depositor or any HOLDRS Investors. Promptly after the execution of any amendment to the Trust Agreement, the Trustee must furnish or cause to be furnished written notification of the substance of the amendment to each HOLDRS Investor. Any amendment that imposes or increases any fees or charges, subject to exceptions, or that otherwise prejudices any substantial existing right of HOLDRS Investors will not become effective until 30 days after notice of the amendment is provided to HOLDRS Investors.

The Trust Agreement states that HOLDRS Trust will terminate in certain circumstances, one of which is upon notice by the Trustee to HOLDRS Investors at least 30 days prior to the early termination date. On August 11, 2011, the Trust Agreement was amended to add the termination event described in the preceding sentence. Each HOLDRS Trust was terminated on the closing date of the Asset Purchase Agreement.

The Trust Agreement gives the Trustee the authority to sell the underlying securities that remain in each HOLDRS Trust at any time after the expiration of four months following the termination date of such HOLDRS Trust.

#### **PART IV**

The Prior Order permits, among other things: (a) series of open-end management investment companies ("ETFs") to issue shares with limited redeemability that can be traded in the secondary market at market prices; (b) secondary market transactions in shares at negotiated prices on a national securities exchange as defined in Section 2(a)(26) of the 1940 Act; (c) dealers to sell such shares to secondary market purchasers unaccompanied by a statutory prospectus when prospectus delivery is not required by the 1933 Act; (d) relief from the seven (7) calendar

day redemption requirement for certain ETFs under specified limited circumstances; (e) certain affiliated persons of the ETFs to deposit securities into, and receive securities from, the ETFs in connection with the purchase and redemption of aggregations of shares of such ETFs; and (f) offering of ETFs based on indexes created, compiled, sponsored or maintained by certain affiliated persons of the Adviser. The Prior Order also permits certain registered management investment companies and unit investment trusts to acquire shares of the ETFs beyond the limits of Section 12(d)(1)(A) and (B) of the 1940 Act and permit ETFs to sell their shares to, and redeem their shares from, certain registered management investment companies and unit investment trusts that own 5% or more of the shares of such ETF.

The Prior Order allows ETFs, among other things, to create and redeem shares only in large specified numbers of shares called "Creation Units." Furthermore, pursuant to the Prior Order, to be eligible to place orders with the Distributor to create Creation Units of the ETFs, an entity or person either must be (1) a "Participating Party," *i.e.*, a broker dealer or other participant in the Clearing Process through the Continuous Net Settlement System of the NSCC; or (2) a DTC Participant; and, in either case, must have executed an agreement with the Distributor ("Participant Agreement"). Pursuant to the terms of the Participant Agreement, the Authorized Participant agrees on behalf of itself or any investor on whose behalf it will act, as the case may be, to certain conditions set forth in the Prior Order.

The Prior Order does not contemplate that Authorized Participants will enter into securities transactions on behalf of a class of investors similar to the Rebalancing Transaction entered into by the Transition Manager. Shares of the Funds were not listed on an exchange prior to the Expiration Time.

#### PART V

Applicants recognize that conducting the Offer is not consistent with the Prior Order and, therefore, Applicants respectfully request that the Division of Investment Management grant the requested no action relief for the following reasons:

The Offer was, in terms of its economic effect, similar to a merger or reorganization into a newly formed ETF shell. In this regard, we note that there have been closed-end fund conversions into ETFs pursuant to shareholder votes that have been permitted. In these transactions, similar to what was contemplated in the Offer, the initial creation order was effected through an Authorized Participant acting on behalf of the shareholders of the effected closed-end fund. In this case, in light of the unique structure of HOLDRS, a merger or reorganization pursuant to a shareholder vote was not a viable option. That is because each HOLDRS Investor

effectively owned the basket of securities underlying his or her HOLDRS.<sup>11</sup> Therefore, each HOLDRS Investor had to affirmatively elect whether or not to convert his or her investment into a Fund and could not be bound by a shareholder vote. Therefore, the Offer was a means of affording HOLDRS Investors the opportunity to convert their HOLDRS into Fund Shares. To ensure that HOLDRS Investors could make an informed decision in this regard, the terms of the Offer were fully described in the Offer to Exchange, including exchange offer documents and registration statements filed on Form N-14 that describe, among other things, the details of the Offer and all material differences between the HOLDRS Trusts and the Funds, including objectives, policies and risks as well as a list of the then expected initial portfolio composition of each Fund and the then current composition of the HOLDRS Trusts.

Furthermore, because the Funds were newly created ETFs that had not been offered to the public at the time of the consummation of the Offer, there was no concern that shareholders of the Funds would be diluted by the Offer. Rather, the initial net asset value of each Fund was based on the Rebalanced HOLDRS Securities that were contributed to each Fund in the Offer consistent with the 1940 Act. In addition, there were no sales charges imposed in connection with the Offer and the Offer was structured so that HOLDRS Investors did not bear any costs related to the Offer, including the fee for canceling their HOLDRS if they tendered HOLDRS for exchange in the Offer. Except for the potential tax gains discussed in footnote 7 above, the shareholders of the Funds did not bear any costs associated with the Offer. HOLDRS Investors that became shareholders of a Fund did not otherwise obtain any benefits to the detriment of future shareholders in the Funds.

Finally, except to the extent necessary to make the Offer and conduct the Rebalancing Transaction, all persons relying on the Prior Order have been and are acting in compliance with the terms and conditions of the Prior Order.

## **PART VI**

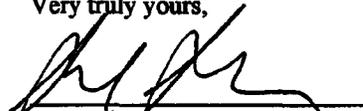
For the reasons set forth above, Applicants respectfully request that the Division of Investment Management grant the relief requested herein. We understand that no other person or entity will be able to rely on the relief requested herein except in connection with the Offer.

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<sup>11</sup> The closed-end fund transactions effectively resulted in closed-end funds being converted into ETFs with the same assets, liabilities and shareholders as the closed-end funds. In the case of the Offer, instead, HOLDRS Investors who beneficially owned Rebalanced HOLDRS Securities effectively transferred such securities to the Funds in exchange for Shares of the Funds.

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 (212) 698-3529 or Allison M. Fumai at (212) 698-3526.

Very truly yours,



Stuart M. Strauss, Esq.

cc: Joseph J. McBrien, Esq.