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JEREMY SENDEROWICZ

jeremy.senderowicz@dechert.com  
+1 212 641 5669 Direct

February 22, 2018

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 DBX ETF Trust for Exemptive, Interpretive and/or No-Action Relief from Rule 10b-17 and Rules 101 and 102 of Regulation M under the Securities Exchange Act of 1934 for Index-Based ETFs of ETFs**

Dear Ms. Tao:

SUMMARY OF REQUEST FOR RELIEF

I am writing on behalf of DBX ETF Trust (the “Trust”), an open-end management investment company, with respect to the Xtrackers High Yield Corporate Bond – Interest Rate Hedged ETF (the “Fund”), a series of the Trust described herein (together, the “Applicants”). 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> ALPS Distributors, Inc. (“Distributor”) and persons or entities engaging in transactions in Shares, including Authorized Participants (as defined below), hereby requests, as applicable, from the staff of the Division of Trading and Markets (“Staff”) of the Securities and Exchange

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<sup>1</sup> Shares of the Fund are currently listed on NYSE Arca, Inc. (“NYSE Arca”) under the ticker symbol “HYIH.”

<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 Exchange Act Section 19(b).

Commission (“Commission”), or from the Commission, exemptions, interpretive or no-action advice regarding Rule 10b-17 and Rules 101 and 102 of Regulation M under the Exchange Act.

The Trust currently offers Shares of the Fund. The Fund is an exchange-traded fund (an “ETF”). The Fund seeks to provide investment results that closely correspond, before fees and expenses, to the performance of the Solactive High Yield Corporate Bond – Interest Rate Hedged Index (the “Index”), which, as described more fully below, holds long positions in U.S. dollar-denominated high yield corporate bonds and holds short positions in U.S. Treasury notes or bonds (“Treasury Securities”). Currently, the Fund tracks the Index by holding (a) high yield bonds; and (b) obtaining short exposure to Treasury Securities via futures contracts (as a substitute for entering into short positions on Treasury Securities directly). Solactive AG (the “Index Provider”) has recently revised the methodology of the Index such that the long portion of the Index is constructed using the same methodology (and constituent securities) as the Solactive USD High Yield Corporates Total Market Index (the “Underlying Index”). Accordingly, for reasons of efficiency, the Fund intends to seek to track the Index by (a) holding shares of the Xtrackers USD High Yield Corporate Bond ETF (the “Underlying ETF”) whose investment objective is to track the performance of the Underlying Index (and which is a separate series of the Trust), rather than investing directly in the high yield corporate bonds comprising the long portion of the Index;<sup>3</sup> and (b) continuing to obtain short exposure to Treasury Securities via futures contracts.

Accordingly, the Fund proposes to transition to operating as an “ETF of ETFs.”<sup>4</sup> Except to the extent that the Fund operates as an ETF of ETFs and obtains short exposure to Treasury Securities via futures contracts, the Fund will operate in a manner similar to the Underlying ETF.

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<sup>3</sup> Pursuant to past relief issued by the Staff on similar facts, the Fund is permitted to replicate the Index by investing all or part of its assets in one or more Underlying ETFs, which seek to track the performance of the Index by investing at least 80% of their Assets in securities included in the Index. “Assets” means net assets, plus the amount of borrowing for investment purposes. See Letter from Courtney S. Thornton, Senior Counsel, Office of Investment Management Regulation, to Margery K. Neale of Willkie Farr & Gallagher LLP dated October 22, 2008 with respect to iShares Trust et al.

<sup>4</sup> The Fund may, in very rare instances, invest directly in the individual securities of the Underlying Index instead of holding shares of the Underlying ETF if holding those individual securities would provide greater liquidity or other efficiencies to the Fund or if the Underlying ETF is no longer accepting purchases. In such event, the Fund will not operate as an ETF or ETFs. See note 10, *infra*.

The Staff has issued in the past relief similar 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 similar relief to index-based ETFs<sup>6</sup> and actively managed ETFs<sup>7</sup> that invest directly in securities, as well as similar relief to various exchange-traded products (collectively, the “Prior ETFs”).<sup>8</sup> The only ETF in which the Fund will invest, the Underlying ETF, is organized in the United States, registered under the Investment Company Act of 1940, as amended (“1940 Act”) and listed on the NYSE Arca under the ticker symbol “HYLB.” The Fund will operate in a manner similar to the Prior ETFs of ETFs. Except to the extent that the Fund operates as an ETF of ETFs, the Fund will operate in a manner similar 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.

Applicants do not believe the Fund raises any significant new regulatory issues that have not already been addressed by the Commission and Staff.

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<sup>5</sup> See Release No. 34-79159, dated October 26, 2016 (with respect to Premise Capital Frontier Advantage Diversified Tactical ETF); Release No. 34-78332, dated July 14, 2016 (with respect to the Janus Detroit Street Trust et al.); Release No. 34-78311, dated July 13, 2016 (with respect to the PowerShares DWA Momentum & Low Volatility Rotation Portfolio et al.); Release No. 34-77942, dated May 27, 2016 (with respect to the SPDR Dorsey Wright Fixed Income Allocation ETF et al.); Release No. 34-77779, dated May 6, 2016 (with respect to the Index IQ ETF Trust et al.); Release No. 34-77747, dated March 30, 2016 (with respect to J.P. Morgan Exchange-Traded Fund Trust et al.); Release No. 34-77380, dated March 16, 2016 (with respect to Dorsey Wright Dynamic Focus 5 ETF et al.); Release No. 34-77328, dated March 9, 2016 (with respect to PowerShares DWA Tactical Multi-Asset Income Portfolio); Release No. 34-76494, dated November 20, 2015 (with respect to FlexShares Trust); Release No. 34-76397, dated November 9, 2015 (with respect to FlexShares Trust); Release No. 34-76193, dated October 19, 2015 (with respect to DBX ETF Trust); Release No. 34-73298, dated October 3, 2014 (with respect to ProShares Morningstar Alternatives Solution ETF); Release No. 34-71652, dated March 5, 2014 (with respect to Global X Funds); 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 of Katten Muchin Rosenman LLP dated March 25, 2009 with respect to Index IQ index-based ETFs of ETFs; Letter from Josephine J. Tao, Assistant Director Division of Trading and Markets, to W. John McGuire of 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 of WisdomTree Asset Management, Inc. dated December 23, 2009 with respect to WisdomTree Trust Index-Based ETF of ETFs; Letter to W. John McGuire of Morgan Lewis & Bockius, LLP from Joseph Furey, Acting Co-Chief Counsel Division of Trading and Markets, dated June 16, 2011 with respect to the Meidell Tactical Advantage ETF and Madrona Forward Global Bond ETF, dated February 8, 2011 with respect to AdvisorShares SIM Dynamic Allocation Diversified Income ETF and SIM Dynamic Allocation Growth Income ETF, dated January 19, 2011 with respect to AdvisorShares Active Bear ETF, 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.

Nevertheless, because the Fund will operate as an ETF of ETFs, Applicants are concerned that the “ETF Class Relief” previously issued by the Staff with respect to certain types of ETFs may

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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 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 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 of the 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 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> 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.
- <sup>8</sup> See for example, 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 StreetTRACKS Gold Trust and Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation to Kathleen H. Moriarty of Carter, Ledyard & Milburn LLP, dated November 17, 2004, with respect to the streetTRACKS Gold Trust.

not extend to the Fund<sup>9</sup> to the extent the Fund operates as an ETF of ETFs.<sup>10</sup> Specifically, the ETF Class Relief does not appear to extend to the Fund when the Fund operates as an ETF of ETFs since the Fund would not meet the terms of Condition 2 of the Equity ETF Class Letter as discussed more fully in Part III herein. In particular, when the Fund operates as an ETF of ETFs, it would 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, Applicants represent that the Underlying ETFs in which the Fund may invest will meet all conditions set forth in one or more of the ETF Class Relief Letters.

Applicants hereby request, 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 requests for relief and Part V is the conclusion.

## PART I

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<sup>9</sup> See Letter from James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to Claire P. McGrath, Esq., Vice President and Special Counsel, The American Stock Exchange, dated August 17, 2001 (re: Exemptive Relief for Exchange Traded Index Funds) (“*2001 Class Letter*”); Letter from James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated January 3, 2005 (re: No-action Relief From Rule 200(g) of Regulation SHO); 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 (October 24, 2006) (re: ETFs comprised of Equity Securities and incorporating relief from certain prior letters) (“*Equity ETF Class Letter*”); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Benjamin Haskin, Esq., Willkie Farr & Gallagher LLP (April 9, 2007) (“*Fixed Income ETF Class Letter*”) and Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to Domenick Pugliese, Esq., Paul, Hastings, Janofsky and Walker LLP with respect to ETFs that are comprised of both equity as well as fixed-income securities (“*Combination ETF Class Letter*”) (collectively, “*ETF Class Relief*” or “*ETF Class Relief Letters*”).

<sup>10</sup> In the rare event the Fund does not operate as an ETF of ETFs for that day, the Fund will operate to meet the conditions of the ETF Class Relief, including the Equity ETF Class Letter. Applicants do not believe that either option will have an effect on the efficacy of the arbitrage process for the Fund.

A. The Trust and the Fund

The Trust is an open-end management investment company currently consisting of [ ] ([ ]) separate exchange-traded “index funds” (including the Fund). DBX Advisors LLC (the “Investment Adviser”) acts as investment adviser to the Fund. The Fund intends to continue to qualify annually and to continue to elect to be treated as a regulated investment company (“RIC”) under the Internal Revenue Code of 1986, as amended (the “Code”).

The Fund seeks investment results that correspond generally to the performance, before fees and expenses, of the Index. The Index is comprised of (a) long positions in U.S. dollar-denominated high yield corporate bonds and (b) short positions in Treasury Securities of, in aggregate, approximate equivalent duration to the high yield bonds. By taking these short positions, the Index seeks to mitigate the potential negative impact of rising Treasury interest rates (“interest rates”) on the performance of high yield bonds (conversely limiting the potential positive impact of falling interest rates). The short positions are not intended to mitigate other factors influencing the price of high yield bonds, such as credit risk, which may have a greater impact than rising or falling interest rates.

The high yield bond positions included in the Index are designed to represent a more liquid selection of bonds than the universe of high yield bonds in the United States not included in the Index. Currently, the bonds eligible for inclusion in the Index include U.S. dollar-denominated high yield corporate bonds that: (i) are issued by companies domiciled in countries classified as developed markets by the Index Provider; (ii) have a composite rating calculated from available ratings among three rating agencies: Moody’s Investors Services (“Moody’s”), Standard & Poor’s Ratings Services (“S&P”) and Fitch, Inc. (“Fitch”) as sub-investment grade; (iii) are from issuers with at least \$1 billion outstanding face value; (iv) have at least \$400 million of outstanding face value; (v) have an original maturity date at most 15 years; and (vi) have at least one year to maturity (or at least 20 months to maturity for bonds newly added to the Index). In addition, the Index may include a substantial number of bonds offered pursuant to Rule 144A under the Securities Act of 1933, as amended (the “1933 Act”). The Index is reconstituted and rebalanced on a monthly basis and the Fund rebalances and reconstitutes its portfolio in corresponding fashion. The Index is market capitalization weighted and the percentage weight of any issuer is capped at 3%.

The Underlying ETF seeks investment results that correspond generally to the performance, before fees and expenses, of the Underlying Index. The high yield bonds in the Underlying Index are the same as those included in the Index; both the Underlying Index and the Index utilize the same

rules-based methodology to select the high yield bonds included therein. The only difference between the Underlying Index and the Index is the interest rate hedging component included in the Index.

The Fund will invest at least 80% of its total assets (but typically far more) in component securities of the Index by indirect investments through the Underlying ETF. The Fund will also obtain short exposure to Treasury Securities via futures contracts.<sup>11</sup>

The Shares are listed on the NYSE Arca. The Fund's Shares will trade at market prices that may differ to some degree from the net asset value ("NAV") of the Shares. Unlike conventional mutual funds, 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 Investment Adviser, Distributor and Authorized Participants

1. Investment Adviser

The Investment Adviser acts as the Fund's investment adviser pursuant to an investment advisory agreement with the Trust on behalf of the Fund (the "Investment Advisory Agreement"). The Investment Adviser, located at 345 Park Avenue, New York, New York 10154, has been registered as an investment adviser with the Commission since 2010 and is a wholly-owned subsidiary of Deutsche Bank AG. As of June 30, 2017, the Investment Adviser had assets under management of \$14.3 billion.

2. Distributor and Authorized Participants

The Trust has appointed ALPS Distributors, Inc., a broker-dealer registered under the Exchange Act and a member of the Financial Industry Regulatory Authority, Inc. ("FINRA"), to act

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<sup>11</sup> While the Index includes short positions in Treasury Securities, the Fund obtains its short exposure through futures contracts as a substitute for entering into short positions directly. The Fund's short futures contracts on Treasury Securities accordingly are not "component securities of the [applicable] Index" for purposes of this calculation. While the Fund has the ability to invest up to 20% of its assets in instruments not included in the Underlying Index (as set forth in the Fund's registration statement), the Fund does not currently expect to invest in instruments other than the Underlying ETF and short futures contracts on Treasury Securities (and, to a limited extent generally in connection with taking in cash on a creation in between rebalancings, in cash or cash equivalents). Applicants expect that the Fund's short futures contracts on Treasury Securities will represent a small portion of the Fund's assets.

as the distributor and principal underwriter of the Creation Units of Shares. The Distributor will distribute Creation Units of the Shares on an agency basis. The Trust may appoint a different Distributor in the future. Entities that have entered into an agreement with the Distributor to become “Authorized Participants” may place orders with the Distributor to purchase or redeem Creation Units, as described in Part I D. 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. 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 a Creation Unit of 50,000 Shares or multiples thereof. Creation Unit transactions are typically conducted in exchange for the deposit or delivery of in-kind securities and/or cash constituting a substantial replication, or a representation, of the securities included in the Index.

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

E. Procedures Applicable To Purchases of the Fund

In order to purchase Creation Units of the Fund, an investor must generally deposit a basket of securities and/or instruments (the “Deposit Securities”) together with a deposit of a specified cash payment (the “Cash Component”), subject to changes from time to time by the Investment Adviser with a view to the investment objective of the Fund. Together, the Deposit Securities and Cash Component constitute the “Fund Deposit,” which represents the minimum initial and subsequent investment amount for a Creation Unit of the Fund.

The function of the Cash Component is to compensate for any differences between the NAV per Creation Unit and the Deposit Amount (as defined below). The Cash Component would

be an amount equal to the difference between the NAV of the Shares (per Creation Unit) and the “Deposit Amount,” which is an amount equal to the aggregate market value of the Deposit Securities. If the Cash Component is a positive number (the NAV per Creation Unit exceeds the Deposit Amount), the Authorized Participant will deliver the Cash Component. If the Cash Component is a negative number (the NAV per Creation Unit is less than the Deposit Amount), the Authorized Participant will receive the Cash Component.

The Fund’s administrator (the “Administrator”), through the National Securities Clearing Corporation (“NSCC”), makes available on each business day, immediately prior to the opening of business (subject to amendments) on the NYSE Arca (currently 9:30 a.m., Eastern time), the list of the names and the required number of shares of each Deposit Security and the amount of the Cash Component (or Cash Deposit) to be included in the current Fund Deposit (based on information at the end of the previous business day).

To be eligible to place orders with the Distributor and to create or redeem 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 of DTC (“DTC Participant”) and must have executed an agreement with the Distributor and the Fund’s transfer agent (the “Transfer Agent”), with respect to creations and redemptions of Creation Units (“Authorized Participant Agreement”).

All orders to create Creation Units of the Fund, subject to certain exceptions and in all cases subject to the terms of the applicable Authorized Participant Agreement, must be received by the Distributor in proper form no later than the closing time of the regular trading session of the NYSE Arca (“Closing Time”) (ordinarily 4:00 p.m., Eastern time) in each case on the date such order is placed for creation of Creation Units to be effected based on the NAV of Shares of the Fund as next determined after receipt of an order in proper form. Orders requesting substitution of a “cash-in-lieu” amount or a Cash Deposit (collectively, “Non-Standard Orders”), must be received by the Distributor no later than 3:00 p.m., Eastern time. On days when the NYSE Arca closes earlier than normal (such as the day before a holiday), the Fund requires standard orders to create Creation Units to be placed by the earlier closing time and Non-Standard Orders to create Creation Units must be received no later than one hour prior to the earlier closing time. Notwithstanding the foregoing, the Trust may, but is not required to, permit Non-Standard Orders until 4:00 p.m., Eastern time, or until the market close (in the event the NYSE Arca closes early).

A fixed creation transaction fee of \$500 is imposed on each creation transaction regardless of the number of Creation Units purchased in the transaction. In the case of cash creations or where the Trust permits or requires a creator to substitute cash in lieu of depositing a portion of the Deposit Securities, the creator may be assessed an additional variable charge to compensate the Fund for the costs associated with purchasing the applicable securities. As a result, in order to seek to replicate the in-kind creation order process, the Trust expects to purchase, in the secondary market or otherwise gain exposure to, the portfolio securities that could have been delivered as a result of an in-kind creation order pursuant to local law or market convention, or for other reasons (“Market Purchases”). In such cases where the Trust makes Market Purchases, the Authorized Participant will reimburse the Trust for, among other things, any difference between the market value at which the securities and/or financial instruments were purchased by the Trust and the cash in lieu amount (which amount, at the Investment Adviser’s discretion, may be capped), applicable registration fees, brokerage commissions, fees and expenses incurred in connection with short sale transactions and certain taxes. The Investment Adviser may adjust the transaction fee to the extent the composition of the creation securities changes or cash in lieu is added to the Cash Component to protect ongoing shareholders. Creators of Creation Units are responsible for the costs of transferring the securities constituting the Deposit Securities to the account of the Trust.

Creation Units may be created in advance of the receipt by the Trust of all or a portion of the Fund Deposit. In such cases, the Authorized Participant will remain liable for the full deposit of the missing portion(s) of the Fund Deposit and will be required to post collateral with the Trust consisting of cash at least equal to a percentage of the marked-to-market value of such missing portion(s) that is specified in the Authorized Participant Agreement. The Trust may use such collateral to buy the missing portion(s) of the Fund Deposit at any time and will subject such Authorized Participant to liability for any shortfall between the cost to the Trust of purchasing such securities and the value of such collateral. The Trust will have no liability for any such shortfall. The Trust will return any unused portion of the collateral to the Authorized Participant once the entire Fund Deposit has been properly received by the Custodian and deposited into the Trust.

F. Procedures Applicable To Redemptions of the Fund

Shares of the Fund may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form on a business day and only through a Participating Party or DTC Participant who has executed an Authorized Participant Agreement. The Administrator, through the NSCC, makes available immediately prior to the opening of business on the NYSE Arca (currently 9:30 a.m., Eastern time) on each business day, the identity

of the Fund's securities and/or an amount of cash that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day.

Unless cash only redemptions are available or specified for the Fund, 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 a redemption order received in proper form – plus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after a receipt of request in proper form, and the value of the Fund Securities, less the redemption transaction fee and variable fees described below. Notwithstanding the foregoing, the Trust will substitute a "cash-in-lieu" amount to replace any Fund Security that is a non-deliverable instrument. The Trust may permit a "cash-in-lieu" amount at the Trust's sole discretion but is not required to do so. The amount of cash paid out in such cases will be equivalent to the value of the instrument listed as a Fund Security. 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 is required to be made by an Authorized Participant. To the extent redemption proceeds consist of Fund Securities, the Trust may deliver securities in different proportions than securities constituting the Fund Securities.

The fixed redemption transaction fee of \$500 is the same no matter how many Creation Units are being redeemed pursuant to any one redemption request. An additional charge, up to a maximum of 2% of the amount redeemed (including the standard redemption fee) will be charged with respect to cash redemptions or redemptions outside of the Clearing Process. An additional variable charge for cash redemptions or partial cash redemptions (when cash redemptions are permitted or required for the Fund) may also be imposed to compensate the Fund for the costs associated with selling the applicable securities. As a result, in order to seek to replicate the in-kind redemption order process, the Trust expects to sell, in the secondary market, the portfolio securities or settle any financial instruments that may not be permitted to be re-registered in the name of the Participating Party as a result of an in-kind redemption order pursuant to local law or market convention, or for other reasons ("Market Sales"). In such cases where the Trust makes Market Sales, the Authorized Participant will reimburse the Trust for, among other things, any difference between the market value at which the securities and/or financial instruments were sold or settled by the Trust and the cash in lieu amount (which amount, at the Investment Adviser's discretion, may be capped). The Investment Adviser may adjust the transaction fee to the extent the composition of the redemption securities changes or cash in lieu is added to the Cash Component to protect ongoing shareholders. In no event will fees charged by the Fund in connection with a redemption exceed 2% of the value of each Creation Unit. Investors who use the services of a broker or other such intermediary may be charged a fee for such services.

## PART II

### A. Dissemination of Information about Creation and Redemption Baskets

As discussed above, the names and required number of shares of each component in the Creation Basket and Redemption Basket, as well as the Cash Component and Cash Redemption Amount, to be tendered in connection with the issuance or redemption, respectively, of Shares of Creation Units will be made available through NSCC, DTC or the Distributor on each business day, prior to the opening of trading on NYSE Arca.

### 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, automated quotation systems, public sources, such as newspapers and other publications, and from a variety of on-line information services, such as Quotron, Bloomberg or Reuters, and other 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 make available the market value of a Share, and (ii) the Listing Exchange or a market data vendor will disseminate every 15 seconds throughout the trading day a calculation of the intraday indicative value of a Share through the facilities of the Consolidated Tape Association. Comparing these two figures allows an investor to determine whether, and to what extent, Shares are selling at a premium or a discount to NAV.

The Fund's website ("Website") will also contain the following information on a per Share basis, for the Fund: (i) the prior business day's closing NAV and closing market price (based on the mid-point of the bid-asked spread at the time the Fund's NAV is calculated or the close of ETF trading on the Listing Exchange ("Bid-Asked Price")), and a calculation of the premium or discount of the Bid-Asked Price in relation to the closing NAV; and (2) data for a period covering at least the four previous calendar quarters (or life of the Fund, if shorter) indicating how frequently the Fund's Shares traded at a premium or discount to NAV based on the daily Bid-Asked Price and closing NAV, and the magnitude of such premiums and discounts. The Website will also display the Fund's Prospectus, and additional information relating to the Fund's performance and portfolio holdings 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

Applicants believe that the relief requested herein is similar to the relief granted by the Commission to the Prior ETFs of ETFs and is 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>12</sup> with no one Component Security constituting more than 25% of the total value of the ETF;<sup>13</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

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<sup>12</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>13</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 balancing of the ETF’s reference securities index.

Component Securities then 50% of the Component Securities must meet the actively-traded securities thresholds;

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>14</sup>

Because the Fund intends to operate as an ETF of ETFs, the Fund will meet all of the criteria of the Equity ETF Class Relief Letter set forth above, with the exception of Condition 2. As an ETF of ETFs, the Fund would likely not hold "a basket of twenty or more" Component Securities and may hold one or more Underlying ETFs in excess of 25% of the total value of its portfolio; the Fund therefore will be unable to meet the requirements of Condition 2 above. Nevertheless, each Underlying ETF in which the Fund invests will meet all conditions set forth in one or more of the ETF Class Relief Letters. Further, Applicants hereby represent 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 and other assets held by the Fund, the ability to acquire such securities, as well as the arbitrageurs' ability to create workable hedges; (b) the Fund will invest at least 80% of its total assets (but typically far more) in component securities of its Index by indirect investments through the Underlying ETF, and the Fund may invest the remaining 20% of its total assets in securities not included in the Index (including, for this purpose, the Fund's short futures contracts on Treasury Securities), money market instruments, including repurchase agreements or other funds which invest exclusively in money market instruments, convertible securities, structured notes and certain derivatives, which the Investment Adviser believes will help the Fund track the Index; (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 Applicants believe 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 the Fund's Shares and the Fund's NAV is expected. Therefore, Applicants hereby request that the Commission grant exemptive, interpretive or no-action relief from Rule 10b-17 and Rules 101

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<sup>14</sup> See, Equity ETF Class Relief Letter at 2.

and 102 of Regulation M as discussed below. As noted above, this relief is similar 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, Authorized Participants and other persons or entities engaging in transactions in the Shares, requests that the Commission grant exemptive, 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**

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, Rule 10b-17(b)(1)(v)(a-b) requires such advance notice to specify (a) for cash distributions, the amount of cash to be paid or distributed per share<sup>15</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 management 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 management investment company.

In addition, compliance with Rule 10b-17(b)(1)(v)(a-b) would be impractical in light of the nature of the 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

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<sup>15</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.

requirements of 10b-17(b)(1)(v)(a-b) to the Fund would increase the chances that the Fund would mis-estimate the amount of any such dividend.<sup>16</sup>

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

In the proposing release for Rule 10b-17 (the “Proposing Release”)<sup>17</sup>, 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

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<sup>16</sup> As a RIC, the Fund is required by the Code to distribute at least 98% of its ordinary income and capital gains during the calendar year. If 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 Funds, 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 Fund 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 Fund 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 declaration date and year-end, but as noted above, requiring the Fund to declare the amount of a dividend ten days in advance of the record date would increase the chance that the Fund would mis-estimate the number of outstanding shares. This, in sum, would increase the chance that the Fund would mis-estimate the per share amount of capital gains each must distribute.

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

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.

Applicants respectfully submit that none of these concerns raised by the Commission in the Proposing Release<sup>18</sup> will be implicated if the requested relief is granted. As set forth above, the Fund 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 Rule 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 management investment companies with fully redeemable shares, thus should be applicable to the Fund with respect to the timing requirements of Rule 10b-17(b)(1)(v)(a-b).<sup>19</sup>

## 2. Rule 101 of Regulation M

Applicants respectfully request that the Commission grant interpretive relief from Rule 101, as discussed below, to permit persons participating in a distribution of Shares of the Fund to bid for or purchase, redeem or engage in other secondary market transactions in such Shares. Alternatively, the Trust requests that the Commission grant an exemption under paragraph (d) of Rule 101 to such effect.

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 from, or attempting to induce any person to bid for or purchase, any security

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<sup>18</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>19</sup> The relief being requested is analytically consistent with the Division of Market Regulation Staff Legal Bulletin No. 9, as revised on September 10, 2010, 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 management investment companies, notwithstanding the fact that shares of Active ETFs are redeemable only in Creation Units.

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.

Applicants 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, as discussed above, 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 relevant Fund 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.

Applicants request 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.

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 significantly affect 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. In such instances, the application of Rule 101 could unnecessarily hinder broker-dealers or other persons in their creation and redemption activities and 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

Applicants respectfully request 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 from the Fund 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.

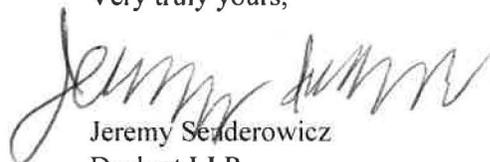
**PART V**

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 212.641.5669.

Very truly yours,



Jeremy Senderowicz  
Dechert LLP