



DIVISION OF  
CORPORATION FINANCE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

March 26, 2018

**Response of the Office of Mergers and Acquisitions  
Division of Corporation Finance**

Eric S. Purple  
Stradley Ronon Stevens & Young, LLP  
1250 Connecticut Avenue, N.W., Suite 500  
Washington, DC 20036-2652

**Re:** PowerShares Exchange-Traded Fund Trust  
Request for Exemptive Relief from Exchange Act Rule 14e-5

Dear Mr. Purple:

We are responding to your letter dated March 26, 2018, addressed to Ted Yu, Nicholas Panos and Bryan Hough. To avoid having to recite or summarize the facts set forth in your letter, our response is attached to the enclosed copy of your correspondence. Unless otherwise noted, capitalized terms in this response letter have the same meaning as in your letter.

On the basis of the representations and the facts presented in your letter, the Division of Corporation Finance, acting for the Commission pursuant to delegated authority, is granting by separate order an exemption from Exchange Act Rule 14e-5.

This exemptive relief permits any Authorized Participant acting as a dealer-manager of a tender offer for a security in which the Fund invests to redeem Shares in Creation Unit size aggregations for a Redemption Basket that may include a subject security or related security as defined under Rule 14e-5(c). The relief also operates to permit such persons, described in your letter as "covered persons" within the meaning of Rule 14e-5(c)(3)(ii), to engage in secondary market transactions with respect to the Shares after the first public announcement of the tender offer and during such tender offer given that such transactions could include, or be deemed to include, purchases of, or arrangements to purchase, subject securities or related securities. In addition, the relief permits such covered persons to make purchases of, or arrangements to purchase, subject securities or related securities in the secondary market for the purpose of transferring such securities to purchase one or more Creation Units of Shares, under the circumstances described in your letter.

To the extent that either the Trust or the Fund constitutes a covered person within the meaning of Rule 14e-5(c)(3)(iv), each also may rely upon the exemptive relief granted herein. In granting this exemptive relief, we note in particular that our grant of relief is conditioned upon the following:

- no purchases of subject securities or related securities made by broker-dealers acting as dealer-managers of a tender offer would be effected for the purpose of facilitating a tender offer;
- any purchases of a portfolio security by a dealer-manager during a tender offer will be effected as adjustments to a basket of securities in the ordinary course of business as a result of a change in the composition of the Fund's portfolio; and
- except for the relief specifically granted herein, any broker-dealer acting as a dealer-manager of a tender offer will comply with Rule 14e-5.

The foregoing exemptive relief is being granted solely based on the representations and the facts presented in your letter. This relief is strictly limited to the application of Rule 14e-5 to the transactions described in your letter. The transactions should be discontinued pending further consultations with the Commission staff if any of the facts or representations set forth in your letter change. In addition, this exemptive relief is subject to modification or revocation if at any time the Commission or the Division of Corporation Finance determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act.

We also direct your attention to the anti-fraud and anti-manipulation provisions of the federal securities laws, including Sections 10(b) and 14(e) of the Exchange Act and Rules 10b-5 and 14e-3 thereunder. The transactions and covered persons within the scope of this exemptive relief must comply with these and any other applicable provisions of the federal securities laws. The Division of Corporation Finance expresses no view with respect to any other questions that these transactions may raise, including, but not limited to, the adequacy of the disclosure concerning, and the applicability of any other federal or state laws to, such transactions.

Sincerely,

/s/ Ted Yu

Ted Yu  
Chief, Office of Mergers & Acquisitions  
Division of Corporation Finance

**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**

**March 26, 2018**

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In the Matter of PowerShares Exchange-Traded  
Fund Trust

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ORDER GRANTING EXEMPTION  
FROM EXCHANGE ACT RULE 14E-5

PowerShares Exchange-Traded Fund Trust submitted a letter dated March 26, 2018 requesting that the Securities and Exchange Commission (“Commission”) grant an exemption from Exchange Act Rule 14e-5 for the transactions described in its letter (“Request”).

Based on the representations and the facts presented in the Request, and subject to the terms and conditions described in the letter from the Division of Corporation Finance dated March 26, 2018, it is ORDERED that the request for exemption from Exchange Act Rule 14e-5 is hereby granted.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Brent J. Fields  
Secretary

Action as set forth or recommended herein APPROVED  
pursuant to authority delegated by the Commission under  
Public Law 87-592.

For: Division of Corporation Finance

By: /s/ Ted Yu

Date: 3/26/2018



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March 26, 2018

**Via Email and Hand Delivery**

Mr. Ted Yu, Chief  
Mr. Nicholas Panos, Senior Special Counsel  
Mr. Bryan Hough, Attorney-Advisor  
Officer of Mergers and Acquisitions  
Division of Corporate Finance  
Securities and Exchange Commission  
100 F. Street, N.E.  
Washington, DC 20549

**Re: Request of PowerShares Exchange-Traded Fund Trust Regarding Relief from Rule 14e-5 under the Securities Exchange Act of 1934 with Respect to the PowerShares Wilshire Micro-Cap Portfolio.**

Dear Mr. Yu:

We are writing on behalf of the PowerShares Exchange-Traded Fund Trust (the “Trust”). The Trust is an open-end management investment company organized as a Massachusetts business trust. The Trust and its series operate as exchange-traded funds (“ETFs”) in reliance on exemptive relief from the Securities Exchange Commission (the “Commission”). The Trust’s investment adviser is Invesco PowerShares Capital Management, LLC (the “Adviser”), and its distributor is Invesco Distributors, Inc. (the “Distributor”). As discussed in greater detail below, the Trust requests exemptive relief under the Securities Exchange Act of 1934 (the “Exchange Act”) from the provisions of Rule 14e-5 on behalf of itself, the market participants discussed below, and the following fund: PowerShares Wilshire Micro-Cap Portfolio (the “Fund”).

This letter is divided into four parts. Part I describes the background of the Fund; Part II describes transactions in the shares of the Fund (“Shares”); Part III contains a discussion of the legal analysis under Rule 14e-5; and Part IV sets forth the request for exemptive relief.

**I. Background**

In late 2017, Invesco Ltd. (the parent of the Adviser) announced the acquisition of the exchange-traded fund business of Guggenheim Capital LLC, (“Guggenheim”). Guggenheim is the parent of Guggenheim Funds Investment Advisors, LLC, the investment adviser to the Claymore Exchange-Traded Fund Trust and its series, the Wilshire Micro-Cap ETF.

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A Pennsylvania Limited Liability Partnership

The Trust and the Claymore Exchange-Traded Fund Trust have agreed to an Agreement and Plan of Reorganization (the “Reorganization Plan”), subject – as pertinent here – to the approval of the shareholders of the Wilshire Micro-Cap ETF (the “Existing Fund”). Under the terms of the Reorganization Plan, the Existing Fund will transfer all or substantially all of its assets and all of its stated liabilities included in its financial statements to the Fund, a newly formed series of the Trust, in exchange for shares of the Fund (and cash with respect to any fractional shares). After that exchange, shares of the Fund received by the Existing Fund will be distributed pro rata to the Existing Fund’s shareholders in liquidation of the Existing Fund. As a result, immediately after the reorganization, each former shareholder of the Existing Fund will own shares of the Fund that will be approximately equal to the value of that shareholder’s full shares of such Existing Fund as of the closing date.

The Fund is designed to be materially identical to the Existing Fund and to operate as such. The Fund will have an identical investment objective and principal investment strategies and will seek to track the same index as the Existing Fund. The investment objective of the Fund is to seek investment results that correspond generally to the performance, before fees and expenses, of its underlying rules-based index, the Wilshire US Micro-Cap Index<sup>SM</sup> (the “Underlying Index”), which includes securities of micro-capitalization companies, including real estate investment trusts and business development companies. The Underlying Index represents a float-adjusted, market capitalization-weighted index of the issues ranked below 2,500 by market capitalization of the Wilshire 5000 Total Market Index<sup>SM</sup>. Under normal market conditions, the Fund will invest at least 90% of its total assets in equity securities that comprise the Underlying Index. The Existing Fund will be the accounting survivor, and will retain its investment performance. The reorganization of the Existing Fund is designed to be a tax-free reorganization. Upon completion of the reorganization, the shareholders of the Fund will own shares in what is essentially a copy of the Existing Fund. The only material differences will be the identity of the trust in which the series resides, the new adviser, and a new distributor.

The Commission has previously granted exemptive relief under Rule 14e-5 to the Existing Fund,<sup>1</sup> an ETF whose operations will be continued by the Fund, as described above. In particular, the Division of Trading and Markets granted limited, conditional exemptive relief, partly under Rule 14e-5 under the Exchange Act, to the Existing Fund and the Claymore Exchange-Traded Fund Trust, pursuant to delegated authority (the “Existing Relief”).<sup>2</sup> The Commission based the Existing Relief on the representations and facts presented in the request letter dated December 16, 2011 (the “Original Request Letter”) that the Claymore Exchange-

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<sup>1</sup> Letter from Josephine J. Tao of the SEC’s Division of Trading and Markets to Jeremy Senderowicz of Dechert, LLP (Dec. 16, 2011) (re: order granting relief from Rule 10b-17, Rule 14e-5 and Rules 101 and 102 of Regulation M under the Securities Exchange Act of 1934 pursuant to delegated authority).

<sup>2</sup> *Id.*

Traded Fund Trust and the Existing Fund submitted to the Commission. The Commission granted relief under Rule 14e-5 based on the representations and facts in the Original Request Letter, noting in particular that purchases or redemptions of the Existing Fund's securities would not appear to result in the abuses at which Rule 14e-5 is directed, and that any bids or purchases by dealer-managers would not be effected for the purpose of facilitating a tender offer.

The Trust is concerned, however, that the exemptive relief previously granted to the Existing Fund may not extend to the Fund because it is a separate and distinct legal entity, belonging to a different trust with a different investment adviser. Furthermore, it does not appear that the "Equity ETF Class Relief" previously issued by the Commission with respect to certain types of ETFs may be available. Specifically, the ETF Class Relief Letter, as defined below, does not appear to extend to the Fund because the Fund's Component Securities<sup>3</sup> might not meet the minimum public float and minimum average daily trading volume thresholds as set forth in Condition 3 of the Equity ETF Class Relief Letter.<sup>4</sup>

As a result, the Trust is requesting the exemption outlined below in Part IV. The Trust does not believe that the exemptive relief requested raises any significant new regulatory issues that have not already been addressed by the Commission;<sup>5</sup> rather, it is simply an extension of the exemptive relief granted to the Existing Fund. Furthermore, the Commission has previously issued exemptive relief substantially similar to that requested herein to index-based ETFs<sup>6</sup> that

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<sup>3</sup> For purposes of this request, "Component Securities" are individual securities that comprise the ETF basket, e.g., securities that are assembled to replicate the particular index that the ETF tracks.

<sup>4</sup> See ETF Class Relief Letters *infra* note 5. It is anticipated that the Fund will have more than 200 Component Securities but may not have 50% of such securities meet the minimum actively traded securities thresholds.

<sup>5</sup> See, e.g., 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"); 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>6</sup> See, e.g., Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, Division of Corporation Finance, to Allison M. Fumai, Dechert LLP, dated December 19, 2017 (with respect to ARK ETF Trust); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, Division of Corporation Finance, to Kinga Kapuscinski, John Hancock Investments, dated December 7, 2017 (with respect to John Hancock Exchange-Traded Fund Trust); 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 EAFV, Value Index Fund); Letter from James Brigagliano, Assistant Director, Division

invest directly in securities, as well as substantially similar exemptive relief to various exchange traded products.<sup>7</sup>

## **II. Transactions In Shares**

Shares are expected to be listed on NYSE Area, Inc., similar to the Existing Fund. On an ongoing basis, the Trust expects to issue and redeem Shares in aggregations of 100,000 Shares (referred to as “Creation Units”). As described below, consistent with other ETFs, transactions in Creation Units for the Fund will occur between the Trust and persons, referred to as “Authorized Participants,” who create and redeem Shares in Creation Units pursuant to contractual arrangements pertaining to the Trust and the Fund. Additionally, as indicated below, Authorized Participants may engage in secondary market transactions in Shares.

Authorized Participants are typically broker-dealers and, as discussed below, may act as dealer-managers of tender offers. The Trust, on behalf of itself, the Fund and Authorized Participants that act as dealer-managers of tender offers, as applicable, requests that the Commission grant exemptive relief from Rule 14e-5 under the Exchange Act in connection with transactions that involve “subject securities” and “related securities” (as defined in Rule 14e-5(c)(6) and (7)) that are included in a “Creation Basket” or a “Redemption Basket,” as described and discussed below. Without such relief, in situations where an Authorized Participant is also a dealer-manager of a tender offer, and therefore a “covered person,” as defined in Rule 14e-

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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 I.L.P., dated July 25, 2002, to Mary Joan Hoene, Carte, 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, e.g., Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, Division of Corporation Finance, to Suzanne M. Russell, Esq., Chapman and Cutler LLP, dated August 23, 2017 (with respect to First Trust Exchange-Traded Fund III); 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).

5(c)(3)(ii), subject to the Rule, the Rule's restrictions could impede the ability of the Fund to operate as intended and as disclosed in publicly filed documents, which could be detrimental to investors.<sup>8</sup>

The Distributor is a broker-dealer registered under the Exchange Act and acts as the distributor and principal underwriter of the Creation Units of Shares of the Fund. The Trust has appointed entities to provide administrative, custodial, transfer agency, fund accounting and dividend disbursing functions for the Fund. The entity providing custodial services is hereafter the "Custodian" and the entity serving as transfer agent for the Fund is hereafter the "Transfer Agent."

The Fund will issue and redeem<sup>9</sup> Shares on a continuous basis at NAV only in Creation Units expected to be comprised of 100,000 Shares. Shares are expected to be listed on a U.S. national securities exchange as defined in Section 2(a)(26) of the 1940 Act (an "Exchange") and trade in the secondary market in the same manner as other equity securities. The trading market on an Exchange affords investors the opportunity to assume and liquidate positions in Shares at their discretion, permitting them to take advantage of prices at any time during the trading day. This combination of intra-day liquidity with the Creation Unit purchase and redemption features

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<sup>8</sup> Consistent with the applicable precedent (*see* notes 5 and 6), the Trust is the party that is requesting relief from the Commission. Although there is no guarantee of future results, the Trust believes that the "in-kind" purchase and redemption features of ETFs help facilitate the close correspondence between an ETF's net asset value ("NAV") and market price to the benefit of the ETF and its shareholders. The Trust and its series, the Fund, therefore have a strong interest in, and are beneficiaries of, the requested relief as it helps ensure that market participants are able to effect creations and redemptions, thereby permitting the Fund to operate as intended. The Trust further believes that the arbitrage activity described below is facilitated when more market participants are able to participate in the purchase and redemption of Creation Units. Additionally, the Trust is seeking relief on behalf of itself and the Fund in the event that the Trust and/or the Fund is deemed to be a "covered person" under Rule 14e-5(c)(3)(iv), as discussed in Part III below.

<sup>9</sup> Redeemability of Creation Units is attributable to the fact that the Trust is an open-end management investment company. The term "open-end company" is defined in Section 5(a)(1) of the Investment Company Act of 1940, as amended (the "1940 Act"), as a management company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the 1940 Act defines a "redeemable security" as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent. Creation Units are redeemable at NAV. Shares, however, are not individually redeemable. The Trust, like other ETFs, may rely on exemptive relief obtained from the Commission permitting it, among other things, to register as an open-end management investment company notwithstanding that Shares are redeemable only in Creation Unit sizes. The relief addresses the possible question that arises as to whether the definitional requirements of a "redeemable security" or an "open-end company" under the 1940 Act have been met. See Investment Company Act Release Nos. 25985 (March 28, 2003) and 27743 (February 27, 2007) (amending Release No. 25985) (the "1940 Act Exemptive Orders").



is generally expected to create potential arbitrage opportunities.<sup>10</sup> In turn, as arbitrageurs (including Authorized Participants) purchase and redeem Creation Units in response to such opportunities, it is anticipated that they will enhance the liquidity of the secondary market, which may help mitigate pricing inefficiencies and reduce the likelihood that Shares will trade at a material premium or discount in relation to their NAV.

In contrast to a typical “mutual fund,” the Fund does not sell or redeem individual Shares. Rather, like other ETFs, it will sell and redeem its Shares in Creation Units.<sup>11</sup> Transactions in Creation Units typically take place between the Trust and Authorized Participants, in the ordinary course of business. Authorized Participants include broker-dealers who have entered into contractual arrangements agreed to by the Distributor and the Transfer Agent setting forth the terms under which Authorized Participants can purchase and redeem Shares in Creation Unit sized aggregations (“AP Agreements”). Creation Units may be issued and redeemed in exchange for an in-kind portfolio of instruments and/or cash in lieu of such instruments. The Custodian, through the National Securities Clearing Corporation, makes available prior to the opening of business on the applicable Exchange on each business day, the list of securities that Authorized Participants must deliver to purchase a Creation Unit (“Creation Basket”) and the list of securities that they will receive if they redeem a Creation Unit (“Redemption Basket”).

In accordance with the applicable AP Agreements, Authorized Participants create and redeem Creation Units under various scenarios. For example, in connection with creation transactions, an Authorized Participant might purchase the relevant securities in the Creation Basket, transfer the securities to the Trust in exchange for the Creation Unit, and convey the Creation Unit to the investor. Conversely, in connection with redemption transactions, an Authorized Participant might receive a Creation Unit from an investor, or otherwise assemble the number of Shares necessary to comprise a Creation Unit, convey the Creation Unit and receive the securities in the Redemption Basket from the Trust.

### **III. Legal Analysis Under Rule 14e-5**

Rule 14e-5 was originally promulgated as Rule 10b-13 under the Exchange Act to safeguard the interests of persons who sell their securities in response to a tender offer.<sup>12</sup> Rule

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<sup>10</sup> Arbitrageurs are expected to stand ready to take advantage of any slight premium or discount in the market price of Shares on the applicable Exchange versus the cost of depositing securities and creating a Creation Unit to be broken down into individual Shares.

<sup>11</sup> Terms and provisions governing sales and redemptions of Shares by the Fund are set forth in the applicable prospectus and statement of additional information; the applications for the 1940 Act Exemptive Orders; and the Trust’s Agreement Declaration of Trust.

<sup>12</sup> Exchange Act Release No. 8712 (October 8, 1969) (the “1969 Adopting Release”). In this regard, the 1969 Adopting Release noted that “[w]here securities are purchased for a consideration greater than that of the tender offer price, this operates to the disadvantage of the security holders who have already deposited their securities

14e-5 prohibits a “covered person” from directly or indirectly purchasing or arranging to purchase any equity securities that are the subject of a tender offer (“subject securities”) or any securities immediately convertible into, exchangeable for, or exercisable for subject securities (“related securities”) except as part of such tender offer. The term “covered person” includes, among others, a dealer-manager of a tender offer. The fact that most Authorized Participants are broker-dealers implicates Rule 14e-5 because the term “covered person” includes a dealer-manager of a tender offer. The term “covered person” also includes any person acting, directly or indirectly, in concert with other covered persons in connection with any purchase or arrangement to purchase any subject securities or any related securities. Therefore, the Trust also is seeking relief in the event it or the Fund may be deemed to be a “covered person” by virtue of the AP Agreements pertaining to the Trust and the Fund.

In order to address situations in which an Authorized Participant acts as a dealer-manager of a tender offer, and a subject security or a related security is part of a group of securities that is received by the Fund when it issues a Creation Unit or part of a group of securities that the Fund distributes when it redeems a Creation Unit (i.e., part of a Creation Basket or a Redemption Basket), the Trust respectfully requests that the Commission grant an exemption from Rule 14e-5 as it applies to such Authorized Participants. The exemption would permit any such Authorized Participant to execute transactions that include, or are deemed to include, purchases of, or arrangements to purchase, subject securities or related securities, but that are not effected for the purposes of facilitating a tender offer and that are conducted in the ordinary course of business (in each case, from the time of the public announcement of the tender offer until the tender offer expires). For purposes of this relief, an Authorized Participant's ordinary course of business is: (1) creating or redeeming Shares in Creation Unit size aggregations that may include a subject security or a related security; and (2) engaging in secondary market transactions in Shares. With respect to redemptions, the Trust notes that the acquisition of individual securities held by the Fund by means of redemptions of Shares would be impractical and extremely inefficient in view of the relatively small number of shares of any one security included in a Redemption Basket and the requirement that a minimum number of Shares (i.e., a Creation Unit) be redeemed. Redemptions of and secondary market transactions in Shares under the circumstances described would not appear to result in the abuses at which Rule 14e-5 is directed.

In addition to the above request for relief, the Trust also is requesting exemptive relief in connection with purchases of Creation Units of Shares by an Authorized Participant acting as a dealer-manager of a tender offer. In this regard, in connection with purchasing Creation Units pursuant to the terms of its AP Agreement, an Authorized Participant may seek to purchase in the secondary market securities comprising a Creation Basket that includes, with respect to a tender offer for which it acts as a dealer-manager, subject securities or related securities. The Trust acknowledges that Rule 14e-5(b)(5) provides an exception to its prohibition for purchases

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and who are unable to withdraw them in order to obtain the advantage of possible resulting higher market prices.”

or arrangements to purchase a basket of securities containing a subject security or a related security if: (i) the purchase or arrangement is made in the ordinary course of business and not to facilitate the tender offer; (ii) the basket contains 20 or more securities; and (iii) covered securities and related securities do not comprise more than 5% of the value of the basket (the “Basket Exception”).

As indicated by the Commission in the release replacing former Rule 10b-13 with Rule 14e-5,<sup>13</sup> transactions in baskets in accordance with the Basket Exception provide little opportunity for a covered person to facilitate an offer<sup>14</sup> or for a security holder to exact a premium from the offeror. Given that the purchases and redemptions of Creation Units of ETFs in general typically involve baskets of securities, Authorized Participants acting as dealer-managers of tender offers for relevant securities may, in certain cases, be able to rely on the Basket Exception in purchasing Creation Units of Shares. From time to time, however, a change in the composition of the portfolio securities of the Fund may result in a change in the basket that has been established for purposes of purchasing its Creation Units. As a consequence, the basket could contain less than 20 securities and/or covered securities and related securities could comprise more than 5% of the value of the basket. For example, a liquidation of the issuer of one of the securities or a merger involving the acquisition of the issuer of one of the securities could cause the number of securities in the basket to fall below 20 and/or could cause covered securities and related securities to comprise more than 5% of the value of the basket. Additionally, as a result of fluctuations in the market value of the securities held in the basket, covered securities and related securities could, at times, comprise more than 5% of the value of the basket. This composition would result in the unavailability of the Basket Exception for an Authorized Participant acting as a dealer-manager of a tender offer for the applicable securities and, in particular, may preclude an Authorized Participant from being able to rely on the Basket Exception.

In order to address situations (including but not limited to the foregoing examples) where the basket contains less than 20 securities and/or covered securities and related securities comprise more than 5% of the value of the basket, the Trust respectfully requests that the Commission provide an exemption under Rule 14e-5 if an Authorized Participant acting as a dealer-manager of a tender offer purchases or arranges to purchase subject securities or related securities in the secondary market for the purpose of transferring such securities to purchase one or more Creation Units of Shares, if such purchases are not effected for the purpose of facilitating such tender offer and are made in the ordinary course of business. Relief would be

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<sup>13</sup> See Exchange Act Release No. 42055 (October 22, 1999) (the “1999 Release”).

<sup>14</sup> As discussed in the 1999 Release, “[f]acilitation of an offer includes purchases intended to bid up the market price of the covered or related security, and includes buying a basket to strip out the covered security in an effort to get the offeror the number of shares it is seeking.” In this regard, the Trust believes that it would be inefficient to facilitate a tender offer in a particular security by means of purchasing all of the securities in a Creation Basket.

necessary in order to permit such Authorized Participants to effect purchases of subject and related securities under such circumstances given that the Basket Exception would not be available. This extension of the Basket Exception would accommodate a potential factual circumstance associated with the operation of ETFs and would be consistent with the rationale underlying the adoption of the Basket Exception. The Trust notes, in particular, that purchases would not be effected for the purpose of facilitating a tender offer.<sup>15</sup>

The Trust understands that, except as permitted by the relief from Rule 14e-5 requested herein, any Authorized Participant acting as a dealer-manager is required to comply with the requirements of Rule 14e-5.

#### **IV. Request For Exemptive Relief**

Based on the foregoing, the Trust, on behalf of itself, the Fund and Authorized Participants that act as dealer-managers of tender offers, respectfully requests that the Commission grant the exemptive relief from Rule 14e-5 under the Exchange Act requested herein in connection with purchases of, and arrangements to purchase, subject securities and related securities outside of a tender offer. As more fully discussed above, the Trust is requesting that the Commission grant exemptions from Rule 14e-5 to permit any Authorized Participant acting as a dealer-manager of a tender offer, under the circumstances described herein, (1) to execute transactions that include, or are deemed to include, purchases of, or arrangements to purchase, subject securities or related securities in connection with (a) the redemption of Shares in Creation Unit size aggregations and (b) secondary market transactions in Shares; and (2) to purchase or arrange to purchase subject securities and related securities in the secondary market for the purpose of transferring such securities to purchase Creation Units. As a related matter, the Trust is requesting that, in light of the relevance of the activities contemplated by the AP Agreements described above to the Trust and the Fund, the Trust and the Fund be permitted to rely on any exemptive relief that is granted. The Trust believes that granting the requested exemptions is consistent with precedent and will not result in the abuses that Rule 14e-5 was designed to address, and that it will facilitate the ability of Authorized Participants to engage in transactions in Creation Units, thereby permitting the Fund to operate as intended to the benefit of its shareholders.

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<sup>15</sup> *Id.*

March 26, 2018  
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Should you have any questions, please call me at (202) 507-5154 or Mark Greer at (312) 964-3505.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Eric S. Purple". The signature is stylized with a large initial "E" and a long horizontal flourish extending to the right.

Eric S. Purple