

October 8, 2015

Josephine J. Tao  
Assistant Director  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: Request of PowerShares Exchange-Traded Fund Trust II for Exemptive, Interpretive and/or No-Action Relief from Rule 10b-17 and Rules 101 and 102 of Regulation M promulgated under the Securities Exchange Act of 1934 for an Index-Based ETF

Dear Ms. Tao:

#### SUMMARY OF REQUEST FOR RELIEF

I am writing on behalf of PowerShares Exchange-Traded Fund Trust II (the “Trust”), an open-end investment company, with respect to the PowerShares DWA Tactical Sector Rotation Portfolio (the “Fund”), a series of the Trust described herein. The Trust, on behalf of itself, the Fund, any national securities exchange or national securities association on or through which shares of the Fund (“Shares”)<sup>1</sup> are listed (each, a “Listing Exchange”) and/or may subsequently trade (with each such market referred to herein as a “Market”)<sup>2</sup>, Invesco Distributors, Inc. (the “Distributor”) and other persons or entities engaging in transactions in Shares, including APs (as defined below), hereby requests, as applicable, from the staff of the Division of Trading and Markets (the “Staff”) of the Securities and Exchange Commission (the “Commission”), or from the Commission, exemptions, interpretive advice or no-action advice, as applicable, regarding Rule 10b-17, and Rules 101 and 102 of Regulation M, under the Exchange Act.

The Trust will offer Shares of the Fund. The Fund is an exchange-traded fund (“ETF”) organized as a series of the Trust. The Fund will seek to track the performance of an underlying index developed by Dorsey, Wright & Associates, LLC (the “Index Provider”). In doing so, the Fund will, under normal circumstances,<sup>3</sup> invest at least 90% of its total assets<sup>4</sup> in securities that

<sup>1</sup> The Trust intends to list the Shares of the Fund described herein on the NASDAQ Stock Market LLC (“NASDAQ”).

<sup>2</sup> In the future, the Trust may determine to list Shares on a Market other than the Listing Exchange. If the Trust lists Shares on a Market other than the Listing Exchange, Shares will be listed in accordance with exchange listing standards that are, or will become, effective pursuant to Section 19(b) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). If the Shares also trade on a Market pursuant to unlisted trading privileges, such trading will be conducted pursuant to self-regulatory organization rules that have become effective pursuant to Section 19(b) of the Exchange Act.

<sup>3</sup> The term “under normal circumstances” as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the securities markets or the financial markets

comprise the underlying index. These securities will include up to four ETFs included in the index (the “Underlying ETFs”), and may include U.S. Treasury Bills. In light of the index composition, the Fund intends to operate as an “ETF of ETFs.” Except for the fact that the Fund will operate as an ETF of ETFs, the Fund will operate in a manner identical to the Underlying ETFs.

The Staff has issued in the past relief substantially identical to that requested herein to index-based and actively managed ETFs operating as ETFs of ETFs (the “Prior ETFs of ETFs”).<sup>5</sup> The Staff has previously issued substantially similar relief to index-based ETFs<sup>6</sup> and actively managed ETFs<sup>7</sup> that invest directly in securities, as well as substantially similar relief to

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generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

<sup>4</sup> “Total Assets” are comprised of the entirety of the assets of the Fund prior to subtracting any liabilities of the Fund. An investment company’s total assets will always be at least equal to (assuming zero liabilities), and generally will exceed, both its net assets and its net assets plus any borrowing for investment purposes, if any.

<sup>5</sup> See Release No. 34-73398, dated October 21, 2014 (with respect to Global X Funds index-based ETFs of ETFs); Release No. 34-71652, dated March 5, 2014 (with respect to First Trust Exchange-Traded Fund VI, on behalf of First Trust Dorsey Wright Focus Five ETF); Release No. 34-69831, dated June 21, 2013 (with respect to ALPS ETF Trust); Release No. 34-68459, dated December 18, 2012 (with respect to ALPS ETF Trust); Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets, to Kathleen H. Moriarty, Katten Muchin Rosenman LLP, dated March 25, 2009 (revised April 12, 2009) (with respect to IndexIQ index-based ETFs of ETFs); Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets, to W. John McGuire, Morgan, Lewis & Bockius, LLP, dated September 14, 2009 (with respect to AdvisorShares Trust actively managed ETFs of ETFs); Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets, to Richard F. Morris, WisdomTree Asset Management, Inc., dated December 23, 2009 (with respect to WisdomTree Trust index-based ETF of ETFs); Letters to W. John McGuire, Morgan, Lewis & Bockius, LLP, from Josephine J. Tao, Assistant Director, Division of Trading and Markets, dated July 2, 2010 (with respect to AdvisorShares Mars Hill ETF), and from James A. Brigagliano, Deputy Director, Division of Trading and Markets, dated May 4, 2010 (with respect to U.S. One Trust ETF).

<sup>6</sup> See Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Jack P. Drogin of Morgan, Lewis & Bockius, LLP, dated August 4, 2005 (with respect to the iShares MSCI EAFE Growth Index Fund and iShares MSCI EAFE Value Index Fund); Letter from James Brigagliano, Assistant Director, Division of Market Regulation, to Jack P. Drogin, Morgan, Lewis & Bockius LLP, dated October 14, 2004 (with respect to the iShares FTSE/Xinhua China 25 Index Fund); Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Stuart Strauss, Mayer, Brown Rowe & Maw, dated October 21, 2002 (with respect to the Fresco Index Shares Fund); Letters from James A. Brigagliano, Assistant Director, Division of Market Regulation, to W. John McGuire, Morgan, Lewis & Bockius LLP, dated July 25, 2002, to Mary Joan Hoene, Carter, Ledyard & Milburn, dated December 1, 2000, and September 5, 2000, and to Kathleen H. Moriarty, Carter, Ledyard & Milburn, dated May 16, 2000 (with respect to various series of iShares Trust); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Kathleen Moriarty, Carter, Ledyard & Milburn, dated May 21, 2001 (with respect to Vanguard Index Funds); Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Barry A. Mendelson, The Vanguard Group, dated October 20, 2004 (with respect to Vanguard Index Funds); and Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Kathleen Moriarty, Carter, Ledyard & Milburn, dated March 9, 2005 (with respect to Vanguard Index Funds).

<sup>7</sup> See Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to PIMCO ETF Trust Actively Managed Fixed Income Exchange Traded Fund, dated November 10, 2009; Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to Grail Advisors ETF Trust, dated April 30, 2009, as revised May 6, 2009; Letter from James A. Brigagliano, Associate Director, Division of Trading and Markets, to Clifford Chance US LLP regarding PowerShares Actively Managed Exchange Traded Fund Trust, dated April 4, 2008; and Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets, to Foley & Lardner LLP regarding Bear Stearns Active ETF Trust, dated March 24, 2008.

various exchange traded products<sup>8</sup> (collectively, the “Prior ETFs”). The only ETFs in which the Fund will invest will be organized in the United States, registered under the Investment Company Act of 1940, as amended (the “1940 Act”), and listed on a Market. The Fund will operate in a manner substantially identical to the Prior ETFs of ETFs, and except for the fact that it will operate as an ETF of ETFs, the Fund will operate in a manner substantially identical to the Prior ETFs. For example, the Fund will disclose its portfolio holdings on a daily basis, and information about the prices of the securities and other instruments held by the Fund will be readily available from a variety of sources.

The Trust does not believe the Fund raises any significant new regulatory issues that have not already been addressed by the Commission and Staff. Nevertheless, because the Fund will operate as an ETF of ETFs, the Trust is concerned that the “ETF Class Relief” previously issued by the Staff with respect to certain types of ETFs may not extend to the Fund.<sup>9</sup> Specifically, the ETF Class Relief does not appear to extend to the Fund since the Fund does not meet the terms of Condition 2 of the Equity ETF Class Relief Letter as discussed more fully in Part IV herein.<sup>10</sup> In particular, the Fund does not expect to hold twenty (20) or more “Component Securities” and may, at times, hold Underlying ETFs in excess of 25% of its total portfolio value. Notwithstanding the foregoing, the Trust represents that all Underlying ETFs in which the Fund invests will either meet all conditions set forth in one or more of the ETF Class Relief Letters or the ETV Class Relief Letter<sup>11</sup>, respectively, will have received individual relief from the

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<sup>8</sup> See, e.g., Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Michael Schmidtberger, Esq., Sidley Austin Brown & Wood LLP, dated January 19, 2006 (with respect to DB Commodity Index Tracking Fund and DB Commodity Services LLC); Letter from Brian A. Bussey, Assistant Chief Counsel, Division of Market Regulation, to Kathleen H. Moriarty, Carter, Ledyard & Milburn, dated December 12, 2005 (with respect to the streetTRACKS Gold Trust); and Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Kathleen H. Moriarty, Carter, Ledyard & Milburn LLP, dated November 17, 2004 (with respect to the streetTRACKS Gold Trust).

<sup>9</sup> See Letter from Catherine McGuire, Esq., Chief Counsel, Division of Market Regulation, to the Securities Industry Association Derivative Products Committee, dated November 21, 2005 (re: Expanded class relief for ETFs with respect to Section 11(d)(1) of the Exchange Act and Rules 10b-10, 11d1-2, 15c1-5, and 15c1-6 under the Exchange Act) (“SIA Letter”); Letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Stuart M. Strauss, Esq., Clifford Chance US LLP, dated October 24, 2006 (re: ETFs comprised of equity securities and incorporating relief from certain prior letters) (“Equity ETF Class Relief Letter”); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Benjamin Haskin, Esq., Willkie, Farr & Gallagher LLP, dated April 9, 2007 (“Fixed Income ETF Class Relief Letter”); and Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to Domenick Pugliese, Esq., Paul, Hastings, Janofsky and Walker LLP, dated June 27, 2007 (re: ETFs that are comprised of both equity and fixed-income securities) (“Combination ETF Class Relief Letter”) (collectively, “ETF Class Relief” or “ETF Class Relief Letters”).

<sup>10</sup> Depending on the composition of the underlying index, the Fund may hold only ETF shares, in which case, it will rely on the Equity ETF Class Relief Letter as modified by the relief sought by this letter, or it will hold a mix of ETF shares and U.S. Treasury Bills. If the underlying mix contains U.S. Treasury Bills, the Fund will rely on the Combination ETF Class Relief Letter. The Combination ETF Class Relief Letter provides class relief to an ETF that is designed to correspond to the performance of an index that includes both equity as well as fixed income securities, if its equity sleeve meets the conditions of the Equity ETF Class Relief Letter and its fixed income sleeve meets the conditions of the Fixed Income ETF Class Relief Letter. The Fund’s investment in U.S. Treasury Bills will meet the conditions of the Fixed Income ETF Class Relief Letter. Assuming the relief requested in this letter is granted, the Fund therefore will be able to meet the requirements of the Combination ETF Class Relief Letter during periods in which the underlying index is composed of ETF shares and U.S. Treasury Bills.

<sup>11</sup> Letter from Racquel L. Russell, Branch Chief, Office of Trading Practices and Processes, Division of Market Regulation, to George T. Simon, Esq., Foley & Lardner LLP, dated June 21, 2006 (“ETV Class Relief Letter”).

Commission, will be able to rely on individual relief even though they are not named parties, or will be able to rely on applicable class relief for actively managed ETFs.<sup>12</sup>

The Trust hereby requests, as applicable, exemptions, interpretive or no-action advice regarding Rule 10b-17, and Rules 101 and 102 of Regulation M, under the Exchange Act.

This Letter is divided into five parts. Part I is a description of the Trust and the Fund. Part II contains a discussion of the dissemination of information regarding Shares. Part III contains a discussion of the ETF Class Relief. Part IV contains the request for relief and Part V is the conclusion.

## **Part I**

### **A. The Trust and the Fund**

The Trust is an investment company currently consisting of sixty-one separate ETFs (including the Fund). Invesco PowerShares Capital Management LLC (the “Advisor”) will act as investment adviser to the Fund. The Fund intends to qualify annually and to elect to be treated as a regulated investment company (“RIC”) under the Internal Revenue Code of 1986, as amended (the “Code”).

The Fund will be named the PowerShares DWA Tactical Sector Rotation Portfolio and will seek results that correspond generally to the price and yield (before the Fund’s fees and expenses) of the Dorsey Wright<sup>®</sup> Sector 4 Index (the “Underlying Index”). The Underlying Index aims to participate in the best-performing sectors of the U.S. equity market while limiting exposure to the market during period of high volatility or market declines. At any given time, the Underlying Index will be composed of up to four PowerShares ETFs (i.e., ETFs advised by the Advisor or its affiliates) from a universe of nine eligible PowerShares ETFs that each invest in a different representative economic sector in the equity markets that the Index Provider believes to have the greatest potential to outperform the other sectors. The Underlying Index is constructed pursuant to the Index Provider’s proprietary methodology, which takes into account the price movement of each sector in the equity markets and ranks each sector by its relative strength, as measured by its movement in price compared to other sectors.

The Underlying Index is equal weighted, with each constituent PowerShares ETF representing 25% of its weight. However, during market periods when fewer than four eligible PowerShares ETFs demonstrate sufficient relative strength, the Underlying Index, in accordance with the methodology developed by the Index Provider, will hold a cash position, represented by U.S. Treasury Bills (with a duration ranging from 0-180 days), in an amount equal to the weight

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<sup>12</sup> With respect to Rules 101 and 102 of Regulation M, such relief is set forth in the Division of Market Regulation Staff Legal Bulletin No.9, as revised on September 10, 2010 (“SLB 9”), which stated that, subject to certain conditions, actively managed exchange traded funds (“Active ETFs”) could rely on the exceptions in Rules 101(c)(4) and 102(d)(4) of Regulation M under the Exchange Act which are only available to open-end investment companies, notwithstanding the fact that shares of Active ETFs are redeemable only in creation units. With respect to Rule 10b-17, such relief is set forth in Release No. 34-67215, dated June 19, 2012. The foregoing relief is referred to collectively as the “Active ETF Relief.”



of the missing PowerShares ETF(s) (for example, at times when only two PowerShares ETFs demonstrate sufficient relative strength to be included in the Underlying Index, the Underlying Index will hold only those two PowerShares ETFs and will invest the remaining 50% of its weight in Treasury Bills). During periods when equity securities as a whole are out of favor, the Underlying Index may hold a 100% cash position. The Index Provider evaluates the Underlying Index constituents monthly and Underlying Index changes are transacted in accordance with the methodology developed by the Index Provider, as more fully described in the prospectus, using a replacement method (an Underlying Index constituent that represents a sector that has fallen out of favor is replaced by the PowerShares ETF representing a sector demonstrating relative strength), and the Underlying Index is rebalanced only when a position drifts materially from its targeted equal-weight allocation.

The PowerShares ETFs that are initially eligible for inclusion in the Underlying Index are set forth below and represent the nine macroeconomic sectors of the U.S. equity markets:

<b>Name</b>	<b>Ticker Symbol</b>	<b>Underlying Index of Underlying ETF</b>
PowerShares DWA Basic Materials Momentum Portfolio	PYZ	Dorsey Wright <sup>®</sup> Basic Materials Technical Leaders Index
PowerShares DWA Consumer Cyclical Momentum Portfolio	PEZ	Dorsey Wright <sup>®</sup> Consumer Cyclical Technical Leaders Index
PowerShares DWA Consumer Staples Momentum Portfolio	PSL	Dorsey Wright <sup>®</sup> Consumer Staples Technical Leaders Index
PowerShares DWA Energy Momentum Portfolio	PXI	Dorsey Wright <sup>®</sup> Energy Technical Leaders Index
PowerShares DWA Financial Momentum Portfolio	PFI	Dorsey Wright <sup>®</sup> Financials Technical Leaders Index
PowerShares DWA Healthcare Momentum Portfolio	PTH	Dorsey Wright <sup>®</sup> Healthcare Technical Leaders Index
PowerShares DWA Industrials Momentum Portfolio	PRN	Dorsey Wright <sup>®</sup> Industrials Technical Leaders Index
PowerShares DWA Technology Momentum Portfolio	PTF	Dorsey Wright <sup>®</sup> Technology Technical Leaders Index
PowerShares DWA Utilities Momentum Portfolio	PUI	Dorsey Wright <sup>®</sup> Utilities Technical Leaders Index

The Shares are expected to be listed on NASDAQ and will trade at market prices that may differ to some degree from the net asset value (“NAV”) of the Shares. Unlike conventional mutual funds, as described further below, the Fund will issue and redeem Shares on a continuous basis, at NAV, only in large specified blocks of 50,000 Shares, each of which is called a “Creation Unit.”

B. The Advisor, Distributor and APs

1. Advisor

The Advisor will act as the Fund's investment adviser pursuant to an investment advisory agreement with the Trust, on behalf of the Fund (the "Advisory Agreement"). The Advisor, located at 3500 Lacey Road, Suite 700, Downers Grove, Illinois 60515, is registered with the Commission as an investment adviser. Pursuant to the Advisory Agreement, the Advisor will manage the investment and reinvestment of the Fund's assets and administer the affairs of the Fund to the extent requested by, and subject to the supervision of, the Board of Trustees of the Trust (the "Board").

2. Distributor and APs

The Board has appointed the Distributor, a broker-dealer registered under the Exchange Act and a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"), to act as the distributor and principal underwriter of the Creation Units of Shares. The Distributor will distribute Shares on an agency basis. The Board may appoint a different distributor in the future. Only entities that have entered into an agreement (a "Participant Agreement") with the Distributor to become "authorized participants" ("APs") may place orders with the Distributor to purchase or redeem Creation Units, as described below.

C. Shares

As described in subparts I.D. through I.F. below, the Fund will issue and redeem its Shares in Creation Units. Shares will not be individually redeemable securities of the Fund. The Trust intends that the initial NAV of Shares will be established at a level convenient for trading purposes. Purchasers of Creation Units will be able to unbundle the Creation Units into the individual Shares comprising such Creation Unit.

D. Purchasing Shares

The Trust will issue Shares at NAV only in Creation Units and only to APs. Creation Unit transactions to purchase Shares will typically be conducted in exchange for the deposit or delivery of in-kind securities constituting a substantial replication of the securities included in the Fund's underlying index and/or cash.

Individual Shares of the Fund may only be purchased and sold in secondary market transactions through brokers. Shares are expected to be listed for trading on NASDAQ and, because Shares will trade at market prices rather than NAV, Shares of the Fund may trade at a price greater than, at, or less than NAV.

E. Procedures Applicable to Purchases of the Fund

The consideration for purchase of Creation Units of the Fund may consist of (i) a designated portfolio of equity securities determined by the Advisor (the "Deposit Securities") per each Creation Unit constituting a substantial replication of the securities included in the underlying index or (ii) cash in lieu of all or a portion of the Deposit Securities together with, in each case, an amount of cash - the "Cash Component" - computed as described below. Together, the Deposit Securities (including the cash in lieu amount) and the Cash Component constitute the "Fund Deposit," which represents the minimum initial and subsequent investment amount for a Creation Unit of the Fund.

The Cash Component serves the function of compensating for any differences between the NAV per Creation Unit and the Deposit Amount (as defined below). The Cash Component is an amount equal to the difference between the NAV of Shares (per Creation Unit) and the market value of the Deposit Securities and/or cash in lieu of all or a portion of the Deposit Securities (the "Deposit Amount"). If the Cash Component is a positive number (i.e., the NAV per Creation Unit exceeds the Deposit Amount), the creator will deliver the Cash Component. If the Cash Component is a negative number (i.e., the NAV per Creation Unit is less than the Deposit Amount), the creator will receive the Cash Component.

The Fund's custodian ("Custodian"), through the National Securities Clearing Corporation ("NSCC"), will make available on each business day, prior to the opening of business of the Listing Exchange (currently 9:30 a.m., Eastern Time), the list of the names and the required number of shares of each Deposit Security to be included in the current Fund Deposit (based on information at the end of the previous business day) for the Fund.

In order to be eligible to place orders with the Distributor and to create a Creation Unit of the Fund, an entity must be (i) a "Participating Party," i.e., a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the NSCC (the "Clearing Process"), a clearing agency that is registered with the Commission; or (ii) a participant that uses the facilities of The Depository Trust Company ("DTC," and such participant, a "DTC Participant").

All orders to create Creation Units, whether through the Clearing Process (through a Participating Party) or outside the Clearing Process (through a DTC Participant), must be received by the Distributor no later than the closing time of the regular trading session on the New York Stock Exchange ("NYSE") (ordinarily 4:00 p.m., Eastern Time) ("Closing Time") in each case on the date such order is placed in order for the creation of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form. In the case of custom orders, the order must be received by the Distributor no later than 3:00 p.m., Eastern Time on the trade date.

A fixed creation transaction fee (the "Creation Transaction Fee") is applicable to each purchase transaction regardless of the number of Creation Units purchased in the transaction. When the Fund (i) permits an AP to substitute cash in lieu of depositing one or more of the requisite Deposit Securities or (ii) issues Creation Units outside the Clearing Process, the Fund may assess a separate, variable transaction fee to an AP to cover the cost of purchasing the

Deposit Securities, including operational processing and brokerage costs, transfer fees, stamp taxes, and part or all of the spread between the expected bid and offer side of the market related to such Deposit Securities.

To the extent contemplated in the applicable Participant Agreement, Shares of the Fund may be issued in advance of receipt of all Deposit Securities subject to various conditions, including an undertaking by the AP to deliver the missing Deposit Securities as soon as possible, which undertaking will be secured by the delivery and maintenance of collateral.

F. Procedures Applicable to Redemptions of the Fund

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the Fund through the Custodian and only on a business day. The Custodian, through the NSCC, will make available prior to the opening of business on the Listing Exchange (currently 9:30 a.m., Eastern Time) on each business day, the identity of the Fund Securities (defined below) that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day.

Unless cash redemptions are permitted or required for the Fund,<sup>13</sup> the redemption proceeds for a Creation Unit generally consist of a portfolio of securities (“Fund Securities”) as announced on the business day of the request for redemption received in proper form—plus or minus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Fund Securities (the “Cash Redemption Amount”), less the applicable Redemption Transaction Fee (defined below) and, if applicable, any variable redemption fees relating to operational processing and brokerage costs, transfer fees or stamp taxes. In the event that the Fund Securities have a value greater than the NAV of the Shares, a compensating cash payment equal to the difference plus the applicable Redemption Transaction Fee and, if applicable, any operational processing and brokerage costs, transfer fees or stamp taxes, is required to be made by or through an AP by the redeeming shareholder.

Orders to redeem Creation Units through the Clearing Process must be delivered through an AP that has executed a Participant Agreement. Investors other than APs are responsible for making arrangements for a redemption request to be made through an AP. An order to redeem Creation Units of the Fund is deemed received by the Trust on a particular date (the “Transmittal Date”) if: (i) such order is received by the Custodian not later than the Closing Time on the Transmittal Date; and (ii) all other procedures set forth in the Participant Agreement are properly followed.

Orders to redeem Creation Units outside the Clearing Process must be delivered through a DTC Participant that has executed the Participant Agreement. A DTC Participant who wishes to place an order for redemption of Creation Units to be effected outside the Clearing Process does not need to be a Participating Party, but such orders must state that the DTC Participant is

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<sup>13</sup> Redemption payments may be made in cash, in-kind, or a combination of both.

not using the Clearing Process and that redemption of Creation Units will instead be effected through transfer of Shares directly through DTC. An order to redeem Creation Units outside the Clearing Process is deemed received by the Trust on the Transmittal Date if (i) such order is received by the transfer agent not later than 4:00 p.m., Eastern time on such Transmittal Date; (ii) such order is accompanied or followed by the requisite number of Shares, which delivery must be made through DTC and the compensating cash payment, if any owed to the Fund, to the Custodian no later than 11:00 a.m., Eastern time on the contractual settlement date; and (iii) all other procedures set forth in the Participant Agreement are properly followed.

A fixed redemption transaction fee (the “Redemption Transaction Fee”) is applicable to each redemption transaction regardless of the number of Creation Units redeemed in the transaction. Investors will also bear the costs of transferring the Fund Securities from the Trust to their account or on their order. A shareholder may request a cash redemption in lieu of securities; however, the Fund may, in its discretion, reject any such request.

## **Part II**

### **A. Dissemination of Information about Deposit Securities and Fund Securities**

As discussed above, the names and required number of shares of the Deposit Securities and Fund Securities to be tendered in connection with the issuance or redemption, respectively, of Shares of Creation Units will be made available on each business day prior to the opening of trading.

### **B. Dissemination of Information about the Fund’s Portfolio Securities**

The prices of the Fund’s portfolio securities (“Portfolio Securities”) will be readily available from, as applicable, the relevant listing Market, other Markets, automated quotation systems, and other sources, such as independent pricing services.

### **C. Dissemination of Information about Shares**

In order to provide current Share pricing information for the Fund for use by investors, professionals and persons wishing to create or redeem Shares, (i) the Listing Exchange will disseminate continuously every 15 seconds throughout the trading day, through the facilities of the consolidated tape, the market value of a Share and (ii) the Listing Exchange, market data vendors or other information providers will disseminate, every 15 seconds throughout the trading day, a calculation of the intraday indicative value of a Share. Comparing these two figures will allow an investor to determine whether, and to what extent, Shares are selling at a premium or a discount to NAV.

The Fund’s website (the “Website”) will also contain the following information on a per Share basis for the Fund: (i) the prior business day’s NAV, the closing market price, the mid-point of the bid-ask spread at the time of calculation of the NAV (the “Bid/Ask Price”), and a calculation of the premium or discount of the Bid-Ask Price at the time of calculation of the



NAV against such NAV; and (ii) data displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. The Website will also display the Fund's Prospectus and additional quantitative information that is updated on a daily basis.

### **Part III**

#### **A. Comparison of the Fund to the Other ETFs Which Have Sought Similar Commission Action and Received Similar Relief**

The Trust believes that the relief requested herein is substantially identical to the relief granted by the Commission to the Prior ETFs of ETFs and substantially similar to the relief granted by the Commission to the Prior ETFs.

#### **B. Applicability of the ETF Class Relief to the Fund**

The ETF Class Relief provides exemptive and/or no-action or interpretive relief with respect to Rule 10b-17, as well as Rules 101 and 102 of Regulation M, under the Exchange Act to any ETF that meets the criteria set forth in the Equity ETF Class Relief Letter. The Equity ETF Class Relief Letter sets forth five criteria that an ETF must meet in order to rely upon the ETF Class Relief. These are:

1. The ETF Shares are issued by an open-end investment company or unit investment trust registered with the Commission under the [1940] Act;
2. The ETF consists of a basket of twenty or more Component Securities,<sup>14</sup> with no one Component Security constituting more than 25% of the total value of the ETF;<sup>15</sup>
3. At least 70% of the ETF must be comprised of Component Securities that meet the minimum public float and minimum average daily trading volume thresholds under the 'actively-traded securities' definition found in Regulation M for excepted securities during each of the previous two months of trading prior to the formation of the relevant ETF; provided, however, that if the ETF has 200 or more Component Securities then 50% of the Component Securities must meet the actively-traded securities thresholds;

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<sup>14</sup> For purposes of the Commission's response, "Component Securities" are defined as individual securities that comprise the ETF basket, e.g., securities that are assembled to replicate the particular index that the ETF tracks.

<sup>15</sup> For purposes of the Commission's response, whether any one Component Security constitutes more than 25% of the total value of the ETF shall be determined as of the most recent rebalancing of the ETF's reference securities index.

4. ETF shares are to be issued and redeemed in Creation Unit aggregations of 50,000 shares or such other amount where the value of a Creation Unit is at least \$1 million at the time of issuance; and

5. The ETF must be managed to track a particular index all the components of which have publicly available last sale trade information. The intra-day proxy value of the ETF per share and the value of the “benchmark” index must be publicly disseminated by a major market data vendor throughout the trading day.<sup>16</sup>

The Fund’s investments in ETF shares will meet all of the criteria of the Equity ETF Class Relief Letter set forth above, with the exception of Condition 2. With respect to Condition 2, the Fund will not hold “a basket of twenty or more Component Securities” and may hold Underlying ETFs in excess of 25% of the total value of its portfolio (due to possible market fluctuations).<sup>17</sup> All Underlying ETFs in which the Fund invests, however, will either meet all conditions set forth in one or more of the ETF Class Relief Letters or the ETV Class Relief Letter, respectively, will have received individual relief from the Commission, will be able to rely on individual relief even though they are not named parties, or will be able to rely on the Active ETF Relief. Further, the Trust hereby represents that: (a) the arbitrage mechanism will be facilitated by the transparency of the Fund’s portfolio and the availability of the intra-day indicative value, the liquidity of securities held by the Fund and the ability to acquire such securities, as well as the arbitrageurs’ ability to create workable hedges; (b) the Fund will invest solely in liquid securities; (c) the Fund will invest in securities that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges; (d) the Trust believes that arbitrageurs are expected to take advantage of price variations between the Fund’s market price and its NAV; and (e) a close alignment between the market price of Shares and the Fund’s NAV is expected. Therefore, the Trust hereby requests that the Commission grant exemptive, interpretive or no-action relief from Rule 10b-17 and Rules 101 and 102 of Regulation M as discussed below. As noted above, this relief is substantially identical to the relief granted to the Prior ETFs of ETFs.

#### **Part IV**

##### **A. Requests for Relief-Introduction**

The Trust, on behalf of itself, the Fund, the Listing Exchange, other Markets, the Distributor, APs and other persons or entities engaging in transactions in the Shares, requests that the Commission grant exemptions, interpretive or no-action advice regarding Rules 10b-17, and Rules 101 and 102 of Regulation M, under the Exchange Act.

##### **1. Rule 10b-17**

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<sup>16</sup> See Equity ETF Class Relief Letter at 2.

<sup>17</sup> The Fund will meet the requirements of the Fixed Income ETF Class Relief Letter with respect to the sleeve of its assets invested in U.S. Treasury Bills.

Rule 10b-17 requires an issuer of a class of publicly-traded securities to give notice of certain specified actions (*e.g.*, dividends, stock splits, rights offerings) relating to such class of securities in accordance with Rule 10b-17(b). Specifically, Rules 10b-17(b)(1)(v)(a-b) require such advance notice to specify (a) for cash distributions, the amount of cash to be paid or distributed per share<sup>18</sup>, and (b) for in-kind distributions, the amount of the security outstanding immediately prior to and immediately following the dividend or distribution and the rate of such dividend or distribution. Paragraph (c) of the Rule, however, states that the Rule shall not apply to redeemable securities issued by open-end investment companies and unit investment trusts registered under the 1940 Act. Except for the fact that Shares must be redeemed in Creation Units, the Trust is intended to function like any other open-end fund continuously offering its shares. It is in recognition of the foregoing that the Division of Investment Management issued an order upon which the Trust may rely permitting the Trust to issue shares with limited redeemability while still treating the Trust like any other open-end investment company. In addition, compliance with Rules 10b-17(b)(1)(v)(a-b) would be impractical in light of the nature of Fund. This is because it is not possible for the Fund to accurately project ten days in advance what dividend, if any, would be paid on a particular record date. Because of this inability to project the amount of any dividend ten days in advance of a record date, applying the timing requirements of 10b-17(b)(1)(v)(a-b) to the Fund would increase the chances that the Fund would misestimate the amount of any such dividend.<sup>19</sup>

The Trust represents that it will comply with the requirements of Rule 10b-17 (other than paragraphs (b)(1)(v)(a-b) thereof). The Trust further represents that, as soon as practicable following the end of trading on the Exchange on the day prior to the ex-date (but not later than the last time at which the Exchange accepts such information on such date) with respect to any distribution to be made by the Fund, the Trust will provide notice to the Exchange containing the information required in Rules 10b-17(b)(1)(v)(a-b).

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<sup>18</sup> The Rule permits a reasonable approximation of the per share distribution to be provided if exact amounts cannot be given because of existing conversion rights which may be exercised during the notice period and may affect the per share cash distribution, as long as the actual per share distribution is subsequently provided on the record date.

<sup>19</sup> As a RIC, the Fund is required by the Code to distribute at least 98% of its ordinary income and 98.2% of its capital gains during the calendar year. If the Trust, with respect to the Fund, declares too small a dividend, it will be charged an excise tax. If it declares too large a dividend, the excess could be considered a return of capital to investors. To avoid an over- or under-distribution of ordinary income, RICs, including the Fund, must estimate: (i) the amount of ordinary income to be earned during the period from the date the dividend is declared to December 31; and (ii) the number of shares that will be outstanding as of the record date. Requiring the Trust to declare the amount of a dividend ten days in advance of the record date would increase the period for estimating ordinary income and the number of outstanding shares, and thus increase the risk of an over- or under-distribution. Requiring the Trust to declare the amount of a dividend ten days in advance of the record date also would increase the chance that the Fund would over- or under-distribute capital gains. Further, unlike ordinary income, the Fund does not have the problem of estimating the aggregate amount of capital gains it will earn between the declaration date and year-end, but as noted above, requiring the Trust to declare the amount of a dividend ten days in advance of the record date would increase the chance that the Trust would misestimate the number of outstanding shares. This, in turn, would increase the chance that the Trust would misestimate the per share amount of capital gains that the Fund must distribute.

In the proposing release for Rule 10b-17 (the “Proposing Release “),<sup>20</sup> in discussing the rights to receive dividends and other rights which accrue to holders of record of securities as of a record date, the Commission stated:

It has been the experience of the Commission and the securities industry that the failure of a publicly held company to provide a timely announcement of the record date with respect to these types of rights has had a misleading and deceptive effect on both the broker-dealer community and the investing public. As a direct result of such failure, purchasers and their brokers may have entered into and settled securities transactions without knowledge of the accrual of such rights and were thus unable to take necessary steps to protect their interests. Further, sellers who have received the benefits of such rights as recordholders on the specified record date after having disposed of their securities, have also disposed of the cash or stock dividends or other rights received as such recordholders without knowledge of possible claims of purchasers of the underlying security to those rights... In many instances, innocent buyers and sellers have suffered losses. In addition, some issuers have made belated declarations of stock splits or dividends with the apparent knowledge that this action would have a manipulative effect on the market for their securities.

The Trust respectfully submits that none of these concerns raised by the Commission in the Proposing Release<sup>21</sup> will be implicated if the requested relief is granted. As set forth above, the Trust will comply with the requirements of Rule 10b-17 except for the timing requirements for notification of the actual amounts of the distributions under Rule 10b-17(b)(1)(v)(a-b). Accordingly, market participants will receive timely notification of the existence and timing of a pending distribution, and will be able to plan their transactions in Shares accordingly. As a result, there should be no confusion or opportunity for manipulation regarding parties’ rights to receive distributions, which concerns inspired the Commission to propose and adopt Rule 10b-17. Therefore, the requested relief concerning the timing requirements of Rules 10b-17(b)(1)(v)(a-b) is consistent with the purposes underlying the adoption of Rule 10b-17 as outlined in the Proposing Release and Adopting Release. The exemption under paragraph (c) of Rule 10b-17, which covers open-end investment companies with fully redeemable shares, thus should be applicable to the Trust with respect to the timing requirements of Rules 10b-17(b)(1)(v)(a-b).

## 2. Rule 101 of Regulation M<sup>22</sup>

The Trust respectfully requests that the Commission grant interpretive relief from Rule 101, as discussed below, to permit persons participating in a distribution of Shares of the

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<sup>20</sup> Exchange Act Release No. 9076 (February 17, 1971).

<sup>21</sup> The foregoing concerns were largely reiterated by the Commission in the release adopting Rule 10b-17. See Exchange Act Release No. 9192 (June 7, 1971) (the “Adopting Release”).

<sup>22</sup> The relief being requested is analytically consistent with SLB 9.

Fund to bid for or purchase, redeem or engage in other secondary market transactions in such Shares.

Generally, Rule 101 of Regulation M is an anti-manipulation regulation that, subject to certain exemptions, prohibits any “distribution participant” and “its affiliated purchasers” from bidding for, purchasing, or attempting to induce any person to bid for or purchase, any security which is the subject of a distribution until after the applicable restricted period, except as specifically permitted in Regulation M. The provisions of Rule 101 apply to underwriters and prospective underwriters, brokers, dealers, and other persons who have agreed to participate or are participating in such distribution.

We understand that while broker-dealers that (i) tender Fund Deposits to the Trust in return for Shares of the Fund in Creation Units; or (ii) redeem Shares of the Fund in Creation Units for receipt of Fund Securities and cash (or cash only) held by the Fund generally will not be part of a syndicate or selling group, and while no broker-dealer will receive fees, commissions or other remuneration from the Trust for the sale of Shares of the Fund in Creation Units, under certain circumstances such broker-dealers could be deemed to be “underwriters” or “distribution participants” as such terms are defined in Rule 100(b).

Paragraph (c)(4) of Rule 101 exempts from its application, inter alia, redeemable securities issued by an open-end management investment company (as such terms are used in the 1940 Act). The Trust is registered as an open-end management investment company under the 1940 Act. However, as discussed above, individual Shares are not redeemable except in Creation Units. Due to the redeemability of the Shares in Creation Units, there should be little disparity between the Shares’ market price and their NAV per Share. Accordingly, the rationale for exempting redeemable securities of open-end management investment companies from the application of Rule 101 is equally applicable to the Shares. Although redemption is subject to the condition of tendering the appropriate number of Shares of Creation Units, the Trust otherwise will continue to function as an open-end fund continuously offering its Shares.

It is in recognition of the special nature of such offerings that open-end management investment company and unit investment trust securities are exempted under paragraph (c)(4). Without such an exemption, they could not operate as intended. In view of the foregoing, the Trust requests that the Commission confirm that as a result of registration of the Trust as an open-end management investment company and the redeemable nature of the Shares in Creation Units, transactions in the Shares would be exempted from Rule 101 on the basis of the exception contained in (c)(4) of such Rule.

The purpose of Rule 101 is to prevent persons from conditioning the market to facilitate a distribution. Creation Units of Shares may be created and redeemed, in-kind (and/or in cash in certain cases) at NAV, on any business day. Holders of Shares also have the benefit of intra-day secondary market liquidity by virtue of their Market listing. Thus, the secondary market price of Shares should not vary substantially from the NAV of such Shares. Because of the redeemability of Shares in Creation Units, coupled with the open-end nature of the Trust, any significant



disparity between the market price of the Shares and their NAV should be eliminated by arbitrage activity. Because the NAV of Shares is largely based on the market value of the Fund's holdings, transactions involving Shares (creations from and redemptions with the Trust, as well as purchases and sales in the secondary market) will not affect NAV. Similarly, such transactions should not have a significant effect on the market price of Shares.

The Trust requests that the Commission clarify that the tender of the Shares to the Fund for redemption and the receipt of Fund Securities upon redemption does not constitute a bid for or purchase of any of such securities, or an "attempt to induce any person to bid for or purchase a covered security, during the applicable restricted period" for the purposes of Rule 101. Redemption entails no separate bid for any of the Fund Securities. As described above, following notice of redemption, the Fund will deliver the specified Fund Securities after the redemption request is received in proper form, except in those cases where redemption proceeds are paid entirely in cash. Absent unusual circumstances, the Fund will not purchase Fund Securities in the secondary market to fulfill a redemption request. Therefore, redemptions of Shares cannot be expected to affect the market price of the Fund Securities. The Distributor will not engage in any secondary market transactions in Shares, either for its own account or for investors.

In view of the lack of any special financial incentive to create Creation Units of Shares, combined with a predictable lack of any meaningful potential for the issuance and the secondary market trading of Shares to affect significantly Shares pricing, application of Rule 101 to a broker-dealer or other person who may be participating in a distribution of Shares or securities held by the Fund is unnecessary and inappropriate, and could unnecessarily hinder broker-dealers or other persons in their creation and redemption activities, in their day-to-day ordinary business of buying and selling Shares and thus undermine the potential beneficial market effects of Shares trading discussed throughout this letter.

### 3. Rule 102 of Regulation M

The Trust respectfully requests that the Commission confirm that, as a result of registration of the Trust as an open-end management investment company and the redeemable nature of the Shares in Creation Units, for the reasons previously stated under our request for relief under Rule 101(c)(4), transactions in Shares would be exempted from Rule 102 on the basis of the exception contained in paragraph (d)(4) of such Rule. Application of Rule 102 in this context would not further the anti-manipulative purposes of the Rule. Alternatively, the Trust requests that the Commission grant an exemption under paragraph (e) of Rule 102 to such effect. Application of Rule 102 in this context would not further the anti-manipulative purpose of this Rule.

The purpose of Rule 102 is to prevent persons from manipulating the price of a security during a distribution and to protect the integrity of the offering process by prohibiting activities that could artificially influence the market for that particular security.

For the reasons described in connection with the requested Rule 101 relief, redemption transactions and secondary market transactions in the Shares are not viable means to manipulate the price of a Portfolio Security held by the Fund during a distribution of such security. The Trust will redeem the Creation Units of Shares at the NAV of the Shares. Although Shares are traded on the secondary market, Shares may only be redeemed in Creation Units. Thus, the Trust believes that the redemption by the Trust of the Shares of the Fund at NAV in consideration principally for Portfolio Securities held by the Fund does not involve the abuses that Rule 102 was intended to prevent.

**Part V**

A. Conclusion

Based on the foregoing, the Trust respectfully requests that the Commission and the Division of Trading and Markets grant the relief requested herein. The forms of relief requested are virtually identical to those actions which the Commission and the Division of Trading and Markets have taken in similar circumstances.

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 (202) 778-9220 or Alan Goldberg at (312) 807-4227.

Sincerely,

A handwritten signature in blue ink, appearing to read "Eric S. Purple", with a large, stylized flourish at the end.

Eric S. Purple