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December 18, 2012

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

Dear Ms. Tao:

#### SUMMARY OF REQUEST FOR RELIEF

I am writing on behalf of ALPS ETF Trust (the "Trust"), an open-end investment company, and the ALPS/GS Momentum Builder® Growth Markets Equities and U.S. Treasuries Index ETF, ALPS/GS Momentum Builder® Multi-Asset Index ETF and ALPS/GS Momentum Builder® Asia ex-Japan Equities and U.S. Treasuries Index ETF (the "Funds"), series of the Trust described herein ("Applicants"). The Trust, on behalf of itself, any national securities exchange or national securities association on or through which shares of the Funds ("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 Commission ("Commission"), or from the Commission, exemptions, interpretive

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<sup>1</sup> The Trust intends to list the Shares of the Fund described herein on the NYSE Arca. In addition, the Commission has issued an exemptive order to the Trust permitting registered investment companies to invest in exchange-traded funds offered by the Trust beyond the limits of Section 12(d)(1) subject to certain terms and conditions, including that such registered investment companies enter into an agreement with the Trust.

<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 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).

or no-action advice regarding Rule 10b-17 and Rules 101 and 102 of Regulation M under the Securities Exchange Act of 1934, as amended (the "Exchange Act").

The Trust intends to offer Shares of the Funds. Each Fund is an exchange traded fund ("ETF") organized as a series of the Trust. Each Fund seeks to track the performance of an underlying index developed by Goldman, Sachs & Co. The Funds intend to operate as "ETFs of ETFs." As such, each Fund will seek to track the performance of its underlying index by investing at least 80% of its assets in other ETFs<sup>3</sup> included in its underlying index ("Underlying ETFs") instead of investing directly in the shares of issuers of individual securities. Except for the fact that the Funds will operate as ETFs of ETFs, the Funds will operate in a manner identical to the underlying ETFs that have been granted relief by the Staff.

The Staff has issued in the past relief substantially identical to that requested herein to index-based and actively managed ETFs operating as ETFs of ETFs (the "Prior ETFs of ETFs").<sup>4</sup> The Staff has previously issued substantially similar relief to index-based ETFs<sup>5</sup> and other actively

<sup>3</sup> Each Fund may also invest in other exchange-traded commodity pools ("ETPs") included in its underlying index.

<sup>4</sup> See 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. Brigagliano, Deputy Director Division of Trading and Markets, dated May 4, 2010 with respect to U.S. One Trust ETF.

<sup>5</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;

managed ETFs<sup>6</sup> that invest directly in securities, as well as substantially similar relief to various ETPs (collectively, the “Prior ETFs”).<sup>7</sup> The only ETFs in which the Funds invest will be organized in the United States, registered under the Investment Company Act of 1940, as amended (“1940 Act”), and listed on a Market. The ETPs in which the Funds invest will issue equity securities and be listed on a Market. The Funds will operate in a manner substantially identical to the Prior ETFs of ETFs. Except for the fact that they will operate as ETFs of ETFs, the Funds will operate in a manner substantially identical to the Prior ETFs. For example, each Fund will disclose its portfolio holdings on a daily basis and information about the prices of the securities and other instruments held by the Funds will be readily available from a variety of sources.

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

Nevertheless, because the Funds operate as ETFs of ETFs, Applicants are concerned that the “ETF Class Relief” previously issued by the Staff with respect to certain types of ETFs may not extend to the Funds.<sup>8</sup> Specifically, the ETF Class Relief does not appear to extend to the Funds

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

<sup>7</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.

<sup>8</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

since the Funds do not meet the terms of Condition 2 and 3 of the Equity ETF Class Letter as discussed more fully in Part IV herein. In particular, the Funds do not expect to hold twenty (20) or more "Component Securities" and may hold Underlying ETFs in excess of 25% of its total portfolio value. Notwithstanding the foregoing, Applicants represent that all Underlying ETFs and ETPs will either meet all conditions set forth in one or more of the ETF Class Relief Letters or the ETV Class Relief Letter<sup>9</sup>, respectively, or will have received individual relief from the Commission.<sup>10</sup>

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 Funds. 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.

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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, Associate 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>9</sup> Letter from Racquel L. Russell, Branch Chief, Office of Trading Practices and Processes, Division of Market Regulations, to George T. Simon, Esq., Foley & Lardner LLP, dated June 21, 2006 ("*ETV Class Relief Letter*").

<sup>10</sup> One Underlying ETF is an actively-managed ETF and has received individual relief, but also is entitled to rely in part on a prior letter from Josephine Tao, Associate Director, Division of Trading and Markets, to Richard F. Morris of WisdomTree Asset Management, Inc., dated May 9, 2008, with respect to relief regarding Section 11(d)(1) of the Exchange Act and Rules 10b-10, 11d1-2, 15c1-5, and 15c1-6 under the Exchange Act.

**PART I****A. The Trust and the Funds**

The Trust is an investment company currently consisting of nine separate exchange traded “index funds.” The Funds consist of the ALPS/GS Momentum Builder® Growth Markets Equities and U.S. Treasuries Index ETF, ALPS/GS Momentum Builder® Multi-Asset Index ETF and ALPS/GS Momentum Builder® Asia ex-Japan Equities and U.S. Treasuries Index ETF. The Funds seek investment results that correspond generally, before fees and expenses, to the performance of the GS Momentum Builder® Growth Markets Equities and U.S. Treasuries Index, GS Momentum Builder® Multi-Asset Index and the GS Momentum Builder® Asia ex-Japan Equities and U.S. Treasuries Index, respectively (each, an “Index”).

The Fund’s investment adviser, ALPS Advisors, Inc. (the “Adviser”), uses a “passive” or indexing approach to try to achieve each Fund’s investment objective. Unlike many other funds, the Funds do not try to “beat” the Index each tracks and does not seek temporary defensive positions when markets decline or appear overvalued. Each Fund will normally invest at least 80% of its total assets in the securities of underlying ETFs that comprise its Index. Each Fund is required to provide 60 days’ notice to its shareholders prior to a change in this policy. Each Fund’s investment objective and the Index which each Fund seeks to track may be changed without shareholder approval.

The GS Momentum Builder® Asia ex-Japan Equities and U.S. Treasuries Index is comprised of shares of Underlying ETFs whose underlying indexes track the equity markets of the following countries in Asia: India, China, Thailand, Taiwan, Hong Kong, Indonesia, Singapore, Malaysia, South Korea and Australia, as well as shares of ETFs whose underlying indexes track U.S. Treasury securities.

The GS Momentum Builder® Multi-Asset Index is comprised of shares of Underlying ETFs whose underlying indexes track U.S., international, developed and emerging equity markets, commodity markets, real estate markets and U.S. fixed income markets (including U.S. Treasuries and investment grade, high yield, international and emerging market bonds).

The GS Momentum Builder® Growth Markets Equities and U.S. Treasuries Index is comprised of shares of Underlying ETFs whose underlying indexes track the equity markets of the following emerging market countries: Brazil, Russia, India, China, Mexico, South Korea, Indonesia, and Turkey, as well as shares of ETFs whose underlying indexes track U.S. Treasury securities.

The range of weights for each Index component is set forth below.

**Investment Constraints of the GS Momentum Builder® Growth Markets Equities and U.S. Treasuries Index.**

iShares Barclays 7-10 Year Treasury Bond Fund	0%	50%
iShares Barclays 20+ Year Treasury Bond Fund	0%	50%
iShares FTSE China 25 Index Fund	0%	30%
WisdomTree India Earnings Fund	0%	30%
Market Vectors Russia ETF	0%	30%
iShares MSCI Brazil Index Fund	0%	30%
iShares MSCI South Korea Index Fund	0%	30%
Market Vectors Indonesia Index ETF	0%	30%
iShares MSCI Turkey Investable Market Index Fund	0%	30%
iShares MSCI Mexico Investable Market Index Fund	0%	30%
Deleverage Position*	0%	100%

\* The Deleverage Position means a hypothetical investment in a total return index comprised of 50% SPDR Barclays Capital 1-3 Month T-Bill ETF (BIL) and 50% iShares Barclays Short Treasury Bond Fund (SHV), rebalanced on each monthly rebalancing date.

**Investment Constraints of the GS Momentum Builder® Multi-Asset Index.**

iShares Barclays 7-10 Year Treasury Bond Fund	0%	50%
iShares Barclays 20+ Year Treasury Bond Fund	0%	50%

iShares Russell 1000 Index Fund	0%	30%
iShares Russell 2000 Index Fund	0%	30%
iShares MSCI EAFE Index Fund	0%	30%
Vanguard MSCI Emerging Markets ETF	0%	30%
iShares S&P GSCI Commodity-Indexed Trust*	0%	25%
iShares Barclays Aggregate Bond Fund	0%	30%
iShares iBoxx \$ High Yield Corporate Bond Fund	0%	30%
iShares Barclays TIPS Bond Fund	0%	30%
SPDR Barclays Capital International Treasury Bond ETF	0%	30%
iShares JPMorgan USD Emerging Markets Bond Fund	0%	30%
WisdomTree EM Local Debt Fund	0%	30%
iShares Dow Jones U.S. Real Estate Index Fund	0%	30%
iShares S&P Latin America 40 Index Fund	0%	30%
PowerShares DB Gold Fund*	0%	25%
Deleverage Position**	0%	100%

\*The sum of the weights of the iShares S&P GSCI Commodity-Indexed Trust and the PowerShares DB Gold Fund may not exceed 25%.

\*\*The Deleverage Position means a hypothetical investment in a total return index comprised of 50% SPDR Barclays Capital 1-3 Month T-Bill ETF (BIL) and 50% iShares Barclays Short Treasury Bond Fund (SHV), rebalanced on each monthly rebalancing date.

**Investment Constraints of the GS Momentum Builder® Asia ex-Japan Equities and U.S. Treasuries Index.**

iShares Barclays 7-10 Year Treasury Bond Fund	0%	50%
iShares Barclays 20+ Year Treasury Bond Fund	0%	50%
WisdomTree India Earnings Fund	0%	30%
iShares FTSE/Xinhua China 25 Index Fund	0%	30%
iShares MSCI Thailand Index Fund	0%	30%
iShares MSCI Taiwan Index Fund	0%	30%
iShares MSCI Hong Kong Index Fund	0%	30%
Market Vectors Indonesia Index Fund	0%	30%
iShares MSCI Singapore Index Fund	0%	30%
iShares MSCI Malaysia Index Fund	0%	30%
iShares MSCI South Korea Index Fund	0%	30%
iShares MSCI Australia Index Fund	0%	30%
Deleverage Position*	0%	100%

\*The Deleverage Position means a hypothetical investment in a total return index comprised of 50% SPDR Barclays Capital 1-3 Month T-Bill ETF (BIL) and 50% iShares Barclays Short Treasury Bond Fund (SHV), rebalanced on each monthly rebalancing date.

Using a methodology (the "Methodology") developed by Goldman, Sachs & Co. (the "Index Provider"), each Index seeks to provide exposure to price momentum of these equity markets and U.S. fixed income markets by reflecting the combination of Underlying ETF weightings that



would have provided the highest six-month historical return, subject to the constraints on maximum and minimum weights and volatility controls described below. The Index is rebalanced monthly, but may also be rebalanced as frequently as daily if the daily volatility control is triggered.<sup>11</sup>

Two levels of volatility control are applied:

- (1) The monthly volatility control is performed on each monthly rebalancing date and sets a maximum limit on the annualized historic six-month “realized” volatility<sup>12</sup> of any selected combination of ETF weights (the “Volatility Target”). Each Index is then rebalanced at that time to reflect such limit.
- (2) The daily volatility control rebalances a portion or all of the current Index components into ETFs that invest in short-term U.S. Treasuries in order to reduce volatility when the annualized historic three-month volatility of the current Index components exceeds a predetermined level. Following any rebalance resulting from the Index components’ volatility exceeding such level, each Index is rebalanced into its prior composition when the annualized historic three-month volatility of such composition declines below the predetermined level.

The portion of each Index that is rebalanced into short-term fixed income ETFs is referred to as the “Deleverage Position.” As described above, the “Deleverage Position” means a hypothetical investment in a total return index comprised of 50% SPDR Barclays Capital 1-3 Month T-Bill ETF (BIL) and 50% iShares Barclays Short Treasury Bond Fund (SHV), rebalanced on each monthly rebalancing date.

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<sup>11</sup> Pursuant to discussions with the staff, we note that, based on historical backtesting performed by the Index Provider, the daily volatility control would only have been triggered in the past under rare circumstances. We further note that such backtested data is not necessarily indicative of future results or performance of an Index.

<sup>12</sup> Realized volatility is an historical calculation of the degree of movement based on prices or values of an asset observed periodically in the market over a specific period. The realized volatility of an asset is characterized by the frequency of the observations of the asset price used in the calculation and the period over which observations are made. The Methodology utilizes six-month realized volatility with respect to the monthly volatility control and three-month realized volatility with respect to the daily volatility control. In each case, realized volatility is calculated from daily closing prices of the shares of the Underlying ETFs over the applicable period and then annualized.

The applicable Volatility Target and volatility control levels for each Index are listed in the table below.

GS Momentum Builder® Growth Markets Equities and U.S. Treasuries Index	20%	22%
GS Momentum Builder® Multi-Asset Index	8%	10%
GS Momentum Builder® Asia ex-Japan Equities and U.S. Treasuries Index	20%	22%

The Shares are listed on the NYSE Arca. Each 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 Funds 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 Adviser, Distributor and Authorized Participants**

**1. Adviser**

ALPS Advisors, Inc. acts as each Fund's investment adviser pursuant to an advisory agreement with the Trust on behalf of the Fund (the "Advisory Agreement"). The Investment Adviser, located at 1290 Broadway, Suite 1100, Denver, Colorado 80203, is registered with the Securities and Exchange Commission as an investment adviser. The Investment Adviser currently employs four investment professionals with more than 70 years combined industry experience. As of December 31, 2011, the Adviser provided supervisory and management services on approximately \$4.76 billion in assets through closed-end funds, mutual funds and exchange-traded funds. Pursuant to the Advisory Agreement, the Investment Adviser manages the investment and reinvestment of the Fund's assets and administers the affairs of the Fund to the extent requested by the Board of Trustees.

**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 as the distributor and principal underwriter of the Creation Units of Shares. The Distributor will distribute 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" ("APs") may place orders with the Distributor to purchase or redeem Creation Units, as described in Part I D. below. APs are not affiliated (within the meaning of Section 2(a)(3) of the 1940 Act) with the Adviser, NYSE Arca or any other Market.

#### C. Shares

As described in subparts I.D. through I.F. below, the Fund will issue and redeem its Shares in aggregations of 50,000 Shares or multiples thereof ("Creation Units"). Shares will not be individually redeemable. The Trust intends that the initial net asset value ("NAV") of Shares will be established at a level convenient for trading purposes.<sup>3)</sup> 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 and redeem Shares at NAV only in a large specified number of Shares called a "Creation Unit" or multiples thereof. A Creation Unit consists of 50,000 Shares. 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 each Fund's benchmark Index.

Individual Shares of a Fund may only be purchased and sold in secondary market transactions through brokers. Shares of the Funds are listed for trading on NYSE Arca and because Shares will trade at market prices rather than NAV, Shares of a 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 a Fund, an investor must generally deposit a designated portfolio of equity securities constituting a substantial replication, or a representation, representing the securities included in the Underlying Index (the "Deposit Securities") and generally make a small cash payment referred to as the "Cash Component." For those APs that are not eligible for trading a Deposit Security, custom orders are available. The list of the names and the numbers of shares of the Deposit Securities, as well as the amount of the Cash Component, is made available by the Funds' custodian through the facilities of the NSCC,

immediately prior to the opening of business each day of the NYSE Arca. The Cash Component represents the difference between the NAV of a Creation Unit and the market value of the Deposit Securities. In the case of custom orders, cash-in-lieu may be added to the Cash Component to replace any Deposit Securities that the AP may not be eligible to trade.

Orders must be placed in proper form by or through either (i) a "Participating Party" i.e., a broker-dealer or other participant in the Clearing Process of the Continuous Net Settlement System of the NSCC (the "Clearing Process") or (ii) a participant of the DTC ("DTC Participant") that has entered into an agreement with the Trust, the Distributor and the transfer agent, with respect to purchases and redemptions of Creation Units. All standard orders must be placed for one or more whole Creation Units of Shares of a Fund and must be received by the Distributor in proper form no later than the close of regular trading on the NYSE (ordinarily 4:00 p.m. Eastern time) ("Closing Time") in order to receive that day's closing NAV per Share. In the case of custom orders the order must be received by the Distributor no later than one hour prior to Closing Time in order to receive that day's closing NAV per Share. A custom order may be placed by an AP in the event that the Trust permits or requires the substitution of an amount of cash to be added to the Cash Component to replace any Deposit Security which may not be available in sufficient quantity for delivery or which may not be eligible for trading by such AP or the investor for which it is acting or any other relevant reason.

A fixed creation transaction fee of \$500 per transaction (the "Creation Transaction Fee") is applicable to each transaction regardless of the number of Creation Units purchased in the transaction. An additional charge of up to four times the Creation Transaction Fee may be imposed on transactions effected outside of the Clearing Process (through a DTC Participant) or to the extent that cash is used in lieu of securities to purchase Creation Units. The price for each Creation Unit will equal the daily NAV per Share times the number of Shares in a Creation Unit plus the fees described above and, if applicable, any transfer taxes.

Shares of a Fund may be issued in advance of receipt of all Deposit Securities subject to various conditions, including a requirement to maintain cash at least equal to 115% of the market value of the missing Deposit Securities on deposit with the Trust.

#### F. Procedures Applicable To Redemptions of the Fund

Shares may be redeemed only in Creation Units at their NAV and only on a day the NYSE Arca is open for business. The Funds' custodian makes available immediately prior to the opening of business each day of the NYSE Arca, through the facilities of the NSCC, the list of the names and the numbers of shares of each Fund's portfolio securities that will be applicable that day to redemption requests in proper form ("Fund Securities"), as well as the Cash Redemption Amount (as defined below). Fund Securities received on redemption may not be identical to Deposit

Securities, which are applicable to purchases of Creation Units. Unless cash redemptions are available or specified for a Fund, the redemption proceeds consist of the Fund Securities, plus cash in an amount equal to the difference between the NAV of Shares being redeemed as next determined after receipt by the transfer agent of a redemption request in proper form, and the value of the Fund Securities (the "Cash Redemption Amount"), less the applicable redemption fee and, if applicable, any transfer taxes. Should the Fund Securities have a value greater than the NAV of Shares being redeemed, a compensating cash payment to the relevant Fund equal to the differential, plus the applicable redemption fee and, if applicable, any transfer taxes will be required to be arranged for, by or on behalf of the redeeming shareholder.

An order to redeem Creation Units of a Fund may only be effected by or through an AP. An order to redeem must be placed for one or more whole Creation Units and must be received by the transfer agent in proper form no later than the close of regular trading on the NYSE (normally 4:00 p.m. Eastern time) in order to receive that day's closing NAV per Share.

A fixed redemption transaction fee of \$500 per transaction (the "Redemption Transaction Fee") is applicable to each redemption transaction regardless of the number of Creation Units redeemed in the transaction. An additional charge of up to four times the Redemption Transaction Fee may be charged to approximate additional expenses incurred by a Fund with respect to redemptions effected outside of the Clearing Process or to the extent that redemptions are for cash. Each Fund reserves the right to effect redemptions in cash. A shareholder may request a cash redemption in lieu of securities, however, a Fund may, in its discretion, reject any such request.

## **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") are 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.<sup>13</sup>

**C. Dissemination of Information about Shares**

In order to provide current Share pricing information for the Funds for use by investors, professionals and persons wishing to create or redeem Shares, the Listing Exchange will disseminate continuously every 15 seconds throughout the trading day, through the facilities of the consolidated tape, (i) the market value of a Share and (ii) a calculation of the estimated NAV ("Estimated NAV") of a Share. 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 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 each 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 Prospectus, and additional quantitative information that is updated on a daily basis.

**PART III**

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

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<sup>13</sup> We note that all rebalances of each Underlying Index, including both those that occur monthly and those that occur as frequently as daily if the daily volatility control is triggered, are posted at least three business days in advance by the Calculation Agent to its website pursuant to the requirements of the rules governing each Underlying Index.

Applicants believe that the relief requested herein is identical to the relief granted by the Commission to the Prior ETFs of ETFs and is virtually identical to that granted in the ETF Class Relief Letters.

**B. Applicability of the ETF Class Relief to the Funds**

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, 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; with no one Component Security constituting more than 25% of the total value of the ETF;
3. At least 70% of the ETF must be comprised of Component Securities that meet the minimum public float and minimum average daily trading volume thresholds under the ‘actively-traded securities’ definition found in Regulation M for excepted securities during each of the previous two months of trading prior to the formation of the relevant ETF; provided, however, that if the ETF has 200 or more Component Securities then 50% of the Component Securities must meet the actively-traded securities thresholds;
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 public available last sale trade information. The infra-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>

The Funds will meet all of the criteria of the Equity ETF Class Relief Letter set forth above, with the exception of Conditions 2 and 3. The Funds do not intend to hold “a basket of twenty or more” Index Constituents and may hold underlying ETFs in excess of 25% of the total value of its portfolio. All Underlying ETFs and ETPs will either meet all conditions set forth in one or more of the ETF Class Relief Letters or the ETV Class Relief Letter, respectively, or will have received individual relief from the Commission.<sup>15</sup> Further, Applicants hereby represent that: (a) the arbitrage mechanism will be facilitated by the transparency of the Funds’ portfolio and the availability of the intra-day indicative value, the liquidity of securities and other assets held by the Funds, ability to acquire such securities, as well as the arbitrageurs’ ability to create workable hedges; (b) the Funds will invest solely in liquid securities; (c) the Funds 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 each Fund’s market price and its NAV; and (e) a close alignment between the market price of Shares and each 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 and 102 of Regulation M as discussed below. As noted above, this relief is identical to the relief granted to the Prior ETFs of ETFs.

#### **PART IV**

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

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

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

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

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

<sup>15</sup> See note 10 *supra*.



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>16</sup>, and (b) for in-kind distributions, the amount of the security outstanding immediately prior to and immediately following the dividend or distribution and the rate of such dividend or distribution. Paragraph (c) of the Rule, however, states that the Rule shall not apply to redeemable securities issued by open-end investment companies and unit investment trusts registered under the 1940 Act. Except for the fact that redemption is subject to the minimum condition of tendering at least 50,000 shares (or such higher minimum amount as set forth in the registration statement), each Fund 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 permitting the Trust to issue shares with limited redeemability while still treating the Trust like any other open-end investment company.

In addition, compliance with Rule 10b-17(b)(1)(v)(a-b) would be impractical in light of the nature of each Fund. This is because it is not possible for each Fund to accurately project ten days in advance what dividend, if any, would be paid on a particular record date. Because of this inability to project the amount of any dividend ten days in advance of a record date, applying the timing requirements of 10b-17(b)(1)(v)(a-b) to each Fund would increase the chances that each Fund would mis-estimate the amount of any such dividend.<sup>17</sup>

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<sup>16</sup> The rule permits a reasonable approximation of the per share distribution to be provided if exact amounts cannot be given because of existing conversion rights which may be exercised during the notice period and may affect the per share cash distribution, as long as the actual per share distribution is subsequently provided on the record date.

<sup>17</sup> As an investment company, each Fund is required by the Internal Revenue Code to distribute at least 98% of its ordinary income and capital gains during the calendar year. If a 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, registered investment companies, including each Fund, must estimate: (i) the amount of ordinary income to be earned during the period from the date the dividend is declared to December 31; and (ii) the number of shares that will be outstanding as of the record date. Requiring each 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 each Fund to declare the amount of a dividend ten days in advance of the record date also would increase the chance that the Funds would over- or under-distribute capital gains. Further, unlike ordinary income, each 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 each Fund to declare the amount of a dividend ten days in advance of the record date would

Each Fund represents that it will comply with the other requirements of Rule 10b-17. Each Fund further represents that, as soon as practicable following the end of trading on the Exchange on the day prior to the ex-date (but not later than the last time at which the Exchange accepts such information on such date) with respect to any distribution made by each Fund, each Fund will provide notice to the Exchange 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>18</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 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.

We respectfully submit that none of these concerns raised by the Commission in the Proposing Release<sup>19</sup> will be implicated if the requested relief is granted. As set forth

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increase the chance that the Funds would mis-estimate the number of outstanding shares. This, in sum, would increase the chance that the Funds would mis-estimate the per share amount of capital gains each must distribute.

<sup>18</sup> Exchange Act Release No. 9076 (February 17, 1971).

<sup>19</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").

above, each 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 Additional Fund 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 investment companies with fully redeemable shares, thus should be applicable to each Fund with respect to the timing requirements of Rule 10b-17(b)(1)(v)(a-b).<sup>20</sup>

## 2. Rule 101 of Regulation M

Applicants respectfully requests that the Commission grant interpretive relief from Rule 101, as discussed below, to permit persons participating in a distribution of Shares of the Funds to bid for or purchase, redeem or engage in other secondary market transactions in such Shares.

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

We understand that while broker-dealers that: (i) tender Portfolio Deposits to the Trust in return for Shares of the Funds in Creation Units; or (ii) redeem Shares of the Funds in Creation Units for receipt of Redemption Securities and cash (or cash only) held by the Funds generally will not be part of a syndicate or selling group, and while no broker-dealer will receive fees, commissions or

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<sup>20</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"), such as the Funds, could rely on the exceptions in Rules 101(c)(4) and 102(d)(4) of Regulation M under the Exchange Act which are only available to open-end investment companies, notwithstanding the fact that shares of Active ETFs are redeemable only in Creation Units.

other remuneration from the Trust for the sale of Shares of the Funds 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 net asset value 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 (or in cash in certain cases) at net asset value, on any Business Day. Holders of Shares also have the benefit of intraday secondary market liquidity by virtue of their Market listing. Thus, the secondary market price of Shares should not vary substantially from the net asset value 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 net asset value should be eliminated by arbitrage activity. Because the net asset value 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 net asset value. 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 each Fund for redemption and the receipt of Redemption 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 Redemption Securities. As described above, following notice of redemption, the Funds will deliver the specified Redemption 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 Funds will not purchase Redemption Securities in the secondary market to fulfill a redemption request. Therefore, redemptions of Shares cannot be expected to affect the market price of the Redemption Securities. The Distributor will not engage in any secondary market transactions in Shares, either for its own account or for investors.

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

### 3. Rule 102 of Regulation M

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 Funds during a distribution of such security. The Trust will redeem the Creation Units of Shares at the NAV of the Shares. Although Shares are traded on the secondary market, Shares may only be redeemed in Creation Units. Thus, the Trust believes that the redemption by the Trust of the Shares of the Funds at NAV in consideration

principally for Portfolio Securities held by the Funds does not involve the abuses that Rule 102 was intended to prevent.

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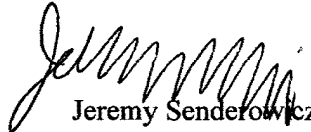
**PART V**

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