

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68439; File No. TP 11-10)

December 14, 2012

Order Granting Limited Exemptions from Exchange Act Rules 101 and 102 of Regulation M to Shares of JPM XF Physical Copper Trust Pursuant to Exchange Act Rules 101(d) and 102(e)

By letter dated December 14, 2012 (the “Letter”),<sup>1</sup> as supplemented by conversations with the staff of the Division of Trading and Markets, counsel for J.P. Morgan Commodity ETF Services LLC (“Sponsor”) on behalf of the Sponsor, JPM XF Physical Copper Trust (“Trust”), and persons or entities engaging in transaction in the shares of the Trust requested that the Securities and Exchange Commission (“Commission”) issue an exemption from Rules 101 and 102 of Regulation M in connection with secondary market transactions in the shares of the Trust, and the creation or redemption of shares of the Trust.<sup>2</sup>

According to the Trust’s registration statement, the Trust was formed as a Delaware statutory trust on October 15, 2010. The Trust, based on representations in the Letter, is a passive, unmanaged investment vehicle and will have no directors, officers, or employees. Additionally, the Letter represents that the Trust is an exchange-traded investment vehicle that will hold only Grade A Copper in physical form. The Letter also states that each share of the Trust represents a fractional undivided interest in the net assets of the Trust (“Share”). The Trust’s investment objective, according to the Letter, is for the value of the Shares to reflect, at

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<sup>1</sup> See Letter from John Crowley to Josephine Tao (December 14, 2012), re: Request of J.P. Morgan Commodity ETF Services LLC for Relief from Certain Provisions of Regulation M, available at: <http://www.sec.gov/divisions/marketreg/mr-noaction.shtml>.

<sup>2</sup> For additional information regarding the Trust please see the Order Approving a Proposed Rule Change to List and Trade Shares of the JPM XF Physical Copper Trust Pursuant to NYSE Arca Equities Rule 8.201, Securities Exchange Act Release No. 68440; \_\_ FR \_\_ (“Approval Order”).

any given time, the value of copper owned by the Trust less the Trust's expenses and liabilities at that time.

The Letter contains the following representations:

- Shares of the Trust will trade on a national securities exchange.<sup>3</sup>
- Shares will be issued and redeemed in basket-size aggregations ("Creation Units") to registered broker-dealers or certain other persons that have entered into a participation agreement with the Trust and the Sponsor ("Authorized Participants").
- Creation Units will be issued and redeemed daily in exchange for a specified amount of physical metal that represents a pro rata share of the metal then held in the Trust.
- The Sponsor does not expect the difference in price based on the locational premia to be significant.<sup>4</sup>
- The Sponsor believes that the copper selection protocol,<sup>5</sup> the independent third-party valuation agent,<sup>6</sup> and information transparency measures<sup>7</sup> will cause the

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<sup>3</sup> See also Approval Order, supra, note 1.

<sup>4</sup> According to the Letter, the copper will be held in one or more warehouses in locations throughout the world. The value of copper depends in part on its location, i.e., copper stored in a location that is low in supply and high in demand carries a higher premium than copper that is stored in a location where supply is high and demand is low. To assist in valuing the Trust's copper, by 9:00 am EST, an independent valuation agent will provide the administrative agent (the administrative agent, which initially will be J.P. Morgan Treasury Securities Services, will administer various daily functions of the Trust ("Administrative Agent")) the locational premia for the locations at which the Trust is permitted to hold copper. The locational premium for a warehouse location for a business day will be calculated as an amount expressed in U.S. dollars that is equal to the average value of copper per metric ton in such location minus the LME Settlement Price of copper on such business day. See Securities Exchange Act Release No. 66816 (April 16, 2012); 77 FR 23772, 23779 ("Notice").

price of Shares in the secondary market to closely track the net asset value per Share of the Trust.

- The Trust will continuously redeem baskets of Shares at net asset value expressed as a pro rata portion of the weight of copper held by the Trust.
- The Sponsor states that it believes that, because Authorized Participants have full, transparent information about the Trust’s copper, including the locational premium and the brand for each lot of copper held by the Trust and whether the

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<sup>5</sup> According to the Letter, the selection protocol is intended to provide a consistent and transparent method of selecting lots to satisfy redemption orders and calculating and paying expenses, by requiring the Administrative Agent to select lots in the following manner: (1) lots will be selected first from the warehouse where it holds available copper that has the lowest locational premium at a particular time (*i.e.*, the “cheapest-to-deliver location”), and then from other warehouse locations successively based on a ranking of their respective locational premia from lowest to highest; (2) if there are multiple lots in the same warehouse location specified by the first step, lots in such warehouse location will be selected based on the date such lots were first delivered to the relevant account, with the earliest delivered lot being selected first; and (3) if there are multiple lots in the same warehouse location that were first delivered to the relevant account on the same date, lots will be selected based on the actual weight of the lot, with the lot having the lowest actual weight being selected first. For additional information, *see* Notice, *supra*, note 3, 77 FR at 23781–82.

<sup>6</sup> According to the Letter, the valuation agent, which is independent from and unaffiliated with the Sponsor, is responsible for providing the locational premium for each permitted warehouse location, which is used to calculate the Trust’s net asset value, determine the cheapest-to-deliver location, and make other determinations for the Trust.

<sup>7</sup> According to the Letter, the Administrative Agent will provide full transparency on its website of the Trust’s assets. The Sponsor anticipates that, through a combination of the use of the selection protocol and transparency of information, each Authorized Participant will be able to assess which lots of copper are likely to be delivered in connection with a redemption order by the Authorized Participant. Additionally, the Exchange will publish two intraday indicative values throughout the course of the day. These two intraday indicative values, discussed in subsequent bullets below, will provide Authorized Participants with an indication of the underlying value of the Trust’s Shares during the trading day, on any day the Exchange is open for business.

brand of any such lot is or has ceased to be an Acceptable Delivery Brand,<sup>8</sup> factors such as locational premia and de-registering of copper will not impair the price alignment process or the arbitrage mechanism.<sup>9</sup>

- NYSE Arca will calculate and disseminate, approximately every 15 seconds during the Exchange’s core trading session, two different intraday indicative values for the Shares: the First-Out IIV and the Liquidation IIV.<sup>10</sup>
- Authorized Participants can generally expect to receive copper from the cheapest-to-deliver location whenever they redeem Creation Units of Shares and are expected to seek to create Creation Units of Shares by transferring copper from the cheapest-to-deliver location at which they have copper available.<sup>11</sup>

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<sup>8</sup> According to the Letter, the LME oversees the registration process for each refinery seeking to register its brand of copper as an acceptable delivery brand for LME registered transactions (“Acceptable Delivery Brand”). Any copper that is delivered to the Trust by an Authorized Participant must, at the time of delivery, be of an Acceptable Delivery Brand. If the LME de-registers a brand of copper that is held by the Trust, the Trust will use the de-branded copper to satisfy redemptions before using any other lots of copper, even if the de-branded copper is not held in the cheapest-to-deliver location.

<sup>9</sup> See supra notes 4 and 9.

<sup>10</sup> The “First-Out IIV” is designed to facilitate arbitrage activity by authorized participants by indicating whether the Shares are trading at a discount or premium during the trading day. See Notice, supra, note 3, 77 FR at 23785. It represents, as of the time of such calculation, the hypothetical U.S. dollar value per Share of the copper that would need to be transferred to or from the Trust to create or redeem one Share included in a Creation Unit, assuming that copper in the cheapest-to-deliver location was used for such creation or redemption. See id. at 23783. The “Liquidation IIV” is an intraday indicative value that represents, as of the time of the calculation, the hypothetical U.S. dollar value per Share of all of the copper owned by the Trust divided by the number of Shares then outstanding. See id. at 23783. For a description of how the Exchange will calculate the First-Out IIV and the Liquidation IIV, see id. at 23784–86.

<sup>11</sup> See Notice, supra, note 3, 77 FR at 23784.

- Arbitrage activity by Authorized Participants is expected to result in the Shares trading within a limited range, with the lower end of that range approximating the first-out intraday indicative value and the higher end of that range approximating the value of copper in the cheapest-to-deliver location at which the Authorized Participants have copper available.<sup>12</sup>

### **Rule 101 of Regulation M**

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 the rule. Rule 100 of Regulation M defines “distribution” to mean any offering of securities that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods. The provisions of Rule 101 of Regulation M apply to underwriters, prospective underwriters, brokers, dealers, or other persons who have agreed to participate or are participating in a distribution of securities, and affiliated purchasers of such persons. Shares of the Trust are in a continuous distribution and, as such, the restricted period in which distribution participants and their affiliated purchasers are prohibited from bidding for, purchasing, or attempting to induce others to bid for or purchase extends indefinitely. As a result, absent an exemption from Rule 101 of Regulation M, the distribution participants would be prohibited from bidding for or purchasing Shares during the distribution without violating Rule 101 of Regulation M.

On the basis of the representations and the facts presented in the Letter, particularly that the Trust will continuously redeem baskets of Shares at net asset value expressed as a pro rata

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<sup>12</sup> Id. at 23785.

portion of the weight of copper held by the Trust and that the secondary market price of Shares is expected to trade within a limited range with the lower end of that range approximating the first-out intraday indicative value and the higher end of that range approximating the value of copper in the cheapest-to-deliver location at which the Authorized Participants have copper available, the Commission finds that it is appropriate in the public interest, and is consistent with the protection of investors, to grant the Shares of the Trust a limited exemption from Rule 101 of Regulation M pursuant to paragraph (d) thereof,<sup>13</sup> to permit persons participating in the distribution of Shares and their affiliated purchasers to bid for or purchase Shares during their participation in such distribution.<sup>14</sup> In particular, the price alignment process and arbitrage mechanism, which are expected to align the price of the Shares in the secondary market to the copper held by the Trust, should mitigate the potential manipulation concerns that Rule 101 of Regulation M is designed to prevent. Accordingly, granting such relief to the Shares to permit persons participating in the distribution of Shares and their affiliated purchasers to bid for or purchase Shares during their participation in such distribution is appropriate in the public interest, and is consistent with the protection of investors.

### **Rule 102 of Regulation M**

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<sup>13</sup> Rule 101(d) of Regulation M specifies the Commission may grant an exemption from the provision of Rule 101, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities.

<sup>14</sup> The Commission, pursuant to delegated authority, has granted similar exemptive relief from Rule 101 to other exchange-traded vehicles that hold only physical metal. See, e.g., Letters from James A. Brigagliano, Assistant Director, Division of Market Regulation, (i) to Kathleen Moriarty, Esq., Carter Ledyard & Milburn, dated November 17, 2004, with respect to the trading of StreetTRACKS Gold Trust, (ii) to David Yeres, dated January 27, 2005, with respect to the trading of the iShares COMEX Gold Trust, and (iii) to David Yeres, dated April 27, 2006, with respect to the trading of iShares Silver Trust.

Rule 102 of Regulation M prohibits issuers, selling security holders, or any affiliated purchaser of such persons from bidding for, purchasing, or attempting to induce any person to bid for or purchase a covered security<sup>15</sup> during the applicable restricted period in connection with a distribution of securities effected by or on behalf of an issuer or selling security holder, except as specifically permitted in the rule. As a result, absent an exemption from Rule 102 of Regulation M, the Shares could not be redeemed by the Trust without violating Rule 102 of Regulation M.

On the basis of the representations and the facts presented in the Letter, particularly that the Trust will continuously redeem baskets of Shares at net asset value expressed as a pro rata portion of the weight of copper held by the Trust and that the secondary market price of Shares is expected to be within a limited range with the lower end of that range approximating the first-out intraday indicative value and the higher end of that range approximating the value of copper in the cheapest-to-deliver location at which the Authorized Participants have copper available, the Commission finds that it is appropriate in the public interest, and is consistent with the protection of investors, to grant the Shares of the Trust a limited exemption from Rule 102 of Regulation M, pursuant to paragraph (e) thereof,<sup>16</sup> to permit the Trust and any of its affiliated purchasers to redeem Shares during the distribution of the Shares.<sup>17</sup> In particular, the price alignment process

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<sup>15</sup> Covered security is defined as any security that is the subject of a distribution, or any reference security. Rule 100(b), 17 CFR 242.100(b).

<sup>16</sup> Rule 102(e) specifies the Commission may grant an exemption from the provision of Rule 102, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities.

<sup>17</sup> The Commission, pursuant to delegated authority, has granted similar exemptive relief from Rule 102 to other exchange-traded vehicles that hold only physical metal. See, e.g., Letters from James A. Brigagliano, Assistant Director, Division of Market Regulation, (i) to Kathleen Moriarty, Esq., Carter Ledyard & Milburn, dated November 17, 2004, with respect to the trading of StreetTRACKS Gold Trust, (ii) to David Yeres, dated January

and arbitrage mechanism, which are expected to align the price of the Shares in the secondary market to the copper held by the Trust, should mitigate the potential manipulation concerns that Rule 102 of Regulation M is designed to prevent. Accordingly, granting such relief to the Shares to permit the Trust and any of its affiliated purchasers to redeem Shares during the distribution of the Shares is appropriate in the public interest, and is consistent with the protection of investors.

### **Conclusion**

IT IS HEREBY ORDERED, pursuant to Rule 101(d) of Regulation M, that, based on the representations and facts presented in the Letter, the Shares of the Trust are exempt from the requirements of Rule 101 to permit persons participating in the distribution of Shares of the Trust and their affiliated purchasers to bid for or purchase such Shares during their participation in such distribution.

IT IS FURTHER ORDERED, pursuant to Rule 102(e) of Regulation M, that, based on the representations and facts presented in the Letter, the Shares of the Trust are exempt from the requirements of Rule 102 to permit the Trust and any of its affiliated purchasers to redeem Shares of the Trust during the distribution of such Shares.

This exemptive relief is subject to modification or revocation at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. Persons participating in the distribution of Shares of the Trust shall discontinue creations and redemptions involving the Shares of the Trust, in the event that any material change occurs with respect to any of the facts or representations made by the Trust, the Sponsor, or its counsel. In addition, persons relying on this exemption are directed to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Sections 9(a), 10(b), and Rule

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27, 2005, with respect to the trading of the iShares COMEX Gold Trust, and (iii) to David Yeres, dated April 27, 2006, with respect to the trading of iShares Silver Trust.

10b-5 thereunder. Responsibility for compliance with these and any other applicable provisions of the federal securities laws and rules must rest with the persons relying on this exemption.

This order does not represent the Commission views with respect to any other question that the proposed transactions may raise, including, but not limited to the adequacy of the disclosure concerning, and the applicability of other federal or state laws and rules to, the proposed transactions.

By the Commission.

Kevin M. O'Neill  
Deputy Secretary