Exchange-Traded Funds: Issues for 2013

1.5 CLE Credits

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1. Presentation
2. Staff No-Action Position Regarding ETF Use of Derivatives
3. Exemptive Application: Fidelity Merrimack Street Trust
4. Exemptive Application: Eaton Vance ETMF Trust
5. Proposed ETF Exemptive Rules
Exchange Traded Funds: Issues for 2013

May 14, 2013

Presented By
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Introduction

• What is an Exchange Traded Fund (ETF)?
  • An ETF is a pooled investment vehicle whose shares are listed and traded on a stock exchange
    • Shares are traded intra-day
    • Shares trade at the market price, which may differ from the ETF’s net asset value (NAV)
    • Investors can buy and sell ETF shares through a broker, just like they would shares of any publicly traded company

• How are ETFs structured?
  • ETFs typically are structured as open-end investment companies or unit investment trusts
  • ETFs that invest primarily in futures contracts, currencies and commodities are not structured as investment companies, but rather as commodity pools
Mutual Funds versus ETFs

• Similarities between ETFs and mutual funds
  • Open-end investment companies (mutual funds) and ETFs are companies that invest in securities and other assets
    • Investors own a proportionate share of the pool of assets
    • Mutual funds and ETFs are subject to the investor protections of the Investment Company Act of 1940 (“1940 Act”)

• Differences between ETFs and mutual funds
  • ETFs may be structured as open-end investment companies but operate differently
  • Mutual funds continuously offer and redeem shares to the public
    • At the end of each business day, mutual funds calculate their NAV
    • Investors buy and sell shares at the next-determined NAV (forward pricing)
  • ETFs sell “creation units” to “authorized participants” (APs) only, not investors
    • ETFs publish the contents of creation units daily
    • Investors buy and sell shares on exchanges at the market price, not at NAV
    • ETFs can be more fully invested since cash does not flow in and out of the portfolio on a daily basis
History of ETFs

- 1990s: ETFs were first developed
  - The first ETFs held baskets of securities that replicated the securities of broad-based stock market indices (e.g., S&P 500)
- As their popularity grew, ETFs tracked more narrow indices
- In the past 10 years, geared (leveraged) ETFs gained popularity
  - Geared ETFs track a positive or negative multiple of the performance of a reference index
- 2008: Bear Stearns launches the first actively managed ETF: The Bear Stearns Current Yield Fund (symbol: YYY)*
  - After a slight delay, YYY began trading a week after JP Morgan bought Bear Stearns
  - YYY closed a year later
- Recently, several new actively-managed ETFs have obtained SEC exemptive relief

*Disclosure: a member of this firm served as fund counsel to YYY
Advantages of ETFs

- ETFs offer several advantages over traditional investment companies

  - ETFs offer investors access to a wide range of sectors, geographies and strategies, including, for example, health care, leisure and entertainment, inflation-protected treasuries, sovereign debt, covered bonds and foreign currencies
  - Many ETFs have lower expenses than mutual funds, but brokerage commissions may offset these lower expenses
  - ETFs have lower tracking errors than mutual funds because they do not manage daily cash flow into and out of the portfolio
  - ETFs may be more tax efficient than mutual funds because they do not sell securities to raise cash to meet daily redemption requests
  - ETFs provide greater portfolio transparency
Market for ETFs

• What is the market for ETFs?
  • In 20 years of existence, ETFs have attracted more than $1.337 trillion of net assets\(^1\)

\[\text{Total net assets of non-1940 Act ETFs}^2\]
\[\text{Total net assets of 1940 Act ETFs}^3\]

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\(^1\) Data for ETFs that invest primarily in other ETFs are excluded from the totals; net assets as of December 31, 2012.
\(^2\) The funds in this category are not registered under the 1940 Act and invest primarily in commodities, currencies, and futures.
\(^3\) The funds in this category are registered under the 1940 Act.

Note: Components may not add to the total because of rounding.

How ETFs Trade

• Market pricing versus NAV
  • Mutual funds establish their NAV once a day, as of the close of business
  • ETF share prices fluctuate all day according to market demand
    • Investors may buy at a premium or discount to NAV
    • Investors selling or buying ETF shares throughout the day may receive different prices

• ETFs have daily transparency
  • Imbalances in supply and demand can affect the market price of an ETF throughout a trading day
  • Transparency minimizes discrepancies between market value and NAV
    • Third parties continuously calculate the intraday indicative value (IIV) of the ETF’s portfolio securities, which is publicly available
How ETFs are Created

• How typical index-based ETFs are born
  • Sponsor selects reference index and creates corporate structure
  • ETF replicates index by investing in each underlying security, a sample of securities, or through derivatives
  • Frequent portfolio rebalancing
  • Sponsor establishes a “creation basket” or “purchase basket”

• “Creation basket” or “purchase basket”
  • Lists specific securities and quantities
  • Serves as a basis for creation units
  • Offers transparency to investors
How ETFs are Created

• Creation units
  • APs buy and sell creation units from ETFs
    • APs are financial institutions, typically broker-dealers, who make a market in ETFs
  • APs contribute cash and/or assets in creation basket to an ETF
  • ETFs issue one creation unit to an AP (typically 25,000 to 200,000 shares)
  • APs hold shares in inventory or sell them on the exchange to investors
  • When investors demand more shares, APs will sell on the market from inventory or buy new creation units
  • When investors sell more shares, APs may buy shares on the market to keep in inventory, or liquidate creation units (sell them back to the ETF)
    • APs return the creation unit to the ETF in exchange for cash and/or assets in the daily “redemption basket”
  • ETFs may allow cash-only purchases to minimize transaction costs
How ETFs are Created

Fund or trust

Authorized participant

- Creation basket and/or cash
- One creation unit

Hold shares

Investors

Trade on an exchange

Source: Investment Company Institute
Types of ETFs

• Index-based ETFs track the performance of a reference index
  • Index components are fully transparent

• Actively managed ETFs pursue an investment objective (much like a mutual fund)
  • Portfolio managers select securities based on research
  • Portfolios must be transparent
    • Website identifies securities and weightings
    • Transparency raises other issues

• Geared ETFs use derivatives to produce a return that is a multiple (positive or negative) of a reference index
Regulation of ETFs

• ETFs are structured in a way that would run afoul of several provisions of the 1940 Act and its rules
  • Sections 2(a)(32) and 5(a)(1) require shares of an open-end fund to be redeemable daily
    • The holder of redeemable securities may present the security to the issuer in exchange for the holder’s proportionate share of the issuer’s net assets
    • Creation units are redeemable securities, but holders of individual shares cannot present them to the issuer (i.e., the ETF), they can only sell them on the exchange
  • Section 22(d) and Rule 22c-1 require issuers to sell redeemable securities only at the current offering price, and to redeem only at the current NAV
  • Section 22(e) prohibits a fund from suspending the right of redemption, or postponing the date of satisfaction of redemption requests for more than seven days
Regulation of ETFs

• Sections 17(a)(1) and 17(a)(2) prohibit, among other things, affiliated persons, principal underwriters or promoters of a fund (or affiliated persons of such persons) from selling a security or other property to, or purchasing a security or other property from, a fund.

• Section 12(d)(1) limits the amount of shares that a registered investment company may hold of another registered investment company, and the amount of shares that one investment company may sell to another as an investment.
  • This prohibition would limit the ability of funds to invest in ETF shares.

• The SEC has the power to exempt ETFs from these laws and rules if it determines that an exemption is consistent with protection of investors.
Regulation of ETFs

• Accordingly, ETFs must apply to the SEC for an order exempting them from these prohibitions before commencing operations

• Exemptive orders allow ETFs to
  • Buy and sell creation units at NAV only with APs
  • Buy and sell shares on exchanges with investors at the current market prices
  • Engage in in-kind transactions with certain affiliates
  • In certain circumstances, delay payment of the proceeds from the redemption of shares beyond seven days (e.g., when portfolio security trades are settled on foreign markets)
  • Allow funds to buy ETF shares in excess of the limitations contained in Section 12(d)(1) of the 1940 Act
The Listing Process

- ETFs must comply with the listing requirements of the exchange
- Section 19(b) of the Securities Exchange Act of 1934 ("Exchange Act") requires an exchange to obtain SEC approval for any "proposed change in, addition to, or deletion from" existing rules of the exchange
- Rule 19b-4(e) under the Exchange Act allows ETF shares that meet generic listing requirements to be listed without approval
- For other ETFs, including actively managed ETFs, the exchange must file a Form 19b-4 to obtain the necessary SEC approval to list
- Before shares can trade on an exchange, issuers of new ETFs may also need relief from certain provisions of the Exchange Act related to lending of new issue securities, customer disclosure requirements, Reg M and notice and tender offer requirements
The Registration Process

• ETFs registered under the 1940 Act must comply with the requirements of Form N-1A
  • Form N-1A was amended in 2009 to include new requirements for ETFs
  • Subject to review by the Division of Investment Management
Proposed Regulations

- On March 11, 2008, the SEC proposed new rules to permit ETFs to operate without the need to obtain individual exemptive orders
  - Proposed Rule 6c-11 would codify most of the exemptions previously granted by the SEC to index-based ETFs and to fully transparent actively managed ETFs
  - ETFs must be transparent by either:
    - Disclosing on their website each business day the identities and weightings of the component securities and other assets held by the fund; or
    - Having a stated investment objective of obtaining returns that correspond to the returns of a securities index whose provider discloses daily on its website the identities and weightings of the component securities and other assets of the index
  - ETFs must trade on a national securities exchange
    - The exchange’s rules must require disclosure of an approximation of the current value of the ETF’s holdings on a frequent intraday basis (e.g., every 15 or 60 seconds)
Proposed Regulations

• Proposed Rule 12d1-4 would allow investment companies to make larger investments in ETFs than currently permitted under the 1940 Act
  • Currently, Section 12(d)(1) limits an investment company to acquiring no more than three percent of another investment company’s shares
  • The proposed rule would be subject to several conditions designed to address “pyramiding” schemes
    • An acquiring fund could not “control” an ETF, as defined in Section 2(a)(9) of the 1940 Act
    • An acquiring fund would be prohibited from redeeming shares it acquired in reliance on the proposed rule
    • An acquired ETF could not itself be a fund of funds
    • Sales charges and service fees charged by the acquiring fund would be limited to those allowed in Rule 2830 of the NASD Conduct Rules
• Proposed amendments to Form N-1A would require funds to include in their registration statements key information to investors who purchase ETF shares in secondary market transactions
Proposed Regulations

• Status of proposed rules

• Comments were due on May 19, 2008, but the SEC appears to have continued to accept comment letters as late as September 10, 2009

• NYSE Arca, Inc. supports the proposal, and particularly the proposed extension of relief for a broader range of affiliates – and not just to “first-tier” or “second-tier” affiliates – including broker-dealers affiliated with an ETF’s adviser, to purchase and redeem creation units through in-kind transactions

• Earlier this year, the SEC identified completion of the proposed ETF rules as one of its top five long-term rulemaking projects
Moratorium on Leveraged ETFs

- In March 2010, the SEC staff announced a moratorium on ETFs that “make significant investments in derivatives”

- In December 2012, the SEC staff announced a partial lifting of the moratorium
  - The staff will no longer defer consideration of exemptive requests relating to actively managed ETFs that make use of derivatives, provided:
    - The ETF’s board will periodically review and approve the ETF’s use of derivatives and how the ETF’s investment adviser assesses and manages risk with respect to the ETF’s use of derivatives; and
    - The ETF’s disclosure of its use of derivatives in its offering documents and periodic reports is consistent with relevant SEC and staff guidance
  - The staff continues to oppose applications of geared ETFs

- The FSOC, in its most recent annual report, noted that this might effect not only hedging activities of ETFs, but also related disclosures
Issues for APs

• Negotiation of contracts

• Status as “issuers”

• Operational issues

• Recent SEC approval of Nasdaq’s pilot program to allow ETF sponsors to pay for increased market liquidity
  • Sponsors of ETFs that trade fewer than 1 million shares a day can buy between $50,000 and $100,000 a year to market makers that can show they are improving the spreads and depth of liquidity in the ETFs
Exchange Traded Notes

- Exchange traded notes (ETNs) are senior unsecured debt obligations of an issuer (usually a bank) designed to track the return of an underlying index or other benchmark.
- ETNs are not pooled investment vehicles and are not registered under the 1940 Act, but ETNs must be registered under the Securities Act.
- Like ETFs, ETNs trade on an exchange and can be bought and sold by individual investors during the trading day.
  - ETNs are debt securities and do not trade at NAV.
  - ETN prices are based solely on supply and demand in the market.
- ETNs must have a repurchase feature that gives investors the ability to redeem notes of a specified minimum value or denomination on a minimum weekly (usually daily) basis at a predetermined price.
- The creditworthiness of an ETN itself is not rated, but is based on the creditworthiness of the issuer.
Exchange Traded Commodity Pools

• Exchange traded commodity pools offer undivided interests in a pool that invests directly in underlying commodities
• Because the underlying assets are not securities, exchange traded commodity pools do not have to register under the 1940 Act
• Exchange traded commodity pools give investors exposure to commodities without taking physical delivery of a commodity
• Shares of exchange traded commodity pools can be bought and sold on an exchange and held in an ordinary brokerage or custodial account
• Shares of exchange traded commodity pools are registered under the Securities Act
Exchange Traded Commodity Pools

- Exchange traded commodity pools generally must comply with the requirements of Form S-1
  - Exchange traded commodity pools do not meet the definition of an “investment company” and cannot register under the 1940 Act
  - Subject to review by the Division of Corporate Finance

- Exchange traded commodity pools are subject to regulation by CFTC
  - Investment advisers may have to register as commodity pool operator
  - Funds must comply with CFTC disclosure requirements
Issues and Outlook

• CFTC Rule 4.5 may require advisers of some ETFs that use derivatives to register as commodity pool operators (CPOs)
  • CFTC recently narrowed exemption for investment companies
  • CPO status will increase compliance and disclosure costs
  • Revising investment strategies to avoid CPO status may increase trading costs

• SEC staff is not likely to lift the moratorium on new geared ETFs until the SEC or the staff resolves issues raised in the SEC’s August 31, 2011 Concept Release on fund use of derivatives

• Implications of the Volcker Rule

• FINRA voiced concerns about the proliferation of newly created exchange traded index products
  • Questions whether retail investors fully understand these products
  • Regulatory and examination priority for 2013

• Single physical commodity copper ETFs authorized by the SEC earlier this year are being challenged in the U.S. Court of Appeals
Issues and Outlook

• The plaintiff’s bar has taken notice of ETFs
  • In Q1 2013, a suit was filed by two pension funds against several ETFs, their advisor, an advisory affiliate that provided securities lending services and the trustees of the ETFs challenging the split between the securities lending revenue paid to the ETFs and that paid to the adviser and its affiliates under Section 36(b) of the 1940 Act

• In March, Eaton Vance filed an application for a new type of exchange-traded product: an exchange traded managed fund (ETMF)
  • The application describes it as an actively managed open-end fund whose shares trade on an exchange at prices directly linked to the fund's next-determined NAV
  • The product is designed to provide the cost and tax efficiencies or ETFs while maintaining confidentiality of portfolio holdings

• ETF assets are likely to continue to grow and increase market share
In March of 2010, the Commission announced in a press release that the staff was conducting a review to evaluate the use of derivatives by mutual funds, exchange-traded funds (“ETFs”), and other investment companies. The press release also indicated that, pending completion of this review, the staff would defer consideration of exemptive requests under the 1940 Act (the “Act”) relating to, among others, actively-managed ETFs that would make significant investments in derivatives.

The staff announced today that it will no longer defer consideration of exemptive requests under the Act relating to actively-managed ETFs that make use of derivatives provided that they include representations to address some of the concerns expressed in the March 2010 press release. These representations are: (i) that the ETF’s board periodically will review and approve the ETF’s use of derivatives and how the ETF’s investment adviser assesses and manages risk with respect to the ETF’s use of derivatives; and (ii) that the ETF’s disclosure of its use of derivatives in its offering documents and periodic reports is consistent with relevant Commission and staff guidance.

The Commission issued the orders listed on Attachment A based on, among other representations, a representation that no actively-managed ETF relying on the relief would invest in options contracts, futures contracts or swap agreements. Consistent with today’s statement, we would not recommend enforcement action to the Commission under sections 2(a)(32), 5(a)(1), 17(a), 22(d), and 22(e) of the Act, or rule 22c-1 under the Act if actively-managed ETFs operating in reliance on such orders invest in options contracts, futures contracts or swap agreements provided that they comply with the representations stated above.

This position is provided to actively-managed ETFs relying on the orders listed on Attachment A for enforcement purposes only and does not express any position with respect to any other representation or condition of those orders, or application of the federal securities laws.

Elizabeth G. Osterman
Associate Director
Office of Exemptive Applications
Office of Investment Company Regulation
December 6, 2012

Attachment A


Attachment A


In the matter of: X File No. 812-14104
Fidelity Distributors Corporation :
Fidelity Management & Research Company :
Fidelity Merrimack Street Trust X

Second Amended and Restated Application for an Order under Section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from Sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and Rule 22c-1 under the Act, under Sections 6(c) and 17(b) of the Act for an exemption from Sections 17(a)(1) and 17(a)(2) of the Act and under Section 12(d)(1)(J) of the Act for an exemption from Sections 12(d)(1)(A) and 12(d)(1)(B) of the Act

Please send all communications and orders to:

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As filed with the Securities and Exchange Commission on April 22, 2013
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SUMMARY OF APPLICATION

In this second amended and restated application ("Application"), Fidelity Management & Research Company ("Adviser"), Fidelity Distributors Corporation ("Distributor") and Fidelity Merrimack Street Trust ("Trust" and, collectively with the Adviser and the Distributor, "Applicants") request an order under Section 6(c) of the Act, for an exemption from Sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and Rule 22c-1 under the Act, under Sections 6(c) and 17(b) of the Act for an exemption from Sections 17(a)(1) and 17(a)(2) of the Act and under Section 12(d)(1)(J) of the Act for an exemption from Sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

Applicants are seeking an order under Sections 6(c) and 17(b) for an exemption from Sections 2(a)(32), 5(a)(1), 17(a), 22(d) and 22(e) of the Act and Rule 22c-1 under the Act ("ETF Relief") to permit the Trust to create and operate an actively-managed investment series of the Trust ("Initial Fund," and together with Future Funds (defined below), the "Funds") that offers exchange-traded shares ("Shares"). Each Fund will operate as an actively-managed exchange-traded fund ("ETF"). Shares of each Fund will be purchased from the Trust only in large aggregations (e.g., at least 25,000 Shares) of a specified number referred to as "Creation Units." Creation Units will be separable upon issue into individual Shares, which will be listed and traded at negotiated prices on a national securities exchange as defined in Section 2(a)(26) of the Act ("Stock Exchange"). The Shares themselves will not be redeemable to the Trust unless

1 All references herein to the term “Fidelity Management & Research Company” include any successor to Fidelity Management & Research Company. For purposes of the requested Order, a “successor” is limited to an entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

2 As used herein, “Trust” shall also include any other open-end series management investment company registered with the Commission (as defined herein) and advised by the Adviser or an entity controlling, controlled by or under common control with the Adviser that complies with the terms and conditions of this Application (any such entity is included in the term Adviser).
combined into a Creation Unit. Applicants request that the order apply to the Initial Fund and any future series of the Trust and to any other open-end management companies or series thereof that utilize active management investment strategies ("Future Funds"). Any Future Fund will (a) be advised by the Adviser, and (b) comply with the terms and conditions of the Application.

The order would permit (i) Shares of the Funds to trade on a Stock Exchange at prices set by the market rather than at net asset value per Share ("NAV"); (ii) certain Funds that make foreign investments to pay redemption proceeds more than seven calendar days after Shares are tendered for redemption; (iii) Shares to be redeemable in Creation Units only; (iv) certain affiliated persons of the Funds and affiliated persons of such affiliated persons ("second-tier affiliates"), to buy securities from, and sell securities to, the Funds in connection with the purchase and redemption of Creation Units; (v) Investing Funds (as defined below) to acquire Shares of the Funds in reliance on Fund of Funds Relief (as defined below); (vi) a Fund to sell its Shares to and redeem its Shares from an Investing Fund of which the Fund is an affiliated person or a second-tier affiliate; and (vii) a Feeder Fund (as defined below) to acquire shares of a Master Fund (as defined below) in reliance on Master-Feeder Relief (as defined below).

Applicants are requesting that the order permit certain investment companies registered under the Act to acquire Shares beyond the limitations in Section 12(d)(1)(A) and permit the Funds, and any principal underwriter for the Funds, and any broker or dealer registered under the Securities Exchange Act of 1934 ("Exchange Act" and such persons registered under the Exchange Act, "Brokers"), to sell Shares beyond the limitations in Section 12(d)(1)(B). Applicants request that any exemption under Section 12(d)(1)(J) from Sections 12(d)(1)(A) and (B) apply to: (1) any Fund that is currently or subsequently part of the same “group of investment companies” as the Initial Fund within the meaning of Section
12(d)(1)(G)(ii) of the Act as well as any principal underwriter for the Fund and any Brokers selling Shares of a Fund to an Investing Fund, as defined below; and (2) each management investment company or unit investment trust registered under the Act that is not part of the same “group of investment companies” as the Funds, and that enters into an FOF Participation Agreement (as defined herein) with a Fund (such management investment companies are referred to herein as “Investing Management Companies,” such unit investment trusts are referred to herein as “Investing Trusts,” and Investing Management Companies and Investing Trusts together are referred to herein as “Investing Funds”). Investing Funds do not include the Funds. This relief would permit the Investing Funds to acquire Shares of the Funds beyond the limitations set forth in Section 12(d)(1)(A), and the Funds, their principal underwriters and any Brokers to sell Shares of the Funds to Investing Funds beyond the limitations set forth in Section 12(d)(1)(B) (“Fund of Funds Relief”).

In addition, Applicants are also requesting relief to permit a Fund that is advised by the Adviser to operate as a feeder fund (“Feeder Fund”) to acquire shares of another registered investment company in the same group of investment companies having the identical investment objectives as the Feeder Fund (“Master Fund”) beyond the limitations in Section 12(d)(1)(A) of the Act and the Master Fund, and any principal underwriter for the Master Fund, to sell shares of the Master Fund to the Feeder Fund beyond the limitations in Section 12(d)(1)(B) of the Act. As discussed in more detail below, Applicants believe that the Feeder Funds may rely on the exemption provided in Section 12(d)(1)(E) of the Act; however, this exemption may be unavailable to the Feeder Funds should the Feeder Funds engage in in-kind

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3 Certain Future Funds may invest in other open-end and/or closed-end investment companies and/or ETFs in excess of the limits in Section 12(d)(1)(A) (each such Fund, an “FOF ETF”). In no case will a Fund that is an FOF ETF rely on the Fund of Funds Relief.
securities transactions with investors and the Master Funds. As a result, Applicants are requesting an exemption from Sections 12(d)(1)(A) and 12(d)(1)(B) to the extent necessary to perform in-kind transactions in a master-feeder structure ("Master-Feeder Relief"). Applicants request that any exemption under Section 12(d)(1)(J) from Sections 12(d)(1)(A) and 12(d)(1)(B) for Master-Feeder Relief apply to any registered investment company or unit investment trust that is currently or subsequently part of the same “group of investment companies” as the Feeder Funds within the meaning of Section 12(d)(1)(G)(ii) of the Act as well as any principal underwriter for the Master Funds selling shares of a Master Fund to a Feeder Fund.

All entities that currently intend to rely on the order are named as Applicants. Any entity that relies on the order in the future will comply with the terms and conditions of the Application. An Investing Fund may rely on the order only to invest in Funds and not in any other registered investment company. In connection with the Fund of Funds Relief, Applicants are further requesting relief under Sections 6(c) and 17(b) from Sections 17(a)(1) and (2) to permit a Fund to sell its shares to and redeem its Shares from, and engage in the in-kind transactions that would accompany such sales and redemptions with, certain Investing Funds of which the Funds are affiliated persons or affiliated persons of affiliated persons. In addition, this relief would permit a Feeder Fund that is an affiliated person of a Master Fund to sell portfolio securities to the Master Fund in exchange for shares of the Master Fund and redeem Master Fund shares for portfolio securities, both in connection with in-kind sales and redemptions of Shares, as discussed herein.

The Securities and Exchange Commission ("Commission") has issued orders on exemptive applications that involve actively-managed ETFs seeking relief substantially identical
to the relief that Applicants are requesting. The requested Master-Feeder Relief is substantially similar to the relief granted to T. Rowe Price Associates, Inc.

No form having been specifically prescribed for this Application, Applicants proceed under Rule 0-2 of the General Rules and Regulations of the Commission.

I. Actively-Managed Exchange Traded Funds.

A. Applicants and Other Entities.

1. The Trust. The Trust is a business trust organized under the laws of the State of Massachusetts, and is registered with the Commission as an open-end management investment company. Currently, the Trust is comprised of one Fund, the Initial Fund, the Fidelity Corporate Bond ETF. The Trust is overseen by a board of trustees ("Board") which meets the composition requirements of Section 10 of the Act. Each Fund will adopt fundamental policies consistent with the Act and be classified as “diversified” or “non-diversified” under the Act. Each Fund that intends to qualify as a regulated investment company ("RIC") will maintain the required level of diversification, and otherwise conduct its operations, so as to meet the RIC diversification requirements of the Internal Revenue Code of 1986, as amended ("Code").

2. The Adviser. Fidelity Management & Research Company will be the investment adviser to the Initial Fund. Fidelity Management & Research Company is a

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6 Applicants have filed a registration statement to register the Initial Fund as a new series of the Trust.

7 The term “Board” includes any board of directors or trustees of a Future Fund, if different.
Massachusetts corporation with its principal office in Boston, Massachusetts. FMR LLC is the parent company of Fidelity Management & Research Company. Each Adviser is or will be registered as an “investment adviser” under Section 203 of the Investment Advisers Act of 1940 (“Advisers Act”) and, subject to the oversight and authority of the Board, will develop the overall investment program for each Fund. The Adviser will arrange and oversee the provision of necessary services for each Fund (including custodial, transfer agency and administration services) and furnish office facilities, equipment, services and executive and administrative personnel necessary for managing the investment program of the Fund. The Adviser may enter into sub-advisory agreements with one or more investment advisers to act as sub-advisers with respect to particular Funds, or their respective Master Funds (each a “Sub-Adviser” and collectively, the “Sub-Advisers”). Any Sub-Adviser will be registered, or not subject to registration, as an investment adviser under the Advisers Act.

3. The Distributor. The Trust will enter into a distribution agreement with the Distributor. The Distributor, a Massachusetts corporation, is a broker-dealer registered under the Exchange Act. The Distributor is an affiliate of the Adviser. The Distributor will act as distributor and principal underwriter of the Funds. Applicants request that the order apply to the Distributor, any successor to the Distributor, and to any other entity hired by a Fund as a future distributor (each, a “Future Distributor”) that complies with the terms and conditions of this Application.

No Distributor, Future Distributor, Adviser, Sub-Adviser, Trust, or Fund is, or will be, affiliated with any Stock Exchange.
B. The Funds.

1. The Initial Fund and its Investment Objective. The name of the Initial Fund is the Fidelity Corporate Bond ETF. The Initial Fund will seek a high level of current income. The Initial Fund will normally invest at least 80% of the Fund’s assets in investment-grade corporate bonds and other corporate debt securities and repurchase agreements for those securities. The Initial Fund may invest its assets in securities of foreign issuers in addition to securities of domestic issuers. Applicants expect the Board to approve the investment advisory agreement with Fidelity Management & Research Company and any sub-advisory agreements for the Initial Fund prior to the launch of the Initial Fund, which Applicants anticipate will be shortly after receipt of all required regulatory approvals.

2. All Funds and their Investment Objectives. Each Fund will invest in accordance with its investment objective and the requirements of the Act and rules thereunder. A Feeder Fund will pursue its investment objective by investing in a Master Fund with an identical investment objective. Applicants have designed this “master-feeder” structure because it is anticipated that, in addition to the Funds, other feeder funds will be created in the future and hold shares of each respective Master Fund. Such other feeder funds could be traditional mutual funds, the shares of which would be individually redeemable, other ETFs or other pooled investment vehicles. Creating an exchange-traded feeder fund is preferable to creating entirely new series for several reasons. First, creating separate funds would create additional overhead costs. Also, assets held in other feeder funds, through increased assets in the Master Fund, should provide economies of scale for the Feeder Funds.8 While certain costs may be higher in a master-

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8 In a master-feeder structure, the Master Fund, rather than the Feeder Fund, would invest its portfolio in compliance with the order. There would be no ability by Fund shareholders to exchange shares of Feeder Funds for shares of another feeder series of the Master Fund.
feeder structure and there may possibly be lower tax efficiencies for the Feeder Funds, the Feeder Funds’ Board will consider any such potential disadvantages against the benefits of economies of scale and other benefits of operating within a master-feeder structure.

Each Fund, or its respective Master Fund, will consist of a portfolio of securities, and other assets and positions (“Portfolio Positions”). To the extent consistent with other investment limitations, the Funds, or their respective Master Funds, may invest assets in mortgage- or asset-backed securities, including “to-be-announced transactions” or “TBA Transactions”, and may engage in short sales and forward commitment transactions. Further, Funds, or their respective Master Funds, may invest in depositary receipts (“Depositary Receipts”). Depositary Receipts are typically issued by a financial institution (“Depositary”) and evidence ownership in a security or pool of securities that have been deposited with the Depositary. A Fund, or its respective Master Fund, will not invest in any Depositary Receipts that the Adviser or Sub-Adviser, as applicable, deems to be illiquid or for which pricing information is not readily available. If a Fund (or its respective Master Fund) invests in

9 A TBA Transaction is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount and price. The actual pools delivered generally are determined two days prior to the settlement date.

10 In a forward commitment transaction, the buyer/seller enters into a contract to purchase/sell, for example, specific securities for a fixed price at a future date beyond normal settlement time.

11 Depositary Receipts include American Depositary Receipts (“ADRs”) and Global Depositary Receipts (“GDRs”). With respect to ADRs, the Depositary is typically a U.S. financial institution and the underlying securities are issued by a foreign issuer. The ADR is registered under the Securities Act of 1933 (“Securities Act”), on Form F-6. ADR trades occur either on a Stock Exchange or off-exchange. The Financial Industry Regulatory Authority (“FINRA”) Rule 6620 requires all off-exchange transactions in ADRs to be reported within 90 seconds and ADR trade reports to be disseminated on a real-time basis. With respect to GDRs, the Depositary may be foreign or a U.S. entity, and the underlying securities may have a foreign or a U.S. issuer. All GDRs are sponsored and trade on a foreign exchange. No affiliated persons of Applicants or any other Fund, Adviser or Sub-Adviser will serve as the depositary bank for any Depositary Receipts held by a Fund (or its respective Master Fund), except a depositary bank that is deemed to be affiliated solely because a Fund owns greater than 5% of the outstanding voting securities of such depositary bank.
derivatives: (i) the Fund’s Board periodically will review and approve the Fund’s (or its respective Master Fund’s) use of derivatives and how the Fund’s investment adviser assesses and manages risk with respect to the Fund’s (or its respective Master Fund’s) use of derivatives; and (ii) the Fund’s disclosure of its (or its respective Master Fund’s) use of derivatives in its offering documents and periodic reports will be consistent with relevant Commission and Commission staff guidance. In addition, to the extent required by then-current Commission positions regarding open-end companies, and as necessary for the arbitrage process, each Fund’s, or its respective Master Fund’s, Portfolio Positions will be liquid. Each Fund’s investment objective will not be considered to be fundamental and can be changed without a vote of its shareholders.

3. Benefits of Funds to Investors. Applicants expect that there will be several categories of market participants who are likely to be interested in purchasing Creation Units. One is the arbitrageur, who stands ready to take advantage of any slight premium or discount in the market price of Shares on the Stock Exchange versus the cost of depositing a Creation Deposit (as defined below) and creating a Creation Unit to be broken down into individual Shares. As described below, Applicants believe that arbitrageurs will purchase or redeem Creation Units in pursuit of arbitrage profit, and in so doing will enhance the liquidity of the secondary market. Applicants expect that arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV should ensure that the Shares will not trade at a material discount or premium in relation to their NAV. Applicants also expect that the Stock Exchange specialists (“Specialists”) or market makers (“Market Makers”), acting in their unique role to provide a fair and orderly secondary market for Shares, also may purchase Creation Units for use in their own market making activities.
Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors. As in the case of other active ETFs, the Funds can be bought or sold like stocks any time throughout each trading day at market prices that are normally close to NAV; may be relatively tax-efficient investment vehicles to the extent that certain Funds, or their respective Master Funds, can minimize capital gains by eliminating from the portfolio low cost basis securities through the in-kind redemption process; publish the composition of their, or their respective Master Funds’, portfolios every day, giving them largely transparent investment portfolios; and immediately reinvest interest received on Portfolio Positions.

4. **Benefits of Fund of Funds Relief.** If Fund of Funds Relief is granted, the Funds will offer the Investing Funds the benefits noted above.

C. **Capital Structure and Voting Rights; Book Entry.**

Shareholders of a Fund will have one vote per Share or one vote per dollar with respect to matters regarding the Trust or the respective Fund for which a shareholder vote is required consistent with the requirements of the Act, the rules promulgated thereunder and applicable state law.

Shares will be registered in book-entry form only and the Funds will not issue Share certificates. The Depository Trust Company, a limited purpose trust company organized under the laws of the State of New York ("DTC"), or its nominee, will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or DTC participants ("DTC Participants"). Shareholders will exercise their rights in such securities indirectly through the DTC and DTC Participants. The references herein to owners or holders of such Shares shall reflect the rights of persons holding an interest in such securities as they may indirectly exercise such rights through the DTC and DTC Participants,
except as otherwise specified. No shareholder shall have the right to receive a certificate representing Shares. Delivery of all notices, statements, shareholder reports and other communications will be at the Funds’ expense through the customary practices and facilities of the DTC and DTC Participants.

D. Exchange Listing.

Shares will be listed on the Stock Exchange and traded in the secondary market in the same manner as other equity securities and ETFs. Except as permitted by the relief requested from Section 17(a), no promoter, principal underwriter (*e.g.*, Distributor) or affiliated person of the Fund, or any affiliated person of such person, will be an Authorized Participant, as defined below, or make a market in Shares. Neither the Adviser nor the Distributor or any affiliated person of the Adviser, its promoter or principal underwriter will maintain a secondary market in Shares. One or more Specialists or Market Makers will be assigned to the Shares.\(^{12}\) As long as the Funds operate in reliance on the requested order, the Shares will be listed on a Stock Exchange.

E. Purchases and Redemptions of Shares and Creation Units.

The Trust will offer, issue and sell Shares of each Fund to investors only in Creation Units through the Distributor on a continuous basis at the NAV per Share next determined after an order in proper form is received. The NAV of each Fund is expected to be

\(^{12}\) If Shares are listed on NYSE Arca, Nasdaq or a similar electronic Stock Exchange, one or more member firms of that Stock Exchange will act as Market Maker and maintain a market for Shares trading on the Stock Exchange. On Nasdaq, no particular Market Maker would be contractually obligated to make a market in Shares. However, the listing requirements on Nasdaq, for example, stipulate that at least two Market Makers must be registered in Shares to maintain a listing. In addition, on Nasdaq and NYSE Arca, registered Market Makers are required to make a continuous two-sided market or subject themselves to regulatory sanctions. If Shares are listed on a Stock Exchange such as the New York Stock Exchange, one or more member firms will be designated to act as a Specialist and maintain a market for the Shares trading on the Stock Exchange. No Market Maker or Specialist will be an affiliated person, or an affiliated person of an affiliated person, of the Funds, except within Section 2(a)(3)(A) or (C) of the Act due to ownership of Shares, as described below.
determined as of 4:00 p.m. Eastern Time (“ET”) on each “Business Day”, which is defined to include any day that the Trust is open for business as required by Section 22(e) of the Act. The Trust will sell and redeem Creation Units of each Fund only on a Business Day. Applicants expect that the initial price of a Creation Unit will be a minimum of $625,000 and will fall in the range of $625,000 to $10 million, and that the initial trading price per individual Share of each Fund will fall in the range of $25 to $100.

The price of Shares trading on the Stock Exchange will be based on a current bid-offer market. No secondary sales will be made to Brokers at a concession by the Distributor or by a Fund. Purchases and sales of Shares on the Stock Exchange, which will not involve a Fund, will be subject to customary brokerage commissions and charges.

1. Placement of Orders to Purchase Creation Units.
   (a) General. In order to keep costs low and permit each Fund to be as fully invested as possible, Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Accordingly, except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (“Deposit Instruments”), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (“Redemption Instruments”).

On any given Business Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and

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13 The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act. In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to Rule 144A under the Securities Act, the Funds will comply with the conditions of Rule 144A.
these instruments may be referred to, in the case of either a purchase or a redemption, as the “Creation Basket.” In addition, the Creation Basket will correspond pro rata to the positions in the Fund’s, or its respective Master Fund’s, portfolio (including cash positions), except:

a. in the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement;

b. for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots; or

c. TBA Transactions, short positions and other positions that cannot be transferred in-kind will be excluded from the Creation Basket.

If there is a difference between the net asset value attributable to a Creation Unit and the aggregate market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (“Balancing Amount”). A difference may occur where the market value of the Creation Basket changes relative to the net asset value of the Fund for the reasons identified in clauses (a) through (c) above.

Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in-kind, solely under the following circumstances:

a. to the extent there is a Balancing Amount, as described above;

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14 The portfolio used for this purpose will be the same portfolio used to calculate the Fund’s NAV for that Business Day.

15 A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

16 This includes instruments that can be transferred in-kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

17 Because these instruments will be excluded from the Creation Basket, their value will be reflected in the determination of the Balancing Amount (defined below).
b. if, on a given Business Day, the Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash;

c. if, upon receiving a purchase or redemption order from an Authorized Participant (as defined below), the Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash;\(^\text{18}\)

d. if, on a given Business Day, the Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) such instruments are not eligible for transfer through either the NSCC Process or DTC Process (each process, defined below); or (ii) in the case of Funds holding non-U.S. investments (“Global Funds”), such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or

e. if the Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or

\(^\text{18}\) In determining whether a particular Fund will sell or redeem Creation Units entirely on a cash or in-kind basis (whether for a given day or a given order), the key consideration will be the benefit that would accrue to the Fund and its investors. Purchases of Creation Units either on an all cash basis or in-kind are expected to be neutral to the Funds from a tax perspective. In contrast, cash redemptions typically require selling portfolio holdings, which may result in adverse tax consequences for the remaining Fund shareholders that would not occur with an in-kind redemption. As a result, tax considerations may warrant in-kind redemptions.
(iii) a holder of Shares of a Global Fund would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in-kind.19

Each Business Day, before the open of trading on the Stock Exchange where the Shares are listed, the Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Balancing Amount (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following Business Day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. The “Creation Deposit” consists of the instruments and cash that the purchaser is required to deliver in exchange for the Creation Units it is purchasing as described above.20

All orders to purchase Creation Units must be placed with the Distributor by or through an “Authorized Participant,” which is either: (1) a “participating party,” i.e., a Broker or other participant, in the Continuous Net Settlement (“CNS”) System of the National Securities Clearing Corporation (“NSCC”), a clearing agency registered with the Commission and affiliated with DTC, or (2) a DTC Participant, which in any case has executed a participant

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19 A “custom order” is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

20 Pursuant to Rule 206(4)-7 under the Advisers Act, the Adviser and any Sub-Adviser or any other investment adviser to a Fund have or, prior to acting as investment adviser to a Fund, will have adopted written policies and procedures designed to prevent violations of the Advisers Act and the rules thereunder. The Adviser and any Sub-Adviser or any other investment adviser to a Fund have also adopted or will adopt policies and procedures as required under Section 204A of the Advisers Act, that, taking into account the nature of their business, are reasonably designed to prevent and detect the misuse of material nonpublic information in violation of the Advisers Act, Exchange Act and the rules thereunder by such investment adviser or any person associated with such investment adviser (its “Inside Information Policy”). In addition, like the Adviser, Sub-Advisers, and any other investment advisers, the Distributor has adopted or will adopt a Code of Ethics as required by Rule 17j-1 under the Act that contains provisions reasonably necessary to prevent Access Persons (as defined in Rule 17j-1) from engaging in any conduct prohibited by the Rule. In accordance with the Code of Ethics and Inside Information Policy of the Adviser, Sub-Advisers, or any other investment adviser to a Fund, personnel of those entities with knowledge about the composition of a Creation Deposit will be prohibited from disclosing such information to any other person, except as authorized in the course of their employment, until such information is made public.
agreement with the Distributor and the transfer agent with respect to the creation and redemption of Creation Units ("Participant Agreement"). An investor does not have to be an Authorized Participant, but must place an order through, and make appropriate arrangements with, an Authorized Participant.

(b) NSCC Process, DTC Process and Process for the Funds. Purchase orders for creations and redemptions of each Fund’s Creation Units will be processed either through an enhanced clearing process or through a manual clearing process as described immediately below. Settlement and clearing of foreign securities presently cannot be made using either the NSCC or DTC clearing processes ("NSCC Process" and "DTC Process", respectively). This is true for current ETFs which hold foreign securities (see international iShares and the international Vanguard ETFs, for example).

For Global Funds, once a purchase order has been placed with the Distributor, the Distributor will inform the Adviser and the Fund’s custodian ("Custodian"). The Custodian will then inform the appropriate sub-custodians. The Authorized Participant will deliver to the appropriate sub-custodians, on behalf of itself or the beneficial owner, the relevant Creation Deposit. The Creation Deposit must be delivered to the accounts maintained at the Custodian or applicable sub-custodians. If applicable, the sub-custodians will confirm to the Custodian that the required Creation Deposit has been delivered, and the Custodian will notify the Adviser and Distributor that the required Creation Deposit has been delivered. The Distributor will then furnish the purchaser with a confirmation and the Fund’s prospectus ("Prospectus").

The Shares will clear and settle in the same manner as the shares of other ETFs and Deposit Instruments will settle in the same manner as other relevant instruments. Deposit Instruments that are U.S. government or U.S. agency securities and any cash will settle via free
delivery through the Federal Reserve System. Other fixed income instruments will settle in accordance with the normal rules for settlement of such instruments in the applicable market.

Equity securities will be processed either through an enhanced clearing process or through a manual clearing process. The enhanced clearing process is available only to those DTC Participants that also are participants in the CNS System of the NSCC. The NSCC/CNS system has been enhanced specifically to effect purchases and redemptions of domestic ETF securities. This enhanced clearing process simplifies the process of transferring a basket of securities between two parties by treating all of the securities that comprise the basket as a single unit. By contrast, the manual clearing process (i.e., the DTC Process), which is available to all DTC participants, involves a manual line-by-line movement of each securities position. Because the DTC Process involves the movement of hundreds of securities individually, while the NSCC Process can act on instructions regarding the movement of one unitary basket which automatically processes the movement of hundreds of securities, DTC typically will charge a Fund more than NSCC to manually settle a purchase or redemption of Creation Units.

The Shares will typically settle through the DTC. The Custodian will monitor the movement of the Creation Deposit and will instruct the movement of Shares only upon validation that such instruments have settled correctly. The settlement of Shares will be aligned with the settlement of the Creation Deposit and will generally occur on a settlement cycle of T+3 Business Days or shorter. Applicants do not believe the issuance and settlement of Creation Units.

21 Applicants note that Shares of the Funds typically will trade and settle on a trade date plus three business days (“T+3”) basis. Where this occurs, Applicants believe that Shares of each fixed income fund will trade in the secondary market at prices that reflect interest and coupon payments on Portfolio Positions through the Shares’ T+3 settlement date. As with other investment companies, the Act requires the Funds to calculate NAV based on the current market value of Portfolio Positions, and does not permit the Funds to reflect in NAV interest and coupon payments not due and payable. Therefore, to the extent that Shares of the fixed income funds may trade in the secondary market at a price that reflects interest and coupon payments due on a T+3 settlement date, Applicants anticipate that such Shares may trade in the secondary market at a slight premium to NAV that reflects these interest and coupon payments. Applicants do not believe that this apparent premium will have any impact on arbitrage activity or the operations of the Funds. The Specialists, Market Makers and other institutional investors who would take advantage of arbitrage activity have full access to this information and regularly consider such information when buying an individual bond or baskets of fixed income securities.
Units in the manner described above will have any material impact on the arbitrage efficiency or the secondary market trading of Shares.

Each Fund may recoup the settlement costs charged by NSCC and DTC by imposing a transaction fee on investors purchasing or redeeming Creation Units ("Transaction Fee"). For this reason, investors purchasing or redeeming through the DTC process may pay a higher Transaction Fee than will investors doing so through the NSCC Process.

(c) Transaction Fees. The Transaction Fee will be borne only by purchasers and redeemers of Creation Units and will be limited to amounts that have been determined appropriate by the Adviser to defray the transaction expenses that will be incurred by a Fund when an investor purchases or redeems Creation Units. The purpose of the Transaction Fee is to protect the existing shareholders of the Funds from the dilutive costs associated with the purchase and redemption of Creation Units. Transaction Fees will differ for each Fund, depending on the transaction expenses related to each Fund’s Portfolio Positions. From time to time and for such periods as the Adviser in its sole discretion may determine, the Transaction

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22 In a master-feeder structure, the Transaction Fees would be paid indirectly to the Master Fund. Applicants are not requesting relief from Section 18 of the Act. Accordingly, a Master Fund may require a Transaction Fee payment to cover expenses related to purchases or redemptions of the Master Fund’s shares by a Feeder Fund only if it requires the same payment for equivalent purchases or redemptions by any other feeder fund. Thus, for example, a Master Fund may require payment of a Transaction Fee by a Feeder Fund for transactions for 20,000 or more shares so long as it requires payment of the same Transaction Fee by all feeder funds for transactions involving 20,000 or more shares. In all cases, the Transaction Fee will be limited in accordance with the requirements of the Commission applicable to open-end management investment companies offering redeemable securities.

23 Where a Fund permits an in-kind purchaser to deposit cash in lieu of depositing one or more Deposit Instruments, the purchaser may be assessed a higher Transaction Fee to offset the transaction cost to the Fund, or its respective Master Fund, of buying those particular Deposit Instruments.
Fee for the purchase or redemption of Shares of any Fund may be increased, decreased or otherwise modified, not to exceed amounts approved by the Board.

(d) Timing and Transmission of Purchase Orders. All orders to purchase Creation Units, whether through the NSCC Process or the DTC Process, must be received by the Distributor no later than the NAV calculation time ("NAV Calculation Time"), generally 4:00 p.m. ET on the date the order is placed ("Transmittal Date") in order for the purchaser to receive the NAV determined on the Transmittal Date. In the case of custom orders, the order must be received by the Distributor no later than 3:00 p.m. ET. On days when a Stock Exchange or the bond markets close earlier than normal, the Funds may require custom orders to be placed earlier in the day.

The Distributor will transmit all purchase orders to the relevant Fund. The Fund and/or the Distributor may reject any order that is not in proper form. After a Fund has accepted a purchase order and received delivery of the Creation Deposit, NSCC or DTC, as the case may be, will instruct the Fund to initiate “delivery” of the appropriate number of Shares to the book-entry account specified by the purchaser. The Distributor will furnish a Prospectus and a confirmation to those placing purchase orders.

A Creation Unit of a Fund will not be issued until the transfer of the good title to the Trust of the Deposit Instruments and/or any cash has been completed. Notwithstanding the foregoing, to the extent contemplated by a Participant Agreement, Creation Units will be issued to an Authorized Participant notwithstanding the fact that the corresponding Creation Deposit has not been received in part or in whole, in reliance on the undertaking of such Authorized Participant to deliver the missing Deposit Instruments or cash payment as soon as possible, which undertaking shall be secured by such Authorized Participant’s delivery and maintenance
of collateral. The Participant Agreement will permit the Fund, or its respective Master Fund, to buy the missing Deposit Instruments at any time and will subject the Authorized Participant to liability for any shortfall between the cost to the Fund, or its respective Master Fund, of purchasing such securities and the value of the collateral. The Participant Agreement may contain further detail relating to such collateral procedures.

2. Payment for Creation Units.

   a) General. Persons purchasing Creation Units from the Funds must transfer the Creation Deposit, plus the applicable Transaction Fee. With respect to cash, the purchaser will make a cash payment by 12:00 p.m. ET on the Business Day following the date on which the request was accepted by the Distributor (T+1). In-kind deposits must be received by 12:00 p.m. ET on the third Business Day following the date on which the request was accepted by the Distributor (T+3).

   b) Global Funds. An in-kind purchase of a Creation Unit of a Global Fund will operate as follows. Once a purchase order has been placed with the Distributor, the Distributor will inform the Adviser and the Custodian. The Custodian will then inform the appropriate sub-custodians. The Authorized Participant will deliver to the appropriate sub-custodians, on behalf of itself or the beneficial owner on whose behalf it is acting, the relevant Creation Deposit. Deposit Instruments must be delivered to the accounts maintained at the applicable sub-custodians. All sub-custodians will comply with Rule 17f-5 under the Act. The instruments and the number of the Deposit Instruments required for the Creation Deposit for each Fund will change as the Portfolio Positions change and are rebalanced from time to time by the Adviser in light of the investment objective of such Fund.
3. **Rejection of Creation Unit Purchase Orders.** As noted above, the Fund and/or Distributor may reject any order to purchase Creation Units that is not submitted in proper form. A Fund may reject a purchase order transmitted to it by the Distributor, for example, if:

   (1) the purchaser or group of related purchasers, upon obtaining the Creation Units, would own eighty percent (80%) or more of the outstanding Shares of such Fund;

   (2) the acceptance of the Creation Deposit would have certain adverse tax consequences, such as causing the Fund to no longer meet the requirements of a RIC under the Code;

   (3) the acceptance of the Creation Deposit would, in the opinion of the Trust, be unlawful, as in the case of a purchaser who is banned from trading in securities;

   (4) the acceptance of the Creation Deposit would otherwise, in the discretion of the Trust or the Adviser, have an adverse effect on the Trust or on the rights of beneficial owners; or

   (5) there exist circumstances outside the control of the Fund that make it impossible to process purchases of Creation Units for all practical purposes. Examples of such circumstances include: acts of God or public service or utility problems such as fires, floods, extreme weather conditions and power outages resulting in telephone, telecopy and computer failures; market conditions or activities causing trading halts; systems failures involving computer or other information systems affecting the Funds, the Adviser, any Sub-Adviser, the transfer agent, the Custodian, the Distributor, DTC, NSCC or any other participant in the purchase process; and similar extraordinary events.
The Distributor will issue or cause the issuance of confirmations of acceptance, and will be responsible for delivering a Prospectus to those persons purchasing Creation Units and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it.

4. **Redemption.** Just as Shares can be purchased from a Fund only in Creation Units, such Shares similarly may be redeemed only if tendered in Creation Units (except in the event the Fund is liquidated).\(^24\) To redeem, an investor must accumulate enough Shares to constitute a Creation Unit. Redemption requests must be placed by or through an Authorized Participant. As required by law, redemption requests in good order will receive the NAV next determined after the request is received.\(^25\) Applicants currently contemplate that Creation Units of the Initial Fund will be redeemed principally in-kind (together with a Balancing Amount). Investors purchasing or redeeming Creation Units entirely in cash will be required to use the DTC Process rather than the NSCC Process.

Redemptions of Creation Units for cash will occur, as described above in section I.E.1.a., through procedures that are analogous (in reverse) to those for purchases. All requests for redemption must be preceded or accompanied by an irrevocable commitment to deliver the requisite number of Shares of the relevant Fund, which delivery must be made to the Trust

\(^{24}\) In the event that the Trust or any Fund is terminated, the composition and weighting of the Portfolio Positions to be made available to redeemers shall be established as of such termination date. There are no specific termination events, but the Trust or any Fund may be terminated either by a majority vote of the Board or by the affirmative vote of a majority of the Shares of the Trust or the Funds entitled to vote. Although the Shares are not automatically redeemable upon the occurrence of any specific event, the Trust’s organizational documents will provide that the Board will have the unrestricted right and power to alter the number of Shares that constitute a Creation Unit. Therefore, in the event of a termination, the Board, in its sole discretion could determine to permit the Shares to be individually redeemable. In such circumstances, the Trust might elect to pay cash redemptions to all beneficial owners with an “in-kind” election for beneficial owners owning in excess of a certain stated minimum amount.

\(^{25}\) Feeder Funds will redeem shares from the appropriate Master Fund and then deliver to the redeeming shareholder the applicable redemption payment.
through, or outside, the NSCC Process, according to the procedures set forth in the Participant Agreement. Transmission of cash amounts, including the Transaction Fee, must be accomplished in a manner acceptable to the Trust and as specified in the Participant Agreement. An entity redeeming Shares in Creation Units outside the NSCC Process or entirely in cash may be required to pay a higher Transaction Fee than would have been charged had the redemption been effected through the NSCC Process.

When using the DTC Process, an in-kind redemption involves delivery of Shares in Creation Units from the entity placing the request to the Fund corresponding with a delivery of the requisite amounts of each of the underlying Portfolio Positions from the Fund to the entity placing the redemption request. Because the DTC Process involves a non-automatic line-by-line position movement of the underlying Portfolio Positions and Shares, both the Fund and the entity placing the request will be required to reconcile delivery and receipt of the correct share amounts for the transfer of Shares and the corresponding transfer of each underlying Portfolio Position. Transmission of any cash, including the Transaction Fee (which includes the processing, settlement and clearing costs associated with securities transfers) must be accomplished in a manner acceptable to the Fund, normally through a DTC cash transfer system. An entity redeeming Shares in Creation Units using the DTC Process may be required to pay a higher Transaction Fee than would have been charged had the redemption been effected through the NSCC Process.

For Global Funds, a redemption request will not be made through DTC. Creation Units of the Initial Fund and certain Future Funds will be redeemed principally in-kind. However, each Fund has the right to make redemption payments in-kind, in cash, or a combination of each, as described above in section I.E.1.a., provided that the value of its
redemption payments equals the NAV of the Shares tendered for redemption. The Adviser may adjust the Transaction Fee imposed on a redemption wholly or partly in cash to take into account any additional brokerage or other transaction costs incurred by the Fund, or its respective Master Fund.

The right to redeem Shares will not be suspended nor payment upon redemption delayed, consistent with Section 22(e) of the Act and Rule 22e-2 under the Act, except as subsequently provided in the request for relief from Section 22(e) with respect to certain Global Funds and their respective Master Funds, as applicable.

5. Pricing of Shares. The price of Shares will be based on a current bid/offer in the secondary market. The price of Shares of any Fund, like the price of all traded securities, is subject to factors such as supply and demand, as well as the current value of the Portfolio Positions held by the Fund. Shares, available for purchase or sale on an intraday basis, do not have a fixed relationship to the previous day’s NAV or the current day’s NAV. Therefore, prices on the Stock Exchange may be below, at or above the most recently calculated NAV of such Shares. Transactions involving the purchase or sale of Shares on the Stock Exchange will be subject to customary brokerage fees and charges.

Applicants believe that the existence of a continuous market for Shares, together with the publication by the Stock Exchange of the current market value of the sum of the Portfolio Positions that were publicly disclosed prior to the commencement of trading in Shares on the Stock Exchange, will be key features of the Trust particularly attractive to certain types of investors.
F. Shareholder Transaction and Operational Fees and Expenses.

No sales charges for purchases of Shares of any Fund are expected to be imposed by any Fund or the Adviser. Each Fund will charge a Transaction Fee, calculated and imposed as described above, in connection with purchase and redemption of Creation Units of its Shares.

All expenses incurred in the operation of the Funds will be borne by the Trust and allocated among the Initial Fund and any Future Funds, except to the extent specifically assumed by the Adviser or some other party.

G. Dividend Reinvestment Service.

The Funds will not make the DTC book entry Dividend Reinvestment Service available for use by beneficial owners for reinvestment of their cash proceeds. Brokers may, however, offer a dividend reinvestment service which uses dividends to purchase Shares on the secondary market at market value in which case brokerage commissions, if any, incurred in purchasing such Shares will be an expense borne by the individual beneficial owners participating in such a service.

H. Availability of Information.

Applicants believe that a great deal of information will be available to prospective investors about the Funds. The Funds’ website, which will be publicly available prior to the public offering of Shares, will include the Prospectus for each Fund that may be downloaded. The website will include additional quantitative information updated on a daily basis, including, on a per Share basis for each Fund, the prior Business Day’s NAV and the market closing price or mid-point of the bid/ask spread at the time of calculation of such NAV (“Bid/Ask Price”).

26 The Bid/Ask Price of a Fund is determined using the highest bid and the lowest offer on the Stock Exchange as of the time of calculation of such Fund’s NAV. The records relating to Bid/Ask Prices will be retained by the Funds or their service providers.
and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV. On each Business Day, before commencement of trading in Shares on the Stock Exchange, the Fund will disclose on its website the identities and quantities of the Portfolio Positions held by the Fund, or its respective Master Fund,27 that will form the basis for the Fund’s calculation of NAV at the end of the Business Day. The website and information will be publicly available at no charge.28

Investors interested in a particular Fund can also obtain its Prospectus, statement of additional information (“SAI”), Shareholder Reports, Form N-CSR and Form N-SAR, filed twice a year. The Prospectus, SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N-CSR and Form N-SAR may be viewed on-screen or downloaded from the Commission’s website at http://www.sec.gov.

In addition, because the Shares will be listed on a Stock Exchange, prospective investors will have access to information about the product over and above what is normally available about a security of an open-end investment company. Information regarding market price and volume is and will be continually available on a real-time basis throughout the day on Brokers’ computer screens and other electronic services. The previous day’s closing price and trading volume information will be published daily in the financial section of newspapers. Each Stock Exchange or other major market data provider will disseminate every 15 seconds throughout the trading day through the facilities of the Consolidated Tape Association an amount

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27 Feeder Funds will disclose information about the securities and other assets and positions held by the Master Fund.

28 Under accounting procedures followed by the Funds, trades made on the prior Business Day (“T”) will be booked and reflected in NAV on the current Business Day (“T+1”). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.
representing the estimated NAV, which will be calculated and disseminated in accordance with the relevant listing standards, on a per Share basis. The Funds are not involved in, or responsible for, the calculation or dissemination of any such amount and make no warranty as to its accuracy.

I. **Sales and Marketing Materials; Prospectus Disclosure.**

Applicants will take appropriate steps as may be necessary to avoid confusion in the public’s mind between a Fund and a conventional “open-end investment company” or “mutual fund.” Although the Trust will be classified and registered under the Act as an open-end management investment company, neither the Trust nor any Fund will be marketed or otherwise held out as a “mutual fund,” in light of the features, described in this Application, that make each Fund significantly different from what the investing public associates with a conventional mutual fund. Instead, each Fund will be marketed as an “actively-managed exchange-traded fund.” No Fund marketing materials (other than as required in the Prospectus) will reference an “open-end fund” or “mutual fund,” except to compare and contrast a Fund with conventional mutual funds. Further, in all marketing materials where the features or method of obtaining, buying or selling Shares traded on a Stock Exchange are described, there will be an appropriate statement or statements to the effect that Shares are not individually redeemable.

No Fund will be advertised or marketed as an open-end investment company, *i.e.*, as a mutual fund, which offers individually redeemable securities. Any advertising material where features of obtaining, buying or selling Creation Units are described or where there is reference to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire Shares from a Fund and tender those Shares for redemption to a Fund in Creation Units only.
As noted above, the Funds may operate in a master-feeder structure. Under such circumstances, the Feeder Funds would operate, and would be marketed, as ETFs. Applicants do not believe the master-feeder structure contemplated in this Application would be confusing to investors because any additional feeder fund that is a traditional mutual fund or other pooled investment vehicle would be marketed separately. Further, as noted above, ETFs are no longer new or novel products, and Applicants believe investors are aware of the differences between ETFs and traditional mutual funds. In addition, functionally similar structures are currently offered in the market without giving rise to investor confusion.\textsuperscript{29} Notwithstanding the limited potential for investor confusion, Applicants will take numerous steps to ensure that investors are not confused. Specifically, the Prospectus for each Feeder Fund will clearly indicate that the Feeder Fund is an ETF, each Feeder Fund will have a Prospectus separate and distinct from any other feeder funds, and as required by the conditions herein, the Feeder Funds will not be marketed as mutual funds. Applicants believe that the efforts outlined above will ensure that every interested investor will understand the differences between the Funds and any Feeder Funds.

J. \textbf{Third Party Broker Dealer Issues.}

Because Creation Units will be offered continuously to the public and, as such, new Shares may be created and issued on an ongoing basis, at any point during the life of a Fund, a “distribution,” as such term is used in the Securities Act, may be occurring. Brokers and other persons may be cautioned that some activities on their part may, depending on the circumstances, result in their being deemed participants in a distribution in a manner which could

\textsuperscript{29} \textit{See} In the Matter of Vanguard Index Funds, et al., Investment Company Release No. 24789 (Dec. 12, 2000).
render them statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act.

For example, a Broker firm and/or its client may be deemed a statutory underwriter if it takes Creation Units after placing an order with the Distributor, breaks them down into the constituent Shares and sells the Shares directly to customers, or if it chooses to couple the purchase of a supply of new Shares with an active selling effort involving solicitation of secondary market demand for Shares. Of course, whether one is an underwriter must take into account all the facts and circumstances pertaining to the activities of the Broker or its client in the particular case, and Brokers and their clients should understand that the examples mentioned above should not be considered a complete description of all the activities that could lead to a categorization as an underwriter.

K. **Master-Feeder Structure**

1. **In-Kind Transactions in a Master-Feeder Structure.**

As discussed above, Applicants currently anticipate that certain Funds will operate in a master-feeder structure, substantially identical to the structures permitted under Section 12(d)(1)(E) of the Act. Each Master Fund would operate as a traditional mutual fund, issuing and redeeming shares in accordance with the requirements of Section 22 of the Act and the rules promulgated thereunder. However, Applicants request that the exemption from Section 22(e) requested herein apply to both the Global Funds and their respective Master Funds. The shareholders of the Master Fund are currently anticipated to be exclusively (i) other investment companies or other pooled investment vehicles that are in the same group of investment companies as the Feeder Fund and (ii) other institutional investors, such as separate accounts.

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30 The requested exemption from Section 22(e) would only apply to in-kind redemptions by the Feeder Funds and would not apply to in-kind redemptions by other feeder funds.
managed by the Adviser, and the interests in the Master Fund will be sold to and redeemed by each of the Master Fund’s shareholders on the same terms and will carry the same rights. From the investor’s perspective, the creation and redemption process will be unaffected by the master-feeder structure. For creations, an investor will deliver a basket consisting of in-kind securities and/or cash to the Feeder Fund, and the Feeder Fund will, in turn, deliver the basket to the Master Fund in exchange for interests in the Master Fund. Redemptions will work the same way, but in reverse. At no point will securities delivered in-kind to a Feeder Fund settle to the account of the Feeder Fund, nor will a Feeder Fund hold any investment other than the securities of its corresponding Master Fund.

2. No Senior Securities.

While shareholders of the Feeder Funds may have different rights of redemption versus shareholders of a traditional mutual fund feeder fund in accordance with the Master-Feeder Relief requested in this Application, the relief requested in this Application will not result in any shareholders of any Master Fund having different rights relative to other shareholders of the same Master Fund. Specifically, the Master Fund will not require, but rather will permit, any shareholder feeder fund, including a Feeder Fund, to redeem in-kind. Similarly, the Master Fund will not require, but rather will permit, all shareholder feeder funds, including a Feeder Fund, to purchase and redeem shares in large aggregations. As a result, the proposed structure does not give rise to a senior security and should not raise any concerns under Section 18 of the Act.

II. Funds of Actively-Managed Exchange-Traded Funds.

A. The Investing Funds.

As discussed above, the Investing Funds will be registered management investment companies and registered unit investment trusts that will enter into a participation
agreement with any Fund ("FOF Participation Agreement") in which it seeks to invest in reliance on the requested order. The Investing Funds will not be part of the same group of investment companies as the Funds. Each Investing Trust will have a sponsor ("Sponsor") and each Investing Management Company will have an investment adviser within the meaning of Section 2(a)(20)(A) of the Act ("Investing Fund Adviser") that does not control, is not controlled by or under common control with the Adviser. Each Investing Management Company may also have one or more investment advisers within the meaning of Section 2(a)(20)(B) of the Act (each, an “Investing Fund Sub-Adviser”). Each Investing Fund Adviser and any Investing Fund Sub-Adviser will be registered, or not subject to registration, as an investment adviser under the Advisers Act.

B. Proposed Transactions.

Applicants propose that the Investing Funds be permitted to invest in the Funds (other than an FOF ETF) beyond the limitations in Sections 12(d)(1)(A) and (B) of the Act. Applicants also propose that the Investing Funds be permitted to effect certain transactions in Shares that would otherwise be prohibited by Section 17(a) of the Act.

C. Fees and Expenses.

Shares of the Funds will be sold by the Fund without sales loads. Investors, including Investing Funds, who buy and sell Shares through a Broker in secondary market transactions may be charged customary brokerage commissions and charges. Applicants anticipate that most, if not all, transactions effected by Investing Funds pursuant to the requested order would be secondary market transactions. For transactions in Creation Units, Transaction Fees are charged to offset transfer and other costs associated with the issuance and redemption of Creation Units. Investing Fund shareholders would indirectly pay their proportionate share of a
Fund’s advisory fees and other operating expenses. As discussed below, certain conditions will apply to the fees and expenses charged by Investing Funds.

D. Conditions and Disclosure Relating to Fund of Funds Relief.

To ensure that the Investing Funds understand and comply with the terms and conditions of the requested relief even though the Investing Funds will not be part of the same group of investment companies as the Funds and will not have an Adviser as the Investing Fund Adviser or Sponsor, any Investing Fund that intends to invest in a Fund in reliance on the requested order will be required to enter into an FOF Participation Agreement with the Fund. The FOF Participation Agreement will require the Investing Fund to adhere to the terms and conditions of the requested order and participate in the proposed transaction in a manner that addresses concerns regarding the requested relief. The FOF Participation Agreement also will include an acknowledgment from the Investing Fund that it may rely on the order requested herein only to invest in the Funds and not in any other investment company.

III. Request for Exemptive Relief and Legal Analysis.

Applicants request a Commission order under Section 6(c) of the Act for an exemption from Sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and Rule 22c-1 under the Act and under Sections 6(c) and 17(b) of the Act for an exemption from Sections 17(a)(1) and 17(a)(2) of the Act, and under Section 12(d)(1)(J) of the Act for an exemption from Sections 12(d)(1)(A) and (B) of the Act.

Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction, or any class of persons, securities, or transactions from any provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and
provisions of the Act. Section 17(b) provides that the Commission will grant an exemption from the provisions of Section 17 (a) if evidence establishes that the terms of the proposed transaction are reasonable and fair, including the consideration to be paid or received, and do not involve overreaching on the part of any person concerned, that the proposed transaction is consistent with the policy of each registered investment company concerned, and that the proposed transaction is consistent with the general purposes of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of Section 12(d)(1), if the exemption is consistent with the public interest and the protection of investors.

A. Sections 2(a)(32) and 5(a)(1) of the Act.

Section 5(a)(1) of the Act defines an “open-end company” as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the 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. Because Shares will not be individually redeemable, a possible question arises as to whether the definitional requirements of a “redeemable security” or an “open-end company” under the Act would be met if such Shares are viewed as non-redeemable securities. In light of this possible analysis, Applicants request an order under Section 6(c) granting an exemption from Sections 2(a)(32) and 5(a)(1) that would permit the Trust to register as an open-end management investment company and redeem Shares in Creation Units only.31

31 The Master Funds will not require relief from Sections 2(a)(32) and 5(a)(1) because the Master Funds will issue individually redeemable securities.
Investors may purchase Shares in Creation Units from each Fund. Creation Units are always redeemable in accordance with the provisions of the Act. Owners of Shares may purchase the requisite number of Shares and tender the resulting Creation Unit for redemption. Moreover, listing on the Stock Exchange will afford all holders of Shares the ability to buy and sell Shares throughout the day in the secondary market. Because the market price of Creation Units will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary materially from their NAV.

Applicants believe that the Funds will not present any new issues with respect to the exemptions which allow for current index-based and actively managed ETFs to redeem their shares only in Creation Units. While Applicants recognize that the potential for more significant deviations between a security’s Bid/Ask Price and NAV exists with actively managed ETFs, that is not the case here since each Fund’s portfolio holdings will be fully transparent. As noted above, each Fund will disclose daily on its website on each Business Day, before commencement of trading of Shares on the Stock Exchange, the identities and quantities of the Portfolio Positions held by the Fund, or its respective Master Fund, that will form the basis for the Fund’s calculation of NAV at the end of the Business Day. Since market participants will be aware, at all times, of each Fund’s, or its respective Master Fund’s, Portfolio Positions which form the basis for its NAV calculation, the risk of material deviations between NAV and market price is similar to that which exists in the case of other index-based and actively managed ETFs. Further, as mentioned herein, Applicants believe that the current disclosure requirements are sufficient to safeguard against investor confusion. Thus, Applicants believe that a Fund issuing

32 Feeder Funds will disclose information about the securities and other assets and positions held by the Master Fund.
Shares as proposed is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

B. Section 22(d) of the Act and Rule 22c-1 under the Act.

Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is being currently offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on the NAV next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

Secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the Prospectus, and not at a price based on NAV. Shares of each Fund will be listed on the Stock Exchange. The Shares will trade on and away from the Stock Exchange at all times on the basis of current bid/ask prices. Thus, purchases and sales of Shares in the secondary market will not comply with Section 22(d) and Rule 22c-1. Applicants request an exemption under Section 6(c) from Section 22(d) and Rule 22c-1 to permit the Shares to trade at negotiated prices.

The concerns sought to be addressed by Section 22(d) and Rule 22c-1 with respect to pricing are equally satisfied by the proposed method of pricing Shares. While there is little legislative history regarding Section 22(d), its provisions, as well as those of Rule 22c-1, appear to have been designed to (i) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (ii) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices, and (iii) assure an orderly

33 Consistent with Rule 19c-3 under the Exchange Act, Stock Exchange members are not required to effect transactions in Shares through the facilities of the Stock Exchange.
distribution of investment company shares by eliminating price competition from brokers offering shares at less than the
published sales price and repurchasing shares at more than the published redemption price.

Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the
secondary market at negotiated prices. Secondary market trading in Shares does not involve the Funds as parties and cannot
result in dilution of an investment in Shares. To the extent different prices exist during a given trading day, or from day to day,
such variances occur as a result of third-party market forces, such as supply and demand, not as a result of unjust or
discriminatory manipulation. In this factual setting, Applicants do not believe that the portfolios could be managed or
manipulated to produce benefits for one group of purchasers or sellers to the detriment of others. Accordingly, Applicants
believe that secondary market transactions in Shares will not lead to discrimination or preferential treatment among
purchasers. Applicants contend that the proposed distribution system also will be orderly. Anyone may sell or acquire Shares
by purchasing them on a Stock Exchange or by creating or redeeming a Creation Unit. Therefore, no dealer should have an
advantage over another Broker in the sale of Shares.

In addition, as described above, Applicants believe that in light of the fact that the Funds will be fully
transparent, arbitrage activity should ensure that differences between NAV and market prices remain immaterial. Furthermore,
Applicants believe that the ability to execute a transaction in Shares at an intraday trading price will be a highly attractive
feature to many investors and offers a key advantage to investors over the once-daily pricing mechanisms of conventional
mutual funds. This feature would be fully disclosed to investors, and the investors would trade in Shares in reliance on the
efficiency of the market.

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Applicants also believe that the Funds will not present any new issues with respect to the exemptions which allow ETF shares to trade at negotiated prices. With proper disclosure to all parties, the Funds do not create any new potential for discrimination or preferential treatment among investors purchasing and selling Shares in the secondary market and those purchasing and redeeming Creation Units. Applicants, therefore, believe that buying and selling Shares at negotiated prices is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

C. Section 22(e) of the Act.

Applicants seek an order of the Commission under Section 6(c) granting an exemption from the seven-day redemption delivery requirement of Section 22(e) of the Act for certain Global Funds and their respective Master Funds, as applicable, under the circumstances described below.  

Section 22(e) provides that, except under circumstances not relevant to this request:

No registered investment company shall suspend the right of redemption, or postpone the date of payment or satisfaction upon redemption of any redeemable security in accordance with its terms for more than seven days after the tender of such security to the company or its agent designated for that purpose for redemption...

Applicants observe that the settlement of redemptions of Creation Units of the Global Funds is contingent not only on the settlement cycle of the U.S. securities markets but

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34 The requested exemption from Section 22(e) would only apply to in-kind redemptions by the Feeder Funds and would not apply to in-kind redemptions by other feeder funds.

35 Applicants acknowledge that no relief obtained from the requirements of Section 22(e) will affect any obligations that it may otherwise have under Rule 15c6-1 under the Exchange Act. Rule 15c6-1 requires that most securities transactions be settled within three business days of the trade date.
also on the delivery cycles present in foreign markets in which those Funds, or their respective Master Funds, invest. Applicants have been advised that, under certain circumstances, the delivery cycles for transferring Portfolio Positions to redeeming investors, coupled with local market holiday schedules, will require a delivery process of up to fifteen (15) calendar days, rather than the seven (7) calendar days required by Section 22(e). Applicants therefore request relief from Section 22(e) in order to provide payment or satisfaction of redemptions within the maximum number of calendar days required for such payment or satisfaction in the principal local markets where transactions in the Portfolio Positions of each Global Fund, or its respective Master Fund, customarily clear and settle, but in all cases no later than fifteen (15) days following the tender of a Creation Unit. In the past, settlement in certain countries, including Russia, has extended to 15 calendar days.

The SAI will disclose those local holidays (over the period of at least one year following the date thereof), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days and the maximum number of days needed to deliver the proceeds for each affected Global Fund. Except as disclosed in the SAI for any Future Fund for analogous dates in subsequent years, deliveries of redemption proceeds for Global Funds are expected to be made within seven (7) days.

Applicants submit that Congress adopted Section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds. Applicants propose that allowing redemption payments for Creation Units of a Fund to be made within a maximum of fifteen (15) calendar days would not be inconsistent with the spirit and intent of Section 22(e). Applicants suggest that a redemption payment occurring within fifteen (15) calendar days following a redemption request would adequately afford investor protection.
Applicants desire to incorporate the creation and redemption mechanism for Creation Units of each Fund as much as possible into the processing and settlement cycles for securities deliveries currently practicable in the principal market(s) for the Portfolio Positions of a given Fund, or its respective Master Fund. Currently, Applicants believe that no significant additional system or operational procedures will be needed to purchase or redeem Creation Units beyond those already generally in place in the relevant jurisdiction. Applicants believe that this approach may make creations and redemptions of Creation Units less costly to administer, enhance the appeal of the product to institutional participants, and thereby promote the liquidity of Shares in the secondary market with benefits to all holders thereof. As noted above, Applicants may utilize in-kind redemptions (although, as noted above, cash redemptions, subject to a potentially higher redemption Transaction Fee, may be required in respect of certain Funds). Applicants are not seeking relief from Section 22(e) with respect to Global Funds that do not effect creations or redemptions in-kind.

Applicants, if using a master-feeder structure, will operate in substantially the same manner. In the case of an in-kind redemption from a Feeder Fund, as discussed herein, the Feeder Fund would make a corresponding redemption from the Master Fund. Applicants do not believe the master-feeder structure would have any impact on the delivery cycle. When a Feeder Fund is seeking a cash redemption, the proceeds to satisfy the redemption would likely be raised in a manner consistent with the Master Fund’s investment objective, e.g., by using cash on hand and/or selling securities. When the Adviser (or Sub-Adviser) determines it is necessary to sell securities, such sales would be conducted consistent with the Master Fund’s investment objective.
As a practical matter, any cash redemption could reduce the proportion of the most liquid assets held by the Master Fund, but no more so than any investment company — as shares are redeemed, there is potentially a reduction in the most liquid assets in a portfolio. Applicants do not believe that shareholders of the Feeder Funds will be disadvantaged relative to shareholders of other feeder funds. In each case redeeming Feeder Fund shareholders, through their Authorized Participant, will receive Redemption Instruments and cash, if any, equal in value to the next calculated NAV. Further, the list of Redemption Instruments that a redeemer will receive from a Feeder Fund will be published daily.

If the requested relief is granted, Applicants intend to disclose in the SAI and all relevant sales literature that redemption payments will be effected within the specified number of calendar days, up to a maximum of fifteen (15) days, following the date on which a request for redemption in proper form is made. Given the rationale for what amounts to a delay typically of a few days in the redemption process on certain occasions and given the facts as recited above, Applicants believe that the redemption mechanism described above will not lead to unreasonable, undisclosed or unforeseen delays in the redemption process. Applicants assert that the request for relief from the strict seven day rule imposed by Section 22(e) is not inconsistent with the standards articulated in Section 6(c). Given the facts as recited above, Applicants believe that the granting of the requested relief is consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act.

On the basis of the foregoing, Applicants believe (i) that the protections intended to be afforded by Section 22(e) are adequately addressed by the proposed method and securities delivery cycles for redeeming Creation Units and (ii) that the relief requested is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended.
by the policy and provisions of the Act. Accordingly, Applicants hereby respectfully request that an order of exemption be 
granted under Section 6(c) in respect of Section 22(e) with respect to the affected Global Funds and their respective Master 
Funds, as applicable.

D. **Sections 17(a)(1) and 17(a)(2) of the Act.**

Applicants seek an exemption from Sections 17(a)(1) and 17(a)(2) of the Act pursuant to Sections 6(c) and 
17(b) of the Act to allow certain affiliated persons to effectuate purchases and redemptions of Creation Units in-kind.

Unless the Commission, upon application pursuant to Section 17(b) of the Act, grants an exemption from the 
provisions of Section 17(a), Section 17(a)(1) of the Act, among other things, makes it unlawful

for any affiliated person or promoter of or principal underwriter for a registered investment 
company ... or any affiliated person of such a person, promoter, or principal underwriter, 
acting as principal — knowingly to sell any security or other property to such registered 
company or to any company controlled by such registered company, unless such sale 
involves solely (A) securities of which the buyer is the issuer, (B) securities of which the 
seller is the issuer and which are part of a general offering to the holders of a class of its 
securities or (C) securities deposited with a trustee of a unit investment trust … by the 
 depositor thereof.

Section 17(a)(2) of the Act makes it unlawful

for any affiliated person or promoter of or principal underwriter for a registered investment 
company ... or any affiliated person of such a person, promoter, or principal underwriter, 
acting as principal— knowingly to purchase from such registered company, or from any 
company controlled by such registered company, any security or other property (except 
securities of which the seller is the issuer).

Each Fund may be deemed to be controlled by an Adviser and hence affiliated persons of each other. In 
addition, the Funds may be deemed to be under common control with

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any other registered investment company (or series thereof) advised by an Adviser (“Affiliated Fund”).

An “affiliated person” of a person, pursuant to Section 2(a)(3)(A) of the Act, includes “any person directly or indirectly owning, controlling, or holding with the power to vote, 5 per centum or more of the outstanding voting securities of such other person” and pursuant to Section 2(a)(3)(C) of the Act “any person directly or indirectly controlling, controlled by, or under common control with, such other person.”

Section 2(a)(9) of the Act defines “control” as

…the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company.

Section 17(b) provides that the Commission will grant an exemption from the provisions of Section 17(a) if evidence establishes that the terms of the proposed transaction are reasonable and fair, including the consideration to be paid or received, and do not involve overreaching on the part of any person concerned, that the proposed transaction is consistent with the policy of each registered investment company concerned, and that the proposed transaction is consistent with the general purposes of the Act.

Because Section 17(b) could be interpreted to exempt only a single transaction from Section 17(a) and because there may be a number of transactions by persons who may be
deemed to be either first-tier or second-tier affiliates, Applicants are also requesting an exemption under Section 6(c) of the Act as well.\footnote{See, e.g., \textit{Keystone Custodian Funds, Inc.}, 21 S.E.C. 295 (1945).} 

There exists a possibility that, with respect to one or more Funds and the Trust, a large institutional investor could own more than 5\% of a Fund or the Trust, or in excess of 25\% of the outstanding Shares of a Fund or the Trust, making that investor a first-tier affiliate of the Fund or Trust under Section 2(a)(3)(A) or Section 2(a)(3)(C) of the Act. In addition, there exists a possibility that, with respect to Affiliated Funds, a large institutional investor could own 5\% or more of, or in excess of 25\% of their outstanding shares, resulting in that investor being deemed to be a second-tier affiliate of a Fund. For so long as such an investor was deemed to be an affiliate, Section 17(a)(1) could be read to prohibit such person from depositing the Creation Deposit with a Fund in return for a Creation Unit (an in-kind purchase). Likewise, Section 17(a)(2) could be read to prohibit the investor from entering into an in-kind redemption with a Fund. Applicants request an exemption to permit persons that are affiliated persons or second-tier affiliates of the Funds solely by virtue of (1) holding 5\% or more, or in excess of 25\% of the outstanding Shares of one or more Funds; (2) having an affiliation with a person with an ownership interest described in (1); or (3) holding 5\% or more, or more than 25\% of the Shares of one or more Affiliated Funds, to effectuate purchases and redemptions in-kind.

Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making in-kind purchases or in-kind redemptions of Creation Units. Both the deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions will be effected in exactly the same manner for all purchases and

\footnote{See, e.g., \textit{Keystone Custodian Funds, Inc.}, 21 S.E.C. 295 (1945).}
redemptions, regardless of size or number. There will be no discrimination between purchasers or redeemers.

The Deposit Instruments and Redemption Instruments available for a Fund will be the same for all purchases and redeemers, respectively, and will correspond pro rata to the Fund’s, or its respective Master Fund’s, Portfolio Positions, except as described above in section I.E.1.a. Deposit Instruments and Redemption Instruments will be valued in the same manner as those Portfolio Positions currently held by the relevant Funds, or their respective Master Funds, and the valuation of the Deposit Instruments and Redemption Instruments will be made in the same manner, regardless of the identity of the purchaser or redeemer.

Any consideration paid by the types of affiliated persons listed above for the purchase or redemption, including in-kind purchases and in-kind redemptions, of Shares directly from a Fund will be based on the NAV of such Fund in accordance with the Fund’s policies and procedures.

Applicants do not believe that in-kind purchases and redemptions will result in abusive self-dealing or overreaching, but rather assert that such procedures will be implemented consistently with the Funds’ objectives and with the general purposes of the Act. Applicants believe that in-kind purchases and redemptions will be made on terms reasonable to a Fund and any affiliated persons because they will be valued pursuant to verifiable objective standards. The method of valuing Portfolio Positions held by a Fund, or its respective Master Fund, is the same as that used for calculating the value of in-kind purchases or redemptions and, therefore, creates no opportunity for affiliated persons or the Applicants to effect a transaction detrimental to the other holders of Shares of that Fund. Similarly, Applicants submit that, by using the same standards for valuing securities held by a Fund, or its respective Master Fund, as are used for
calculating the value of in-kind redemptions or purchases, the Fund will ensure that its NAV will not be adversely affected by such securities transactions.

In addition to the customary relief from the requirements of Sections 17(a)(1) and 17(a)(2) permitting in-kind creations and redemptions by investors who are affiliates of a Fund by virtue of holding more than 5% or 25% of the Fund’s shares, to the extent that a Fund operates in a master-feeder structure, Applicants also request relief permitting the Feeder Funds to engage in in-kind creations and redemptions with the applicable Master Fund. The customary Sections 17(a)(1) and 17(a)(2) relief would not be sufficient to permit such transactions because the Feeder Funds and the applicable Master Fund could also be affiliated by virtue of having the same investment adviser. However, as with the customary Section 17 relief, Applicants believe that in-kind creations and redemptions between a Feeder Fund and a Master Fund advised by the same investment adviser do not involve “overreaching” by an affiliated person. Such transactions will occur only at the Feeder Fund’s proportionate share of the Master Fund’s net assets, and the distributed securities will be valued in the same manner as they are valued for the purposes of calculating the applicable Master Fund’s NAV.\footnote{Fund directors and investment advisers are subject to strict fiduciary duties under federal and state law and to specific requirements relating to valuation and redemptions.} Further, all such transactions will be effected with respect to pre-determined securities and on the same terms with respect to all investors. Finally, such transaction would only occur as a result of, and to effectuate, a creation or redemption transaction between the Feeder Fund and a third-party investor.

For the reasons set forth above, Applicants believe that: (i) with respect to the relief requested pursuant to Section 17(b), the terms of the proposed transactions, including the consideration to be paid and received, are reasonable and fair and do not involve overreaching on the part of any person concerned, the proposed transactions are consistent with the policies of...
each registered investment company concerned, and that the proposed transactions are consistent with the general purposes of
the Act, and (ii) with respect to the relief requested pursuant to Section 6(c), the requested exemption for the proposed
transactions is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended
by the policy and provisions of the Act.

E. Sections 12(d)(1)(A) and 12(d)(1)(B) of the Act

Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring securities of an
investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company,
more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies,
more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end
investment company, its principal underwriter and any Broker from selling the investment company’s shares to another
investment company if the sale will cause the acquiring company to own more than 3% of the acquired company’s voting
stock, or if the sale will cause more than 10% of the acquired company’s voting stock to be owned by investment companies
generally. Applicants request relief to permit Investing Funds to acquire Shares in excess of the limits in Section 12(d)(1)(A)
of the Act and to permit the Funds, their principal underwriters and any Brokers to sell Shares to Investing Funds in excess of
the limits in Section 12(d)(1)(B) of the Act.\textsuperscript{38} Section 12(d)(1)(J) of the Act states that the Commission may conditionally or
unconditionally exempt any person, security or transaction, or any class or classes of persons, securities, or transactions from
any provision of Section 12(d)(1) to the extent that such exemption is consistent with the public interest and the protection of
investors.

\textsuperscript{38} In no case, however, will a Fund that is an FOF ETF rely on the exemption from Section 12(d)(1) being requested in this
Application.

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Applicants also request relief from Sections 12(d)(1)(A) and 12(d)(1)(B) to the extent necessary to permit the Feeder Funds to perform creations and redemptions of Shares in-kind in a master-feeder structure. This structure is substantially identical to traditional master-feeder structures permitted pursuant to the exception provided in Section 12(d)(1)(E). Section 12(d)(1)(E) provides that the percentage limitations of Section 12(d)(1)(A) and 12(d)(1)(B) shall not apply to a security issued by an investment company (in this case, the shares of the applicable Master Fund) if, among other things, that security is the only investment security held by the Feeder Fund. Applicants believe the proposed master-feeder structure complies with Section 12(d)(1)(E) because each Feeder Fund will hold only investment securities issued by its corresponding Master Fund; however, the Feeder Funds may receive securities other than securities of its corresponding Master Fund if a Feeder Fund accepts an in-kind creation. Applicants do not believe that the securities involved in the in-kind transactions are ever “held” on the books of a Feeder Fund because the Feeder Fund is merely acting as a conduit through which securities are delivered from the investor to the Master Fund and the securities received are never settled to the Feeder Fund. However, there is potentially a hypothetical moment when accepting or distributing securities in-kind that such securities could be deemed “held” by a Feeder Fund. As a result, to the extent that a Feeder Fund may be deemed to be holding both shares of the Master Fund and, for a hypothetical moment in the course of a creation or redemption, other securities, the Applicants are requesting appropriate relief from Section 12(d)(1)(A) and 12(d)(1)(B). The Feeder Funds would operate in compliance with all other provisions of Section 12(d)(1)(E).

39 See Signature Financial Group, Inc., SEC No-Action Letter (Dec. 28, 1999) (Funds using a master-feeder structure sought no-action relief from Section 17(a) of the Act to permit in-kind redemptions between the master and the feeder. There was no request for, and thus no relief from, Section 12(d)(1)).
Congress enacted Section 12(d)(1) (then Section 12(c)(1)) in 1940 to prevent one investment company from buying control of another investment company.\(^{40}\) In enacting Section 12(d)(1), Congress sought to ensure that the acquiring investment company had no “effective voice” in the other investment company.\(^{41}\) As originally proposed, Section 12(d)(1) would have prohibited any investment by an investment company in another investment company. Congress relaxed the prohibition in the Section’s final version, presumably because there was some concern that an investment company should not be prohibited from taking advantage of a good investment just because the investment was another investment company.

“[Y]ou may get situations where one investment company may think that the securities of another investment company are a good buy and it was not thought advisable to freeze that type of purchase.”\(^{42}\)

Congress tightened Section 12(d)(1)’s restrictions in 1970 to address certain abuses perceived to be associated with the development of fund holding companies (i.e., funds that primarily invest in other investment companies).\(^{43}\) These abuses included: (i) undue influence such as through the threat of large-scale redemptions of the acquired fund’s shares; (ii) layering of fees and expenses (such as sales loads, advisory fees and administrative costs); and (iii) unnecessary complexity. The Commission identified these abuses in its 1966 report to Congress, titled *Public Policy Implications of Investment Company Growth* ("PPI Report").\(^{44}\)

\(^{40}\) House Hearing, 76th Cong., 3d Sess., at 113 (1940).


\(^{42}\) House Hearing, 76th Cong., 3d Sess., at 112 (1940) (testimony of David Schenker).


Applicants propose a number of conditions designed to address these concerns. Certain of Applicants’ proposed conditions address the concerns about large-scale redemptions identified in the PPI Report, particularly those regarding the potential for undue influence. Applicants will take steps to ensure that the Investing Funds comply with any terms and conditions of the requested relief by requesting that an Investing Fund enter into an FOF Participation Agreement as a condition precedent to investing in a Fund beyond the limits imposed by Section 12(d)(1)(A).

The FOF Participation Agreement will require the Investing Fund to adhere to the terms and conditions of the order. Condition B.1 limits the ability of an Investing Fund’s Advisory Group or an Investing Fund’s Sub-Advisory Group (individually, or in the aggregate) (each defined below) to control a Fund, or its respective Master Fund, within the meaning of Section 2(a)(9) of the Act. For purposes of this Application, an “Investing Fund’s Advisory Group” is defined as the Investing Fund Adviser, or Sponsor, any person controlling, controlled by, or under common control with such Adviser or Sponsor, and any investment company or issuer that would be an investment company but for Sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by the Investing Fund Adviser, the Sponsor, or any person controlling, controlled by, or under common control with such Adviser or Sponsor.

For purposes of this Application, an “Investing Fund’s Sub-Advisory Group” is defined as any Investing Fund Sub-Adviser, any person controlling, controlled by, or under common control with the Investing Fund Sub-Adviser, and any investment company or issuer that would be an investment company but for Sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Investing Fund Sub-Adviser or any person controlling, controlled by or under common control with the Investing Fund Sub-
Adviser. The condition does not apply to the Investing Fund’s Sub-Advisory Group with respect to a Fund, or its respective Master Fund, for which the Investing Fund Sub-Adviser or a person controlling, controlled by, or under common control with the Investing Fund Sub-Adviser acts as the investment adviser within the meaning of Section 2(a)(20)(A) of the Act.

Condition B.2 prohibits Investing Funds and Investing Fund Affiliates from causing an investment by an Investing Fund in a Fund to influence the terms of services or transactions between an Investing Fund or an Investing Fund Affiliate and the Fund, or its respective Master Fund, or Fund Affiliate. “Fund Affiliate” is defined as an investment adviser, promoter, or principal underwriter of a Fund and any person controlling, controlled by or under common control with any of these entities. “Investing Fund Affiliate” is defined as the Investing Fund Adviser, Investing Fund Sub-Adviser, Sponsor, promoter and principal underwriter of an Investing Fund, and any person controlling, controlled by or under common control with any of these entities.

Conditions B.3, B.4, B.6, B.7 and B.8 are specifically designed to address the potential for an Investing Fund and certain affiliates of an Investing Fund (including Underwriting Affiliates) to exercise undue influence over a Fund, or its respective Master Fund, and certain of its affiliates. For purposes of this Application, an “Underwriting Affiliate” is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Investing Fund Adviser, Investing Fund Sub-Adviser, employee or Sponsor of the Investing Fund, or a person of which any such officer, director, member of an advisory board, Investing Fund Adviser or Investing Fund Sub-Adviser, employee or Sponsor is an affiliated person. An Underwriting Affiliate does not include any person whose relationship to the Fund is covered by Section 10(f) of the Act. An offering of securities during the existence of
an underwriting or selling syndicate of which a principal underwriter is a principal underwriter is an Underwriting Affiliate is an “Affiliated Underwriting.”

Condition B.9 is intended to ensure that the Fund’s Board and its Adviser, as well as the Investing Funds’ board of directors and investment adviser, or trustee (“Trustee”) and Sponsor, as applicable, understand the terms and conditions of the exemptive order and agree to fulfill their responsibilities under the order. A representation to this effect is required to be included in the FOF Participation Agreement which must be in effect between the Fund and an Investing Fund before an investment is made in excess of Section 12(d)(1)(A).

A Fund may choose to reject any direct purchase of Creation Units by an Investing Fund. To the extent an Investing Fund purchases Shares in the secondary market, a Fund would still retain its ability to reject initial purchases of Shares made in reliance on the requested order by declining to enter into the FOF Participation Agreement prior to any investment by an Investing Fund in excess of the limits of Section 12(d)(1)(A). A Fund would also retain its right to reject any initial investment by an Investing Fund in excess of the limits in Section 12(d)(1)(A) of the Act by declining to execute an FOF Participation Agreement with an Investing Fund.

With respect to concerns regarding layering of fees and expenses, Applicants propose several conditions.

Under Condition B.10, before approving any advisory contract under Section 15 of the Act, the board of directors or trustees of any Investing Management Company, including a majority of the directors or trustees who are not “interested persons” within the meaning of Section 2(a)(19) of the Act (“independent directors or trustees”), will be required to find that the advisory fees charged under the contract are based on services provided that will be in
addition to, rather than duplicative of, services provided under the advisory contract of any Fund, or its respective Master Fund, in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the Investing Management Company.

In addition, Conditions B.5 and B.11 of the requested order are designed to prevent unnecessary duplication or layering of sales charges and other costs.

Under Condition B.5, an Investing Fund Adviser, Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Investing Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under Rule 12b-1 under the Act) received from a Fund, or its respective Master Fund, by the Investing Fund Adviser, Trustee or Sponsor or an affiliated person of the Investing Fund Adviser, Trustee or Sponsor, other than any advisory fees paid to the Investing Fund Adviser, Trustee or Sponsor or its affiliated person by a Fund, or its respective Master Fund, in connection with the investment by the Investing Fund in the Fund. Condition B.5 also provides that any Investing Fund Sub-Adviser will waive fees otherwise payable to the Investing Fund Sub-Adviser, directly or indirectly, by the Investing Fund in an amount at least equal to any compensation received by the Investing Fund Sub-Adviser, or an affiliated person of the Investing Fund Sub-Adviser, other than any advisory fees paid to the Investing Fund Sub-Adviser or its affiliated person by the Fund, or its respective Master Fund, in connection with any investment by the Investing Fund in the Fund made at the direction of the Investing Fund Sub-Adviser. In the event that the Investing Fund Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Investing Fund. Condition B.11 prevents any sales charges
or service fees on shares of an Investing Fund from exceeding the limits applicable to a fund of funds set forth in the National Association of Securities Dealers (“NASD”) Conduct Rule 2830.45

The FOF Participation Agreement will include an acknowledgement from the Investing Fund that it may rely on the requested order only to invest in the Funds and not in any other investment company.46 No Fund, or its respective Master Fund, will acquire securities of any investment company or company relying on Section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in Section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund, or its respective Master Fund, to purchase shares of other investment companies for short-term cash management purposes or pursuant to the Master-Feeder Relief. Thus, in keeping with the PPI Report’s concern with overly complex structures, the requested order will not create or give rise to circumstances enabling an Investing Fund to invest in excess of the limits of Section 12(d)(1)(A) in a Fund which is in turn able to invest in another investment company or 3(c)(1) or 3(c)(7) issuer in excess of such limits. In addition to avoiding excess complexity, Applicants believe that the condition requiring that Funds, or their respective Master Funds, will not, except to the extent permitted by exemptive relief from the Commission permitting the Fund, or its respective Master Fund, to purchase shares of other investment companies for short-term cash management purposes or pursuant to the Master-Feeder Relief, invest in any other investment company or

45 Any references to NASD Conduct Rule 2830 include any successor or replacement rule to NASD Conduct Rule 2830 that may be adopted by FINRA.

46 Applicants acknowledge that the receipt of compensation by (a) an affiliated person of an Investing Fund, or an affiliated person of such person, for the purchase by the Investing Fund of Shares of a Fund or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Shares to an Investing Fund, may be prohibited by Section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.
3(c)(1) or 3(c)(7) issuer in excess of the limits of Section 12(d)(1)(A) mitigates the concerns about layering of fees.

Applicants note that certain ETFs now trading have been operating under orders granting relief that is virtually identical to the Fund of Funds Relief requested in this Application. Applicants are not aware of any problems or difficulties encountered by such ETFs or the mutual funds relying upon such orders, and expect that the experience of the Funds identified herein and Investing Funds should be the same.

F. Sections 17(a)(1) and 17(a)(2) of the Act Relating to Fund of Funds Relief.

Applicants seek relief from Section 17(a) pursuant to Section 17(b) and Section 6(c) to permit a Fund, to the extent that the Fund is an affiliated person of an Investing Fund, to sell Shares to, and purchase Shares from, an Investing Fund and to engage in the accompanying in-kind transactions.

Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3)(B) of the Act defines an “affiliated person” of another person to include any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person. An Investing Fund relying on the requested exemptive relief could own 5% or more of the outstanding voting securities of a Fund. In such cases, and for other reasons, the Fund could become an affiliated person, or an affiliated person of an affiliated person of the Investing Fund, and direct sales and redemptions of its Shares with an Investing Fund and any accompanying in-kind transactions could be prohibited. Applicants anticipate that there may be Investing Funds that are not part of the same group of investment companies as the Funds, but are subadvised by an Adviser. Applicants are not seeking relief.
from Section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or an affiliated person of an affiliated person, of an Investing Fund because an investment adviser to the Funds is also an investment adviser to an Investing Fund.

Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by Section 17(a) if it finds that:

(i) the terms of the proposed transaction, including consideration to be paid or received, are fair and reasonable and do not involve overreaching on the part of any person concerned;

(ii) the proposed transaction is consistent with the policy of each registered investment company concerned; and

(iii) the proposed transaction is consistent with the general purposes of the Act.

The Commission has interpreted its authority under Section 17(b) as extending only to a single transaction and not a series of transactions.

Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants expect that most Investing Funds will purchase Shares in the secondary market and will not purchase Creation Units directly from a Fund.

Section 17(a) is intended to prohibit affiliated persons in a position of influence or control over an investment company from furthering their own interests by selling property that they own to an investment company at an inflated price, purchasing property from an investment company at less than its fair value, or selling or purchasing property on terms that involve
overreaching by that person. For the reasons articulated in the legal analysis of Section 12(d)(1), above, Applicants submit that, with regard to Section 17(a), the proposed transactions are appropriate in the public interest, consistent with the protection of investors and do not involve overreaching.

Applicants believe that an exemption is appropriate under Sections 17(b) and 6(c) because the proposed arrangement meets the standards in those sections. First, the terms of the proposed arrangement are fair and reasonable and do not involve overreaching. Any consideration paid for the purchase or redemption of Shares directly from a Fund will be based on the NAV of the Fund in accordance with policies and procedures set forth in the Fund’s registration statement. Further, the Deposit Instruments and Redemption Instruments available for a Fund will be the same for all purchases and redeemers, respectively, and will correspond pro rata to the Fund’s Portfolio Positions, except as described above in section I.E.1.a.

Second, the proposed transactions directly between Funds and Investing Funds will be consistent with the policies of each Investing Fund. The purchase of Creation Units by an Investing Fund will be accomplished in accordance with the investment restrictions of the Investing Fund and will be consistent with the investment policies set forth in the Investing Fund’s registration statement. The FOF Participation Agreement will require any Investing Fund that purchases Creation Units directly from a Fund to represent that the purchase of Creation Units from a Fund by an Investing Fund will be accomplished in compliance with the investment

47 To the extent that purchases and sales of Shares occur in the secondary market and not through principal transactions directly between an Investing Fund and a Fund, relief from Section 17(a) would not be necessary. However, the requested relief would apply to direct sales of Shares in Creation Units by a Fund to an Investing Fund and redemptions of those Shares. The requested relief is also intended to cover the in-kind transactions that may accompany such sales and redemptions.
restrictions of the Investing Fund and will be consistent with the investment policies set forth in the Investing Fund’s registration statement.

Third, Applicants believe that the proposed transactions are consistent with the general purposes of the Act. Applicants also believe that the requested exemptions are appropriate in the public interest. Shares offer Investing Funds a flexible investment tool that can be used for a variety of purposes. Applicants also submit that the exemption is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the reasons set forth above, Applicants believe that: (i) with respect to the relief requested pursuant to Section 17(b), the terms of the proposed transactions, including the consideration to be paid and received, are reasonable and fair and do not involve overreaching on the part of any person concerned, the proposed transactions are consistent with the policies of each registered investment company concerned, and that the proposed transactions are consistent with the general purposes of the Act, and (ii) with respect to the relief requested pursuant to Section 6(c), the requested exemption for the proposed transactions is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

IV. Conditions.

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

A. ETF Relief.

1. As long as a Fund operates in reliance on the requested order, the Shares of the Fund will be listed on a Stock Exchange.
2. No Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that the Shares are not individually redeemable and that owners of the Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only.

3. The website for the Funds, which is and will be publicly accessible at no charge, will contain, on a per Share basis, for each Fund the prior Business Day’s NAV and the market closing price or Bid/Ask Price, and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

4. On each Business Day, before commencement of trading in Shares on the Stock Exchange, the Fund will disclose on its website the identities and quantities of the Portfolio Positions held by the Fund (or its respective Master Fund) that will form the basis for the Fund’s calculation of NAV at the end of the Business Day.

5. The Adviser or any Sub-Adviser, directly or indirectly, will not cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Instrument for the Fund through a transaction in which the Fund (or its respective Master Fund) could not engage directly.

6. The requested relief, other than the Fund of Funds Relief and the Section 17 relief related to a master-feeder structure, will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively managed exchange traded funds.
B. Fund of Funds Relief

Applicants agree that any order of the Commission granting the requested Fund of Funds Relief will be subject to the following conditions:

1. The members of an Investing Fund’s Advisory Group will not control (individually or in the aggregate) a Fund (or its respective Master Fund) within the meaning of Section 2(a)(9) of the Act. The members of an Investing Fund’s Sub-Advisory Group will not control (individually or in the aggregate) a Fund (or its respective Master Fund) within the meaning of Section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Fund, the Investing Fund’s Advisory Group or the Investing Fund’s Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares of the Fund in the same proportion as the vote of all other holders of the Fund’s Shares. This condition does not apply to the Investing Fund’s Sub-Advisory Group with respect to a Fund (or its respective Master Fund) for which the Investing Fund Sub-Adviser or a person controlling, controlled by or under common control with the Investing Fund Sub-Adviser acts as the investment adviser within the meaning of Section 2(a)(20)(A) of the Act.

2. No Investing Fund or Investing Fund Affiliate will cause any existing or potential investment by the Investing Fund in a Fund to influence the terms of any services or transactions between the Investing Fund or an Investing Fund Affiliate and the Fund (or its respective Master Fund) or a Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company, including a majority of the independent directors or trustees, will adopt procedures reasonably designed to ensure that the Investing Fund Adviser and any Investing Fund Sub-Adviser are
conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or an Investing Fund Affiliate from a Fund (or its respective Master Fund) or a Fund Affiliate in connection with any services or transactions.

4. Once an investment by an Investing Fund in Shares of a Fund exceeds the limit in Section 12(d)(1) (A)(i) of the Act, the Board of the Fund (or its respective Master Fund), including a majority of the independent directors or trustees, will determine that any consideration paid by the Fund (or its respective Master Fund) to the Investing Fund or an Investing Fund Affiliate in connection with any services or transactions: (i) is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund (or its respective Master Fund); (ii) is within the range of consideration that the Fund (or its respective Master Fund) would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund (or its respective Master Fund) and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

5. The Investing Fund Adviser, or Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Investing Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund (or its respective Master Fund) under Rule 12b-1 under the Act) received from a Fund (or its respective Master Fund) by the Investing Fund Adviser, or Trustee or Sponsor, or an affiliated person of the Investing Fund Adviser, or Trustee or Sponsor, other than any advisory fees paid to the Investing Fund Adviser, or Trustee or Sponsor, or its affiliated person by the Fund (or its respective Master
Fund), in connection with the investment by the Investing Fund in the Fund. Any Investing Fund Sub-Adviser will waive fees otherwise payable to the Investing Fund Sub-Adviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund (or its respective Master Fund) by the Investing Fund Sub-Adviser, or an affiliated person of the Investing Fund Sub-Adviser, other than any advisory fees paid to the Investing Fund Sub-Adviser or its affiliated person by the Fund (or its respective Master Fund), in connection with the investment by the Investing Management Company in the Fund made at the direction of the Investing Fund Sub-Adviser. In the event that the Investing Fund Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Investing Fund or Investing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund (or its respective Master Fund)) will cause a Fund (or its respective Master Fund) to purchase a security in an Affiliated Underwriting.

7. The Board of a Fund (or its respective Master Fund), including a majority of the independent directors or trustees, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund (or its respective Master Fund) in an Affiliated Underwriting, once an investment by an Investing Fund in the securities of the Fund exceeds the limit of Section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Investing Fund in the Fund. The Board will consider, among other things: (i) whether the purchases were consistent with the investment objectives and policies of the Fund (or its respective Master Fund); (ii) how the performance of securities purchased in an Affiliated Underwriting.
Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund (or its respective Master Fund) in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to ensure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders of the Fund.

8. Each Fund (or its respective Master Fund) will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by an Investing Fund in the securities of the Fund exceeds the limit of Section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate’s members, the terms of the purchase, and the information or materials upon which the Board’s determinations were made.

9. Before investing in Shares of a Fund in excess of the limits in Section 12(d)(1)(A), each Investing Fund and the Trust will execute an FOF Participation Agreement stating, without limitation, that their respective boards of directors or trustees and their investment advisers, or Trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its...
investment in Shares of a Fund in excess of the limit in Section 12(d)(1)(A)(i), an Investing Fund will notify the Fund of the investment. At such time, the Investing Fund will also transmit to the Fund a list of the names of each Investing Fund Affiliate and Underwriting Affiliate. The Investing Fund will notify the Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Fund and the Investing Fund will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under Section 15 of the Act, the board of directors or trustees of each Investing Management Company, including a majority of the independent directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund (or its respective Master Fund) in which the Investing Management Company may invest. These findings and their basis will be fully recorded in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Fund (or its respective Master Fund) relying on the Fund of Funds relief will acquire securities of any investment company or company relying on Section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in Section 12(d)(1)(A) of the Act, except to the extent (i) the Fund (or its respective Master Fund) acquires securities of another investment company pursuant to exemptive relief from the Commission permitting the Fund (or its
respective Master Fund) to acquire securities of one or more investment companies for short-term cash management purposes or (ii) the Fund acquires securities of the Master Fund pursuant to the Master–Feeder Relief.

V. Names and Addresses.

The following are the names and addresses of Applicants:

Fidelity Distributors Corporation
Fidelity Management & Research Company
Fidelity Merrimack Street Trust
82 Devonshire Street
Boston, Massachusetts 02109

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All questions concerning this Application should be directed to the persons listed on the cover page of this Application.

By:

Fidelity Distributors Corporation

By: /s/ Scott Couto
Name: Scott Couto
Title: President

Fidelity Management & Research Company

By: /s/ Scott C. Goebel
Name: Scott C. Goebel
Title: Senior Vice President and General Counsel

Fidelity Merrimack Street Trust

By: /s/ Scott C. Goebel
Name: Scott C. Goebel
Title: Secretary
AUTHORIZATION

FIDELITY DISTRIBUTORS CORPORATION

In accordance with Rule 0-2(c) under the Act, Scott Couto states that all actions necessary to authorize the execution and filing of this Application by Fidelity Distributors Corporation have been taken, and that as President thereof, he is authorized to execute and file the same on behalf of Fidelity Distributors Corporation.

/s/ Scott Couto
Scott Couto
President
April 22, 2013
AUTHORIZATION

FIDELITY MANAGEMENT & RESEARCH COMPANY

In accordance with Rule 0-2(c) under the Act, Scott C. Goebel states that all actions necessary to authorize the execution and filing of this Application by Fidelity Management & Research Company have been taken, and that as Senior Vice President and General Counsel thereof, he is authorized to execute and file the same on behalf of Fidelity Management & Research Company.

/s/ Scott C. Goebel
Scott C. Goebel
Senior Vice President and General Counsel
April 18, 2013
AUTHORIZATION
FIDELITY MERRIMACK STREET TRUST

In accordance with Rule 0-2(c) under the Act, Scott C. Goebel, in his capacity as Secretary of Fidelity Merrimack Street Trust (“Trust”), states that all actions necessary to authorize the execution and filing of this Application have been taken, and the person signing and filing this document are authorized to do so on behalf of the Trust pursuant to his general authority as Secretary of the Trust and pursuant to the following resolution adopted by the Board of Trustees of the Trust on November 15, 2012:

RESOLVED: That any officer of the Trust be, and each hereby is, authorized to prepare, or cause to be prepared, executed and filed with the Securities and Exchange Commission an application and any amendments thereto, as may be necessary, for an order or orders of exemption from the Investment Company Act of 1940, as amended, as may be necessary to allow the Trust to operate actively managed exchange-traded funds, and with such changes as deemed appropriate by such officers upon the advice of counsel.

/s/ Scott C. Goebel
Scott C. Goebel
Secretary
April 18, 2013
VERIFICATION

FIDELITY DISTRIBUTORS CORPORATION

The undersigned, being duly sworn, deposes and says that he has duly executed the attached Application for and on behalf of Fidelity Distributors Corporation, that he is President of such entity and as such is authorized to sign this Application on its behalf, and that all actions taken by officers and other persons necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument and its contents, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ Scott Couto
Scott Couto
President
April 22, 2013
VERIFICATION

FIDELITY MANAGEMENT & RESEARCH COMPANY

The undersigned, being duly sworn, deposes and says that he has duly executed the attached Application for and on behalf of Fidelity Management & Research Company, that he is Senior Vice President and General Counsel of such entity and as such is authorized to sign this Application on its behalf, and that all actions taken by officers and other persons necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument and its contents, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ Scott C. Goebel
Scott C. Goebel
Senior Vice President and
General Counsel

April 18, 2013
VERIFICATION

FIDELITY MERRIMACK STREET TRUST

The undersigned, being duly sworn, deposes and says that he has duly executed the attached Application for and on behalf of Fidelity Merrimack Street Trust, that he is the Secretary of such entity and as such is authorized to sign this Application on its behalf, and that all actions taken by officers and other persons necessary to authorize deponent to execute and file such instrument have been taken. Deponent further says that he is familiar with such instrument and its contents, and that the facts therein set forth are true to the best of his knowledge, information and belief.

/s/ Scott C. Goebel
Scott C. Goebel    April 18, 2013
Secretary
UNITED STATES OF AMERICA
BEFORE THE
U.S. SECURITIES AND EXCHANGE COMMISSION

File No. 812-__________

Application for an order under section 6(c) of the Investment Company Act of 1940 for an exemption from sections 2 (a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c-1 under the Act and under sections 6(c) and 17(b) of the Act for exemptions from sections 17(a)(1) and 17(a)(2) of the Act and under section 12(d)(1)(J) of the Act for exemptions from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act

In the Matter of
Eaton Vance Management and
Eaton Vance ETMF Trust

Please send all communications to:
Frederick S. Marius, Esq.
Stephen W. Clarke
Eaton Vance Management
Two International Place
Boston, MA 02110

With a copy to:
Stacy L. Fuller, Esq.
K&L Gates LLP
1601 K Street, N.W.
Washington, DC  20006-1600
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I. SUMMARY OF APPLICATION

In this application, Eaton Vance Management (“Eaton Vance”), a Massachusetts business trust and wholly owned subsidiary of Eaton Vance Corp. with its principal place of business in Boston, Massachusetts, and Eaton Vance ETMF Trust (the “Trust”) (collectively, the “Applicants”) seek exemptive relief to permit them to offer exchange-traded managed funds (“ETMFs”), a new kind of registered investment vehicle.

ETMFs are, in essence, actively managed open-end funds whose shares (“Shares”) trade on an exchange at prices directly linked to the fund’s next-determined net asset value (“NAV”). As described below, ETMFs seek to provide the cost and tax efficiencies and shareholder protections of exchange-traded funds (“ETFs”) to investors in active fund strategies, while maintaining the confidentiality of current portfolio trading information. Because they would provide market makers with opportunities to earn reliable, low-risk arbitrage profits without intraday hedging, ETMFs can be expected to trade at consistently tight spreads to NAV in the absence of full portfolio holdings disclosure.

To permit ETMFs, Applicants request an order (“Order”) under section 6(c) of the Investment Company Act of 1940, as amended (the “Act”), for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c-1 under the Act and under sections 6(c) and 17(b) of the Act for exemptions from section 17(a) of the Act and under section 12(d)(1)(J) for exemptions from sections 12(d)(1)(A) and (B) of the Act.

Although ETMFs differ from ETFs in certain important respects, the relief requested to permit the operation of ETMFs (“ETMF Relief”) is substantially the same as the relief previously granted by the Securities and Exchange Commission (“Commission”) for ETFs.¹ This

application discusses in detail the factual and legal considerations supporting ETMF Relief. The relief requested to permit ETMFs (and certain other registered open-end management investment companies) operating as feeder funds to engage in in-kind transactions with a master fund ("Master-Feeder Relief") is substantially similar to no-action relief previously provided by the Commission staff ("SEC Staff"). 2 The relief requested to permit ETMFs to sell their shares to other registered funds ("Fund of Funds Relief") is also substantially the same as relief previously provided. 3

Applicants request that the ETMF Relief apply to the ETMF described in Appendix A ("Initial ETMF"). Applicants also request that the ETMF Relief apply to any future series of the Trust or any other registered open-end management investment company or series thereof that is advised by Eaton Vance or any entity controlling, controlled by or under common control with Eaton Vance (collectively, the "Adviser") (such funds, "Future ETMFs"). 4 The Initial ETMF and Future ETMFs together are the "ETMFs."

Applicants request that the Master-Feeder Relief apply to ETMFs and other registered open-end management investment companies advised by the Adviser that operate as feeder funds in a master-feeder structure (each such ETMF, an "ETMF Feeder," each such other open-end investment company, a "Mutual Fund Feeder," and together, the "Feeder Funds"). The Feeder Funds would invest in registered open-end management investment companies in the same "group of investment companies," as defined in section 12(d)(1)(G)(ii) of the Act, as the Feeder Funds (each, a "Master Fund"), and the requested Master-Feeder Relief also would apply to the Master Funds.

Applicants request that the Fund of Funds Relief apply to (a) any ETMF, (b) Acquiring Funds (as defined below), (c) the registered broker-dealer ("Broker") acting as principal underwriter for the distribution of Shares ("Distributor") and (d) other Brokers that sell ETMF shares to Acquiring Funds.

A.          ETMF Relief

ETMFs can be thought of as a hybrid between traditional mutual funds and ETFs, combining features of both. Like ETFs, ETMFs will be exchange-traded, directly issue and redeem Shares only in prescribed large Share aggregations ("Creation Units"), impose fees on Shares issued and redeemed to offset the associated fund costs, and may utilize in-kind transfers of portfolio securities in issuing and redeeming Shares. Like mutual funds, ETMFs will be bought and sold at prices based on end-of-day NAV and will seek to maintain the confidentiality of their current portfolio trading information by disclosing holdings only at a lag.

The distinguishing aspects of ETMFs are as follows:


3 See, e.g., EGA Order, T. Rowe Order (collectively, "Fund of Funds Precedent").

4 All entities that currently intend to rely on the Order have been named as Applicants.
An ETMF’s Shares will be listed and trade on a national securities exchange, as defined in section 2(a)(26) of the Act (“Exchange”), at prices based on the ETMF’s next-computed NAV, within the meaning of rule 22c-1 under the Act (“NAV-Based Prices”). NAV will be determined at the end of each day that the New York Stock Exchange (“NYSE”) is open for trading (“Business Day”), normally 4:00 p.m. Eastern Time (“ET”). In trading on the Exchange, Share transaction prices will vary from NAV by a market-determined premium to, or discount from, such NAV (“premium/discount”). Rules adopted by the Exchange will provide for purchases and sales of Shares utilizing such “NAV-Based Trading” to be executed throughout each Business Day’s regular trading session (generally 9:30 a.m. ET to 4:00 p.m. ET). All bids, offers and transactions in Shares on the Exchange will be priced at a specified premium or discount to NAV, which may be zero. Orders to transact in Shares at prices determined other than by reference to NAV will not be permitted under the rules of the Exchange.

ETMFs will not charge a sales load. Brokers’ compensation for selling Shares will be limited to (a) any commissions they charge in connection with secondary market transactions in Shares, (b) the spread between the bid prices at which they purchase Shares and ask prices at which they sell Shares, and/or (c) the net premium over (or discount from) NAV of Shares they sell (purchase) in the market and then enter into offsetting transactions with the ETMF to purchase (redeem).

Shares may be purchased and redeemed by or through Authorized Participants (as defined below) in Creation Unit quantities, principally in exchange for the securities and/or cash (“Basket”) specified by the ETMF at the beginning of each Business Day. The value of each day’s Basket, plus or minus a Balancing Amount (as defined below), will equal the value of a Creation Unit on that day. All persons purchasing or redeeming Creation Units will incur a fee (“Transaction Fee”) to cover the estimated cost to the ETMF of processing the transaction and converting the Basket to the desired portfolio composition.

In NAV-Based Trading, the premium or discount to NAV (e.g., +$0.01, -$0.02) will be locked in at trade execution, whereas the final transaction price (e.g., $20.20 per Share) will not be determined until that Business Day’s NAV is computed. Unlike conventional ETFs, trading in ETMFs will not offer investors the opportunity to buy and sell intraday based on current (versus end-of-day) determinations of value.

Future ETMFs may compute their NAV more than once each Business Day or once daily at times other than 4:00 pm ET, consistent with rule 22c-1 under the Act.

Applicants expect that the listing rules adopted by any Exchange for ETMFs will mandate that NAV-Based Prices apply to all transactions in Shares on the Exchange.

The number of Shares constituting a Creation Unit will be set by the Adviser based primarily on its determination of the Creation Unit size that will be most conducive to efficient arbitrage between the ETMF’s market trading prices and NAV. Maintaining relatively small Creation Unit sizes enables ETMF market makers to limit their exposure to market risk in Share inventory held overnight. Applicants expect a Creation Unit to consist of a specified number of Shares between 5,000 and 50,000 Shares.

To the extent that the closing value of the securities and cash in an ETMF’s Basket on a given Business Day differs from that day’s computed Creation Unit value, a Balancing Amount (as defined below) would be added to or subtracted from the transaction proceeds of a creation or redemption.
To preserve the confidentiality of its current portfolio trading program, an ETMF will normally disclose the specific composition of its investments (“Portfolio Holdings”) only at periodic intervals and with a lag, consistent with mutual fund disclosure practices. As described below, the arbitrage mechanism that connects market trading prices of Shares to NAV in NAV-Based Trading does not require contemporaneous disclosure of Portfolio Holdings to function effectively.

Consistent with its Portfolio Holdings disclosure policies, an ETMF’s daily Basket will normally vary from the current Portfolio Holdings as required to maintain the confidentiality of its current trading activity. Securities that the Adviser is in the process of acquiring for the ETMF will generally not be represented in the Basket until their purchase is completed. Securities currently held, but in the process of being sold, may not be removed from the Basket until the sale program is substantially completed. The Basket may include proportionately more cash than in the ETMF’s portfolio of investments (“Portfolio”), with such additional cash substituting for Portfolio Holdings that are not included in the Basket;

Like ETFs, ETMFs will cause estimates of the intraday value of their Shares (“Intraday Indicative Values” or “IIVs”) to be publicly disseminated at periodic intervals throughout the regular trading session of the listing Exchange each Business Day. ETMF IIVs will be disseminated at intervals of not more than 15 minutes, rather than at the 15-second intervals at which ETF IIVs are normally disseminated. IIVs play a different role for ETMFs than in conventional ETF trading. In the context of ETMFs, the sole purpose of IIVs is to help investors determine the number of Shares to buy or sell if they want to transact in an approximate dollar amount (i.e., if I want to acquire approximately $5,000 of an ETMF, how many Shares do I buy?). Applicants believe that disseminating IIVs every 15 minutes strikes the right balance between providing sufficient investor information for this purpose while avoiding potential adverse consequences that could flow from more frequent IIV dissemination.

Applicants seek relief pursuant to sections 6(c) and 17(b) of the Act to permit ETMFs to operate in the manner described.

B. Master-Feeder Relief

Efficiencies in the management and administration of two or more mutual funds of the same sponsor that follow similar investment programs may be achieved by the funds investing in a common underlying investment vehicle using a master-feeder arrangement. Rather than holding all of their securities and other investments directly, Feeder Funds invest indirectly in the securities and other investments of the associated Master Funds. Applicants anticipate that, under certain circumstances, it may be desirable for an ETMF and one or more mutual funds to invest as Feeder Funds in the same Master Fund.

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10 Mutual funds are required to disclose their holdings in full at least once quarterly, with a lag of not more than 60 days, on Form N-CSR and Form N-Q. As a matter of practice, many mutual funds provide public disclosure of their holdings more frequently and with a shorter delay (such as monthly with a 30-day lag). The disclosure practices of ETMFs are expected to mimic those of mutual funds holding similar types of investments.

11 In determining whether an ETMF will operate in a master-feeder structure, the board of trustees of the Trust (“Board”) will weigh the potential advantages and disadvantages of such a structure for the ETMF.
To treat its investors fairly and consistently, a Master Fund that combines one or more ETMF Feeders and one or more Mutual Fund Feeders should transact with each Feeder Fund on a basis that protects the Master Fund (and, indirectly, other Feeder Funds) against the costs of accommodating the Feeder Fund’s inflows and outflows. The Master Fund would accomplish this by imposing a fee (“Master Fund Transaction Fee”) on Feeder Fund inflows and outflows, sized to cover the estimated cost to the Master Fund of converting the transferred securities and/or cash to the desired composition. The Master Fund Transaction Fee would be applied equally to all Feeder Funds so as not to discriminate among Feeder Funds. Thus, each Feeder Fund would pay the same Master Fund Transaction Fee in connection with the same deposit of securities and/or cash with the Master Fund. A Feeder Fund that transacts with the Master Fund primarily in kind through the transfer of securities as selected or approved by the Master Fund would generally be subject to lower Master Fund Transaction Fees than another Feeder Fund that transacts with the Master Fund in cash.

Applicants seek relief pursuant to sections 6(c) and 17(b) of the Act to permit in-kind purchases of Master Fund interests by the Feeder Funds.\(^\text{12}\)

C. Fund of Funds Relief

The Fund of Funds Relief would permit registered management investment companies and unit investment trusts (“UITs”) that are not part of the same “group of investment companies,” as defined in section 12(d)(1)(G)(ii) of the Act, as an ETMF, and that enter into an Acquiring Fund Agreement (as defined below) with the ETMF, to acquire its Shares beyond the limits of section 12(d)(1)(A). Such registered management investment companies are referred to herein as “Acquiring Management Companies,” such UITs are referred to herein as “Acquiring Trusts,” and, collectively with Acquiring Management Companies, “Acquiring Funds.” The Fund of Funds Relief would also permit each ETMF, Distributor and/or a Broker to sell Shares to an Acquiring Fund beyond the limits of section 12(d)(1)(B).

In addition, the Fund of Funds Relief would provide relief from sections 17(a)(1) and (2) to permit an ETMF that is an affiliated person, or an affiliated person of an affiliated person (“second-tier affiliate”), as defined in section 2(a)(3) of the Act, of an Acquiring Fund to sell its Shares to, and redeem its Shares from, an Acquiring Fund and to engage in the accompanying in-kind transactions. The Fund of Funds Relief would not apply to any ETMF that is, either directly or through a master-feeder structure, acquiring securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits set forth in section 12(d)(1)(A) of the Act, except as noted in condition C.11 below. Further, an Acquiring

\(^{12}\) Investments by Feeder Funds in a Master Fund would occur pursuant to section 12(d)(1)(G) of the Act and rule 12d1-2 under the Act. In-kind redemptions by a Feeder Fund from a Master Fund would occur within the parameters of Signature Financial Group, Inc. (SEC Ref. No. 99-825, pub. avail. Dec. 28, 1999) (“Signature Financial Letter”), and Applicants are not seeking relief for these transactions.
Fund could rely on the requested Fund of Funds Relief only to invest in ETMFs and not in any other registered investment company.

D. Request for Relief

Applicants believe that:

● With respect to the relief requested pursuant to section 6(c), the relief is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act;

● With respect to the relief requested pursuant to section 17(b), the proposed transactions are reasonable and fair and do not involve overreaching on the part of any person concerned, are consistent with the policies of the ETMFs and with the general purposes of the Act; and

● With respect to the relief requested pursuant to section 12(d)(1)(J), the relief is consistent with the public interest and the protection of investors.

No form having been specifically prescribed for this application, Applicants proceed under rule 0-2 under the Act.

II. APPLICANTS

A. The Trust and the Initial ETMF

The Trust is a business trust, organized under the laws of the Commonwealth of Massachusetts and consisting of multiple series. The Trust will be registered with the Commission as an open-end management investment company and will be overseen by the Board, composed in compliance with sections 10 and 16 of the Act.

Each ETMF (and, in the case of ETMF Feeders, any Master Funds) will be structured as a diversified or non-diversified open-end management investment company. Its Portfolio Holdings will qualify it for registration as an open-end management investment company under the Act, and it will adopt fundamental and non-fundamental policies in compliance with section 8 of the Act.

Each ETMF and its Shares will be registered under the Securities Act of 1933, as amended (the “Securities Act”), and the Act. Shares will be distributed through the Distributor as principal underwriter. Each ETMF will have its advisory and distribution agreements approved in accordance with section 15 of the Act and will comply with the capital structure requirements of section 18 of the Act applicable to open-end investment companies.

Each ETMF intends to maintain the required level of diversification and otherwise conduct its operations so as to qualify as a “regulated investment company” (“RIC”) under the Internal Revenue Code (“Code”). Under such circumstances, dividends and other distributions
by ETMFs will be declared and paid in the same manner as by other registered open-end investment companies and in compliance with the Code and the Act.\textsuperscript{13}

Beneficial owners of Shares (“Beneficial Owners”) will have one vote per Share with respect to matters for which a shareholder vote is required, consistent with the requirements of the Act and the rules promulgated thereunder and the laws of the Commonwealth of Massachusetts. Shares will be registered in book-entry form only. No Beneficial Owner shall have the right to receive a certificate representing Shares.

The Depository Trust Company, New York, New York, a limited purpose trust company organized under the laws of the State of New York (“DTC”), or its nominee will be the record or registered owner of all outstanding Shares. Beneficial Owners will be shown on the records of DTC or DTC-participating institutions (e.g., Brokers, banks, trust companies and other financial institutions) (“DTC Participants”).

Beneficial Owners of Shares will exercise their rights in Shares indirectly through DTC and DTC Participants. Dividends will normally be paid and all notices, statements, shareholder reports and other communications required under the Act and other applicable laws to be given to Beneficial Owners will normally be provided through the customary practices and facilities of DTC and DTC Participants.

B. The Adviser

Eaton Vance will be the investment adviser to the ETMFs. Eaton Vance is a Massachusetts business trust and wholly owned subsidiary of Eaton Vance Corp. with its principal place of business in Boston, Massachusetts. Eaton Vance is, and any other Adviser will be, registered as an “investment adviser” under section 203 of the Investment Advisers Act of 1940, as amended (the “Advisers Act”). Subject to the oversight and authority of the Board, the Adviser will develop and manage the overall investment program of each ETMF and will arrange and oversee the provision of necessary services for each ETMF (including custodial, transfer agency and administration services). The Adviser may enter into subadvisory agreements with other investment advisers to act as subadvisers with respect to ETMFs (“Subadvisers”). Any Subadviser will be registered under the Advisers Act.

C. The Distributor

A broker-dealer registered under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), will act as Distributor of the ETMFs. The Distributor may be affiliated with the Adviser, but will not be affiliated with the Exchange upon which the ETMF is listed. Applicants request that the relief requested in this application apply to any Distributor of Shares, whether affiliated or unaffiliated with the Adviser. Any Distributor will comply with the terms

\textsuperscript{13} No ETMF will make the DTC book-entry dividend reinvestment service available for use by Beneficial Owners for reinvestment of their cash proceeds, but certain Brokers may make a dividend reinvestment service available to their clients. Brokerage commissions and other costs, if any, incurred in purchasing Shares with the cash from the distributions generally will be an expense borne by the individual Beneficial Owners participating in reinvestment through such service.
and conditions of this application. The Distributor will distribute Shares on an agency basis.

D. Custodian, Transfer Agent and Fund Administrator/Accountant

Applicants expect The Bank of New York Mellon to act as the custodian, transfer agent and fund administrator/accountant for the ETMFs. The Bank of New York Mellon is a wholly owned subsidiary of The Bank of New York Mellon Corporation, a global financial services company headquartered in New York, New York.

III. APPLICANTS’ PROPOSAL FOR ETMFS

A. Investment Program

Each ETMF’s Portfolio Holdings will consist of securities and other assets as selected and managed by its Adviser or Subadviser to pursue the ETMF’s investment objective. Among other types of investments, ETMFs may hold common stocks, other equity securities, including shares of ETFs and other investment companies, and fixed-income securities, loans and other debt instruments traded in the U.S. or non-U.S. markets. ETMFs may engage in short sales and may invest in mortgage-backed and asset-backed securities, forward commitment transactions, TBA Transactions, depositary receipts or shares, forward foreign currency contracts, options contracts, futures contracts, swap agreements, currencies, money market instruments, cash and cash equivalents. In all cases, an ETMF’s investments will be made in accordance with its investment policies and the requirements of the Act and rules thereunder. If an ETMF operates as a Feeder Fund, its investments will be made in whole or in part through associated Master Funds.

14 A “to-be-announced transaction” or “TBA Transaction” is a method of trading mortgage-backed securities.

15 ETMFs (and, in the case of ETMF Feeders, any Master Funds) may invest in American Depositary Receipts (“ADRs”) and Global Depositary Receipts (“GDRs”) representing foreign securities (collectively, “Depositary Receipts”). Depositary Receipts are typically issued by a financial institution (“Depositary”) and evidence ownership in a security or pool of securities that have been deposited with the Depositary. For ADRs, the Depositary is typically a U.S. financial institution and the underlying securities are issued by a foreign issuer. ADRs are registered under the Securities Act on Form F-6. ADR trades occur either on an Exchange or off-exchange. FINRA Rule 6620 requires all off-exchange transactions in ADRs to be reported within 90 seconds and ADR trade reports to be disseminated on a real-time basis. With respect to GDRs, the Depositary may be a foreign or U.S. entity, and the underlying securities may have a foreign or U.S. issuer. All GDRs are sponsored and trade on a foreign exchange. No affiliated person of ETMFs, the Adviser or any Subadviser will serve as the Depositary for any Depositary Receipts held by an ETMF. Further, ETMFs (or, in the case of ETMF Feeders, any Master Funds) will not invest in any Depositary Receipts that the Adviser or Subadviser deems to be illiquid or for which pricing information is not readily available.

16 If an ETMF (or, in the case of an ETMF Feeder, any Master Fund) invests in futures, options and/or swaps contracts (“derivatives”): (a) the Board periodically will review and approve (i) the ETMF’s (or, in the case of ETMF Feeders, their Master Funds’) use of derivatives and (ii) how the ETMF’s Adviser assesses and manages risk with respect to the ETMF’s (or, in the case of ETMF Feeders, their Master Funds’) use of derivatives; and (b) the ETMF’s disclosure of its (or, in the case of ETMF Feeders, their Master Funds’) use of derivatives in its offering documents and periodic reports consistent with relevant Commission and SEC Staff guidance.
B. Listing and Trading

Shares will be listed on an Exchange in the same manner as other equity securities and ETFs. The principal secondary market for the Shares will be the Exchange on which they are listed (the “Listing Exchange”). Applicants currently expect the NASDAQ Stock Market (“NASDAQ”) to be the Listing Exchange for ETMFs.17

Applicants expect member firms of NASDAQ to be named Registered NASDAQ Market Makers (“RMMs”) for each ETMF, responsible for promoting an active and liquid trading market in Shares. No RMM of any ETMF will be an affiliated person, or second-tier affiliate, of the ETMF, except under section 2(a)(3)(A) or (C) of the Act solely due to ownership of Shares. Further, except to the extent permitted by the ETMF Relief requested under section 17(b) of the Act from section 17(a), no Distributor, promoter or affiliated person of the ETMF, or any second-tier affiliate, will be an Authorized Participant or make a market in Shares, unless permitted to do so by a Commission rule, other exemptive order or SEC Staff no-action letter.

C. Share Trading Prices

The principal difference between trading in Shares and trading in other exchange-traded securities, including ETF shares, is that market trading price of an ETMF’s Shares will be directly linked to the ETMF’s end-of-day NAV.18 In NAV-Based Trading, all bids, offers and share transaction prices are expressed as a market-determined premium or discount (e.g., +$0.01, -$0.02) to that day’s NAV. For each trade, the premium or discount to NAV (which may be zero) is locked in at trade execution and the final transaction price (i.e., NAV plus or minus the market-determined premium/discount to NAV) is determined at the end of the day when the ETMF’s NAV is computed.

Although Share prices will be quoted throughout the day relative to NAV (e.g., NAV+$0.01, NAV-$0.02), there is not a fixed relationship between market trading prices and NAV. Instead, the premium or discount to NAV at which Share transactions are executed will depend on the balance of supply and demand for Shares and other factors affecting secondary market trading. Prices in the secondary market may be above, at or below NAV.

Similar to ETFs, ETMFs will rely upon an arbitrage mechanism to keep market trading prices of Shares aligned with NAV. In conventional ETF trading, a tight relationship between an ETF’s market trading price and its underlying portfolio value cannot be assured unless market makers have sufficient knowledge of the ETF’s portfolio holdings to enable them to hedge the intraday market risk they assume as they take ETF inventory positions in connection with their market-making activities. The mechanism that connects an ETF’s market price to its current portfolio value is the ability of market makers and other arbitrageurs to earn arbitrage profits by

17 Applicants note that NASDAQ’s listing requirements would require at least two RMMs to be registered in order for an ETMF to maintain a NASDAQ listing. RMMs on NASDAQ must make a continuous, two-sided market at all times or risk regulatory sanctions. Applicants believe that competition among RMMs, other market makers and other arbitrageurs should result in a highly efficient market for Shares.

18 Aspects of NAV-Based Trading are protected intellectual property described in one or more of U.S. Patent Nos. 7,444,300, 7,689,501, 7,496,531, 8,131,621, 8,306,901 and 8,332,307 and in pending patent applications.
entering into offsetting positions in the ETF’s underlying securities as they transact intraday in ETF shares, buying (or selling) the underlying securities to the extent they sell (buy) ETF shares.19

ETF market makers commonly employ transactions in a representative hedge portfolio,20 rather than trading the underlying ETF portfolio securities themselves, to add or subtract offsetting market exposure as they build short or long inventory positions in ETF shares through intraday trading. For many ETFs, using a full replication of the underlying securities portfolio for intraday hedging purposes is often impractical. The arbitrage profit earned by a market maker that uses a hedge portfolio will fluctuate to the extent that the hedge portfolio deviates in performance from that of the ETF positions over their respective holding periods. A loose correspondence between the hedge portfolio and the ETF’s holdings means that arbitrage profits may be highly variable, and will depend on factors beyond the market maker’s control. The more uncertain the potential to earn arbitrage profits, the more market makers will seek to be compensated by maintaining wider bid-ask spreads and larger premiums/discounts to underlying NAV.

In ETMF trading, by contrast, a market maker takes on no intraday market risk in its Share inventory positions because all transaction prices are based on the ETMF’s end-of-day NAV. Whether an ETMF’s underlying value goes up or down over the course of a trading day will not affect how much profit a market maker earns by selling (or buying) Shares in the market at a net premium (discount) to NAV, and then purchasing (redeeming) an offsetting number of Shares at the end of the day in transactions with the ETMF. No intraday market risk means no requirement for intraday hedging, and therefore no associated requirement to know the current composition of the Portfolio’s non-Basket holdings.

The arbitrage that connects ETMF market prices to NAV is effected at the end of each trading day when a market maker or other arbitrageur purchases (or redeems) Creation Units of Shares through an Authorized Participant to offset the net amount of Shares it has sold (bought) over the course of the trading day, and buys (sells) the quantity of Basket securities corresponding to the number of Creation Units purchased (redeemed). An ETMF market maker who purchases (or redeems) a Creation Unit at the end of a trading day to offset its net intraday sales (purchases) of a Creation Unit quantity of Shares will earn arbitrage profits to the extent

19 Market makers can offload accumulated short positions in ETF shares and long positions in the underlying securities (or long positions in ETF shares and short positions in the underlying securities) by transacting with the ETF through an Authorized Participant to purchase (redeem) Creation Units of shares at the end of each Business Day. A market maker who purchases (or redeems) a Creation Unit of an ETF at the end of a Business Day to offset its net sales (purchases) of a Creation Unit quantity of shares will earn arbitrage profits to the extent that it either sells (buys) the ETF shares at an aggregate premium (discount) to their then-current values or buys (sells) a Creation Unit-equivalent quantity of the underlying securities at an aggregate discount (premium) to their respective corresponding values, and the net amount of ETF premium (discount) plus portfolio securities discount (premium) exceeds the transaction fee applied by the ETF to a creation (redemption) of a Creation Unit.

20 For example, the hedge portfolio for a large-cap domestic equity ETF may be the S&P 500 Index. An ETF market maker using the S&P 500 at its hedge portfolio would transact in S&P 500 index futures, S&P 500 index ETFs, underlying S&P 500 stocks or other S&P 500-linked market instruments to implement intraday changes in its hedge position as it transacts in ETF shares.
that it either sells (buys) Shares at an aggregate premium (discount) to NAV or buys (sells) a Creation Unit-equivalent quantity of Basket securities at an aggregate discount (premium) to their end-of-day values, and the net amount of ETMF premium (discount) plus Basket securities discount (premium) exceeds the Transaction Fee that applies to a purchase (redemption) of a Creation Unit.21

Different from ETFs trading in conventional intraday markets, ETMFs offer market makers an arbitrage profit opportunity that does not depend on either corresponding intraday adjustments in ETF and portfolio securities positions or the use of a hedge portfolio to manage intraday market risk. ETMF market makers need not transact in portfolio securities at times and in quantities corresponding to their transactions in ETF shares or, alternatively, expose themselves to the costs and risks of hedging their intraday ETF positions through transactions in a hedge portfolio that may vary in performance from the ETF itself. A “perfect arbitrage” in an ETMF requires only that market makers holding short (or long) positions in Shares accumulated intraday transact with the ETMF to purchase (redeem) a corresponding number of Creation Units of Shares, buy (sell) the equivalent quantities of Basket securities at market-closing or better prices, and offload any remaining sub-Creation Unit Share inventory through market transactions prior to the close.22

Because the arbitrage mechanism that underlies ETMF trading is simpler, more reliable and exposes market makers to less risk than conventional ETF arbitrage, market makers should require less profit inducement to establish and maintain markets in ETMF Shares than in similarly constituted ETFs, thereby enabling ETMFs to routinely trade at smaller premiums/discounts and narrower bid-ask spreads. Further, because the arbitrage mechanism that underlies efficient trading of ETMFs does not involve non-Basket securities, the need for full portfolio transparency to achieve tight markets in Shares is eliminated.

21 The arbitrage mechanism is simplified for cash creations and redemptions. An ETMF market maker who purchases (or redeems) a Creation Unit in cash to offset its net intraday sales (purchases) of a Creation Unit quantity of Shares will earn arbitrage profits to the extent that it sells (buys) Shares in the secondary market at an aggregate premium (discount) to NAV that exceeds the Transaction Fee that applies to a cash creation (redemption) of a Creation Unit.

22 ETMF market makers are expected generally to seek to minimize their exposure to price risk in Shares by holding little or no overnight inventory. Eaton Vance believes that establishing Creation Unit sizes for ETMFs that are somewhat smaller (i.e., in a range of 5,000 to 50,000 Shares) than is customary for ETFs will support efficient arbitrage between an ETMF’s market trading prices and NAV by facilitating tighter market maker inventory management. To the extent that market makers hold small positions in Shares overnight, they are expected to aggregate such holdings with other risk positions and transact at or near the market close to buy or sell offsetting positions in appropriate, broad-based hedging instruments, such as S&P 500 and other index futures and ETFs. Such hedging of overnight inventory risk on a macro basis does not require disclosure of non-Basket Portfolio Holdings.
D. Portfolio Holdings Disclosure

ETMFs will not make their full Portfolio Holdings available on a daily basis. Rather, like traditional mutual funds, ETMFs will disclose their holdings only at periodic intervals, and with a lag. All ETMFs will disclose their holdings in full at least once quarterly, with a lag of not more than 60 days. Similar to mutual fund industry practices, ETMFs may provide public disclosure of their holdings more frequently and with shorter than the maximum allowable delay (such as monthly with a 30-day lag).

As described above, the arbitrage mechanism that connects market trading prices of Shares to NAV in NAV-Based Trading does not require contemporaneous disclosure of Portfolio Holdings to function effectively. Because disclosing holdings in real-time can facilitate front-running of portfolio trades and enable copycat investors to replicate a fund’s portfolio positioning, active managers have to date largely avoided the transparent ETF model. By removing the requirement for portfolio transparency, ETMFs have the potential to provide investors with access to a broad range of active strategies in a structure that provides the cost and tax efficiencies and shareholder protections of an exchange-traded fund.

E. Purchases and Redemptions of Creation Units

1. Timing

The Trust will issue and redeem Shares of ETMFs in Creation Units through the Distributor each Business Day at the NAV per Share next determined after an order in proper form is received. Validly submitted orders to purchase or redeem Creation Units on each Business Day will be accepted until the NYSE market close (the “Order Cut-Off Time”), generally 4:00 p.m. ET, on the Business Day that the order is placed (the “Transmittal Date”). All orders must be received by the Distributor no later than the Order Cut-Off Time in order to receive the NAV determined on the Transmittal Date.

For custom orders (as defined below), the Distributor may require that the order be received no later than one hour prior to Order Cut-Off Time. When the Listing Exchange or bond markets close earlier than normal, an ETMF may require orders for Creation Units to be placed earlier in the Business Day. Orders to purchase Shares of ETMFs invested in fixed-income instruments may not be accepted on any day when the bond markets are closed.

2. Payment

To keep trading costs low and enable a fund to be as fully invested as possible, Creation Units will generally be issued and redeemed primarily on an in-kind basis for most types of ETMFs. Creation and redemptions may be effected entirely in cash for ETMFs for which in-kind delivery of Portfolio Holdings is not practicable or deemed not in the best interests of shareholders.

Subject to certain exceptions described below, Creation Units of an ETMF will be purchased by making a deposit of the securities and/or cash specified by the ETMF (“Deposit...
Instruments”), and shareholders redeeming Creation Units will receive a transfer of the securities and/or cash specified by the ETMF (“Redemption Instruments”). On any given Business Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments are expected to be identical. To the extent there is a difference between the NAV of a Creation Unit and the aggregate market value of the Basket exchanged for the Creation Unit, the party conveying the lower value will pay to the other an amount in cash equal to that difference (the “Balancing Amount”).

To preserve the confidentiality of an ETMF’s trading activities, Applicants anticipate that the Basket will normally not be a pro rata slice of the Portfolio. Rather, securities being acquired will generally be excluded from the Basket until their purchase is completed and securities being sold may not be removed from the Basket until the sale program is substantially completed. When deemed by the Adviser to be in the best interest of an ETMF and its shareholders, other Portfolio Holdings may be excluded from the Basket. Whenever Portfolio Holdings are excluded from the Basket, the Basket may include proportionately more cash than is in the Portfolio, with such additional cash substituting for the excluded Portfolio Holdings.

An ETMF may permit an Authorized Participant to deposit or receive, as applicable, cash in lieu of some or all of the Basket securities, solely because: (a) such securities are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (b) such securities are not eligible for trading by the Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (c) a holder of Shares of an ETMF investing in foreign securities would be subject to unfavorable income tax treatment if the holder received redemption proceeds in kind. No other Basket substitutions will be permitted.

In addition, an ETMF that normally issues and redeems Creation Units in kind may require purchases and redemptions to be made entirely on a cash basis. In such an instance, the ETMF will announce, before the open of trading on a given Business Day, that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash. An

23 The Deposit Instruments and the Redemption Instruments are herein referred to generically as the “Basket” (as defined above). ETMFs must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the securities included as Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act. In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, ETMFs must comply with the conditions of rule 144A.

24 Orders including cash in lieu of Basket securities pursuant to this paragraph are “custom orders.”

25 In determining whether an ETMF will issue or redeem Creation Units entirely on a cash or in-kind basis (whether for a given day or a given order), the key consideration will be the benefit that would accrue to the ETMF and its investors. For instance, in bond transactions, the Adviser may be able to obtain better execution than Share purchasers because of the Adviser’s size, experience and potentially stronger relationships in the fixed-income markets. Purchases of Creation Units either on an all-cash basis or in kind are expected to be neutral to the ETMFs from a tax perspective. In contrast, cash redemptions typically require selling Portfolio Holdings, which may result in adverse tax consequences for the remaining ETMF shareholders that would not occur with an in-kind redemption. As a result, tax considerations may warrant use of in-kind redemptions.
ETMF may also determine, upon receiving a purchase or redemption order from an Authorized Participant, to require the purchase or redemption, as applicable, to be made entirely in cash.

Each Business Day, before the open of trading on the Listing Exchange, the Adviser will cause the Basket, including the names and quantities of the securities and other instruments in the Basket and the estimated Balancing Amount,\textsuperscript{26} for that day to be disseminated through the National Securities Clearing Corporation (“NSCC”), a clearing agency registered with the Commission and affiliated with DTC.\textsuperscript{27} The published Basket will apply until a new Basket is announced, and there will be no intra-day changes to the Basket except to correct errors in the published Basket. The Adviser will also make available on a daily basis information about the previous day’s Balancing Amount.

3. Authorized Participants

All orders to purchase or redeem Creation Units must be placed with the Distributor by or through an “Authorized Participant,” which is either: (a) a “participating party,” (i.e., a Broker or other participant in the Continuous Net Settlement (“CNS”) System of the NSCC) or (b) a DTC Participant, which in any case has executed an agreement with the Distributor (“Participant Agreement”). An investor does not have to be an Authorized Participant to transact in Creation Units, but must place an order through and make appropriate arrangements with an Authorized Participant.

4. Clearance and Settlement

Orders for purchases and redemptions of Creation Units will be processed either through an enhanced clearing process or through a manual clearing process. The NSCC/CNS system for effecting in-kind purchases and redemptions of ETFs investing in domestic securities (the “NSCC Process”) is expected to be available for ETMFs as well. The NSCC Process simplifies the transfer of a basket of securities between two parties by treating all of the securities that constitute the basket as a single unit.

There are limitations on investors’ ability to use the NSCC Process. First, it is available only to those DTC Participants that also are participants in the CNS System of the NSCC. Other DTC Participants must use a manual clearing process (the “DTC Process”), involving a line-by-

\textsuperscript{26} Applicants expect the same information to be provided through the ETMF’s Listing Exchange each Business Day prior to the opening of trading in Shares.

\textsuperscript{27} Personnel of the Adviser and any Subadviser who are responsible for the designation and dissemination of the Basket will be prohibited from communicating any changes in the Basket to other personnel within their organizations, any affiliates, or other unauthorized individuals or organizations until after such changes have been disseminated through NSCC. In reviewing the policies and procedures of any Subadviser pursuant to Rule 38a-1 under the Act, Applicants will seek to ensure that they are consistent with the foregoing. In addition, the Adviser, any Subadviser and the Distributor will each have adopted a code of ethics as required by Rule 17j-1 under the Act that contains provisions reasonably necessary to prevent Access Persons (as defined in Rule 17j-1) from engaging in any conduct prohibited in Rule 17j-1. The Adviser and any Subadviser, as required under section 204A of the Advisers Act, will also have adopted policies and procedures that are reasonably designed, taking into account the nature of its business, to prevent the misuse, in violation of the Advisers Act or the Exchange Act or the rules or regulations thereunder, of material non-public information by the Adviser, the Subadviser or any associated person.
line movement of each securities position, which is available to all DTC Participants. Because the DTC Process involves the movement of securities individually, while the NSCC Process can act on instructions regarding the movement of one unitary basket that automatically processes the movement of multiple securities, DTC may charge an ETMF more than NSCC to settle purchases and/or redemptions of Creation Units.

Further, the NSCC Process is generally only available for transactions involving domestic equity securities. Thus, it may only be used in connection with in-kind transactions for Creation Units of ETMFs that include only domestic equity securities in their Basket.

Orders for purchases and redemptions of Creation Units of ETMFs that invest in foreign securities and include foreign securities in their Basket (“Global ETMFs”) will not go through either the NSCC Process or the DTC Process. Rather, such transactions will go through the ETMF’s custodian and sub-custodian network. Once a creation order for such an ETMF has been placed with the Distributor, the Distributor will inform the Adviser and the ETMF’s custodian. The custodian will then inform the appropriate sub-custodians. In connection with a creation, the Authorized Participant will deliver to the appropriate sub-custodians, on behalf of itself or the Beneficial Owner on whose behalf it is acting, the Basket securities and cash as determined according to the procedures described above. The sub-custodians will confirm to the custodian that the purchase consideration has been delivered, and the custodian will notify the Adviser and Distributor of the delivery. After Shares have been instructed to be delivered, the Distributor will furnish the purchaser with a confirmation and a prospectus (if necessary). For a redemption, the same process proceeds in reverse.

In-kind transactions in Creation Units of ETMFs that invest in fixed-income instruments will generally clear and settle in the same manner as transactions in fixed-income ETFs. Basket securities that are U.S. government or U.S. agency securities and any cash will settle via free delivery through the Federal Reserve System. Non-U.S. fixed-income securities will settle in accordance with the normal rules for settlement of such securities in the applicable non-U.S. market. Shares will settle through DTC. The custodian will monitor the movement of the underlying Basket securities and cash and will instruct the movement of Shares only upon validation that such securities and cash have settled correctly. The settlement of Shares will be aligned with the settlement of the underlying Basket and, except as discussed below with respect to Basket securities traded in foreign markets, will generally occur no later than the third Business Day following the day on which an order is deemed received by the Distributor.

Applicants do not believe that the issuance and settlement of Creation Units in any of the manners described above will have a material negative impact on the arbitrage efficiency or the secondary market trading of Shares.

5. Delivery

The Distributor will transmit all purchase orders received from Authorized Participants to the relevant ETMF. After an ETMF has accepted a purchase order and received delivery of the purchase consideration, NSCC or DTC, as applicable, will instruct the ETMF to initiate delivery of the appropriate number of Shares to the book-entry account specified by the Authorized Participant. Delivery of Creation Units by the ETMF is expected to occur within the normal

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settlement cycle, currently no later than the third Business Day following the day on which an order is deemed to be received by the Distributor. The Distributor will issue or cause the issuance of confirmations of acceptance, will be responsible for delivering a prospectus to persons purchasing Creation Units, and will maintain records of both the orders placed with it and the confirmations of acceptance furnished by it.

Shares will not normally be issued until after the transfer to the ETMF of good title to the purchase consideration. To the extent contemplated by the relevant Participant Agreement, however, Shares may be issued to an Authorized Participant notwithstanding the fact that the purchase consideration has not been received, in part or in whole, by the ETMF in reliance on an undertaking by the Authorized Participant to deliver the missing portion as soon as possible, with the undertaking secured by the Authorized Participant’s delivery and maintenance of collateral acceptable to the ETMF. The Participant Agreement will permit the ETMF to buy any missing Basket securities at any time and will subject the Authorized Participant to liability for any shortfall between the cost to the ETMF of purchasing such securities and the value of the collateral.

All requests for redemption must be preceded or accompanied by the requisite number of Shares of the relevant ETMF, which delivery will generally be made through the DTC Process. Additional information on redemption processes will be provided in the Participant Agreement.

6. Transaction Fees

All persons purchasing or redeeming Creation Units are expected to incur a Transaction Fee to cover the estimated cost to the ETMF of processing the transaction, including the costs charged to it by NSCC or DTC, and the estimated trading costs incurred in converting the Basket to the desired portfolio composition. Transaction Fees will be borne only by purchasers and redeemers of Creation Units and will be limited to amounts that have been authorized by the Board and determined by the Adviser to be appropriate to defray the expenses that the ETMF incurs when an investor purchases or redeems Creation Units.28 The purpose of Transaction Fees is to protect an ETMF’s existing shareholders from the dilutive costs associated with the purchase and redemption of Creation Units. Transaction Fees will differ among ETMFs and may vary over time for an ETMF, depending on the estimated trading costs related to a particular ETMF’s Portfolio Holdings and Basket, processing costs and other considerations. Transaction Fees may include fixed amounts per creation or redemption event, amounts varying with the number of Creation Units purchased or redeemed, and amounts varying based on the time an order is placed. ETMFs that permit the substitution of cash for Basket securities may impose higher Transactions Fees on the substituted cash amount. In addition, investors purchasing or redeeming through the DTC Process may pay a higher Transaction Fee than investors using the NSCC Process because Applicants expect DTC generally to charge ETMFs more than NSCC in connection with Creation Unit transactions.

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28 In all cases, the Transaction Fees will be limited in accordance with the requirements of the Commission applicable to open-end management investment companies offering redeemable securities.
Sales charges (or loads) will not be imposed by any ETMF on purchases or redemptions of Creation Units or secondary market transactions in Shares. Investors purchasing or selling Shares in the secondary market may incur customary brokerage commissions, fees and expenses.

7. Order Rejection

An ETMF and/or the Distributor may reject any order that is not in proper form. Further, an ETMF may reject a purchase order transmitted to it by the Distributor if, for example:

(a) the purchaser or group of related purchasers, upon obtaining the Creation Units, would own 80% or more of the outstanding Shares of such ETMF;

(b) the acceptance of the purchase consideration would have certain adverse tax consequences, such as causing the ETMF to no longer meet the requirements of a RIC under the Code;

(c) the acceptance of the purchase consideration would, in the opinion of the Trust, be unlawful, as in the case of a purchaser who is banned from trading in securities;

(d) the acceptance of the purchase consideration would otherwise, in the discretion of the Trust or the Adviser, have an adverse effect on the Trust or on the rights of Beneficial Owners; or

(e) there exist circumstances outside the control of the ETMF that make it impossible to process purchases of Creation Units for all practical purposes. Examples of such circumstances include: acts of God or public service or utility problems such as fires, floods, extreme weather conditions and power outages resulting in telephone, telecopy and computer failures; market conditions or activities causing trading halts; systems failures involving computer or other information systems affecting the ETMF, the Adviser, the transfer agent, the custodian, the Distributor, DTC, NSCC or any other participant in the purchase process; and similar extraordinary events.

F. ETMF Investors

1. Creation Unit Investors

Applicants believe that there will be several types of market participants interested in buying and redeeming Creation Units of Shares:

- market makers and other arbitrageurs who seek to earn arbitrage profits by selling (and buying) Shares in the secondary market at a net premium (discount) to NAV, and then purchasing (redeeming) an offsetting number of Creation Units of Shares;

- Authorized Participants who purchase and redeem Creation Units in fulfilling such function; and

- institutional investors who transact in Creation Units to gain exposure to a particular ETMF's investment strategy and choose to invest directly in the ETMF, rather than acquiring Shares on the secondary market.
2. Secondary Market Investors

Applicants expect that secondary market purchasers of Shares will consist primarily of investors seeking access to a particular ETMF’s investment strategy who are attracted to the potential cost, performance and tax efficiency advantages of the ETMF structure. By removing the requirement for Portfolio Holdings transparency, Applicants expect the ETMF structure to significantly expand the range of active strategies that are available in an exchange-traded format.

G. Intraday Indicative Values

The Trust will arrange for the continuous calculation by an independent third party and publication throughout the regular trading session of the Listing Exchange (generally 9:30 a.m. to 4:00 p.m. ET) each Business Day of the IIV of each ETMF’s Shares.\(^\text{29}\) IIVs will be disseminated at intervals of not more than 15 minutes, which differs from the 15-second intervals at which the IIVs of ETFs are normally disseminated. Unlike for ETFs, ETMF IIVs do not provide information useful in determining whether a current purchase or sale of Shares would occur at a premium or discount to the ETMF’s underlying value. In NAV-Based Trading, the relationship of market trading prices of Shares to NAV is explicit (e.g., NAV+$0.01, NAV-$0.02) and may be controlled using limit orders.

The sole purpose of IIVs in the context of ETMFs is to help investors determine the number of Shares to buy or sell if they want to transact in an approximate dollar amount (i.e., if I want to acquire approximately $5,000 of an ETMF, how many Shares do I buy?). For this purpose, Applicants believe that dissemination of IIVs every 15 minutes is sufficient. More frequent IIV dissemination may increase fund costs without apparent benefit and could focus unwarranted investor attention on these disclosures. Moreover, for certain strategies, more frequent IIV disclosures could provide unintended information about current Portfolio trading activity to market participants who possess the requisite analytical capabilities, computational power and motivation to reverse engineer the Portfolio Holdings.\(^\text{30}\)

\(^{29}\) Neither the Trust nor any ETMF will be involved in, or responsible for, the calculation or dissemination of any such amount and will make no warranty as to its accuracy.

\(^{30}\) The potential for market participants to use publicly disseminated IIVs to determine a fund’s Portfolio Holdings (and to identify day to day changes in holdings) through data analysis has long been understood to be at least theoretically possible. In practice, the risk of information leakage increases as the frequency and precision of a fund’s IIV disclosures increase and as the number of Portfolio Holdings and the number of potential investments eligible for inclusion in the Portfolio diminish. Research conducted by Applicants confirms that IIV dissemination at 15-minute intervals (26 data points per day) presents no risk of inadvertent Portfolio Holdings disclosure for any ETMF investment strategy being contemplated. Dissemination of precisely calculated IIVs at 15-second intervals (1560 data points per day) may introduce reverse engineering risk for certain fund strategies, particularly those with concentrated Portfolios or constrained investment opportunity sets.
Applicants will seek to ensure that ETMF investors understand the purpose of disseminating ETMF IIVs and how to use them to size secondary market purchases of Shares. Applicants believe that the different frequency of IIV dissemination for ETFs and ETMFs will help reinforce for investors that the IIV serves a different purpose for the respective products. As discussed below, Applicants will engage in a concerted campaign to educate investors about ETMFs, including the role IIVs play in buying and selling Shares.

H. Buying and Selling Shares

The process of buying and selling Shares will be similar in most respects to that used in buying and selling shares of ETFs and other exchange-traded securities. An investor will first need to determine the number of Shares to buy or sell. Like the purchase or sale of other exchange-traded securities, this normally involves a simple math exercise—dividing the intended dollar amount of the purchase or sale by the estimated price. For an ETMF, the transaction price can be estimated as the sum of the most recent IIV and the current bid (for sales) or offer (for purchases). If, for example, an investor seeks to buy approximately $5,000 of an ETMF whose current IIV is $19.98 and whose current offer price is NAV+$0.02, he or she should place an order to buy 250 shares (=5,000÷20.00).

Entering orders to buy and sell ETMFs will take place in the customary manner. The only significant difference versus entering traditional orders is that price limits for limit orders are expressed relative to NAV (e.g., NAV+$0.01, NAV-$0.02), rather than as an absolute dollar price. When a retail ETMF order is submitted electronically, the investor will receive a reminder of the principal distinctions of investing in ETMFs and be required to acknowledge that the investor has read and understood this information before the order is finalized.

Once finalized, an ETMF order will be transmitted by the investor’s Broker to the Exchange to be matched against the best current offer (for a purchase) or best current bid (for a sale) for execution. An order execution will be binding on both buyer and seller at the time their orders are matched on the Exchange. A notice of order execution will be issued by the Exchange to the trading parties contemporaneous with trade execution, stating the transaction price by reference to the to-be-determined NAV. After the Exchange receives the relevant ETMF’s NAV at the end of the day, it will: (a) price each trade in Shares at the executed premium or discount to NAV; (b) provide trade confirmations with final prices to the trading parties; and (c) deliver the trades to the NSCC for clearance and settlement. The parties to the trade will issue notices of order execution and trade confirmations to their customers upon receipt of trade information from the Exchange.

For investors, the only unusual aspect of the reporting, clearance and settlement of ETMF trades will be that, rather than receiving a single trade confirmation, they will receive both a notice of order execution—provided upon trade execution and reflecting the number of shares bought or sold and the executed premium/discount to NAV—and a final confirmation—provided at the end of the day after NAV is computed and including final pricing information.

31 Prior to the launch of ETMFs, the Listing Exchange and Brokers will have installed systems for the entry of orders to buy and sell Shares using NAV-Based Trading.
I. Investor Education and Market Information

The Applicants understand the importance of establishing and maintaining a robust education program to support the launch of ETMFs. To seek to ensure that potential investors adequately understand ETMFs, the Adviser will undertake to educate the marketplace about the features, potential benefits and risks of investing in ETMFs. In particular, the Adviser will seek to focus investors’ attention on the key distinctions of ETMF investing, which include:

- how to buy and sell ETMFs (see Section III.H above);
- the role of IIVs in ETMF trading (see Section III.G above);
- the Portfolio disclosure policies of ETMFs and understanding that the current Basket is not a proxy for the Portfolio (see Sections III.D and III.E.2 above); and
- the contingent pricing aspect of NAV-Based Trading.

Like mutual funds, ETMFs will not offer investors the opportunity to buy and sell intraday based on a current (versus end-of-day) determination of a Share’s value. Although limit orders may be used to control the premium or discount to NAV at which transactions in Shares are executed, limit orders cannot be used to control or limit trade execution prices based on changes in an ETMF’s NAV, which will be determined at the end of the Business Day.

Most of the fund information available for ETMFs, and the means for communicating such information to the marketplace, will be substantially similar to what fund sponsors now provide for mutual funds and ETFs. The Adviser will maintain a public website disclosing current fund information and containing links to current fund documents, including a fact sheet, summary and full prospectuses, statement of additional information (“SAI”) and shareholder reports. The website will also contain, on a per Share basis for each ETMF, the prior Business Day’s NAV, the Bid/Ask Price, and a calculation of the premium or discount of the Bid/Ask Price against such NAV. The “Bid/Ask Price” is the midpoint of the highest NAV-based bid and the lowest NAV-based offer on the Listing Exchange as of the time of calculation of the ETMF’s NAV. Each of the special aspects of investing in ETMFs will be explained in detail in the educational materials available on the website, addressed in point-of-sale trade verification disclosures, and disclosed in fund prospectuses and summary prospectuses, other fund disclosure documents and advertising or marketing materials.

Current NAV-Based Prices, best bids and offers for Shares, volume of Shares traded and other intraday trading information customarily available for exchange-traded securities will be continuously available for ETMFs on a real-time basis throughout each Business Day on Brokers’ computer terminals and through established electronic market data services. Such information may be accessed using the ETMF’s ticker symbol. As discussed above, the Trust will also arrange for the calculation and publication of IIVs for each ETMF throughout each Business Day.

The key difference in the intraday market trading information available for ETMFs versus ETFs is that ETMF prices will be expressed by reference to the next-determined
NAV (e.g., “NAV+$0.01” or “N+$0.01”). Representing ETMF prices in this manner will make it clear to market participants that bids, offers and execution prices for ETMFs are based on a stated premium or discount to a future NAV, and that final transaction prices are determined when the reference NAV is computed.

Each ETMF’s registration statement, website and any advertising or marketing materials will include prominent disclosure that:

- trading prices of Shares are linked to the ETMF’s next-computed NAV and will vary from NAV by a market-determined premium or discount, which may be zero;
- trading prices of Shares may be above, at or below NAV, and may vary significantly from anticipated levels;
- trading in Shares does not offer the opportunity to transact intraday based on current (versus end-of-day) determinations of the Shares’ value;
- although limit orders can be used to control differences in trade price versus NAV (cost of trade execution), they cannot be used to control or limit trade execution prices;
- individual Shares may only be purchased and sold on an Exchange through a Broker and may not be purchased or redeemed directly from an ETMF;
- Shares may be purchased or redeemed in transactions directly with an ETMF only in Creation Unit quantities by or through Authorized Participants;
- there can be no guarantee that an active trading market for Shares will develop or be maintained, or that their listing will continue or remain unchanged;
- the Basket is not intended to be representative of current Portfolio Holdings and may vary significantly from the Portfolio;
- buying and selling Shares on the Exchange may require the payment of brokerage commissions and expose the buyer or seller to other transaction costs;
- due to brokerage commissions and other transaction costs that may apply, frequent trading may detract from realized investment returns; and
- an investor’s realized returns will be reduced if the investor sells Shares at a greater discount or narrower premium to NAV than he or she acquired the Shares.

No ETMF will be marketed or held out as an open-end investment company or mutual fund. To that end, the description of ETMFs in all marketing materials will be limited to the terms “exchange-traded managed fund,” “investment company,” “fund” and “trust,” without reference to an ETMF being an “open-end fund” or a “mutual fund.”
J. Delivery of Disclosure Documents

Section 5(b)(2) of the Securities Act makes it unlawful to carry or cause to be carried through interstate commerce any security for the purpose of sale or delivery after sale unless accompanied or preceded by a statutory prospectus. Although section 4(3) of the Securities Act excepts certain transactions by dealers from the provisions of section 5 of the Securities Act, section 24(d) of the Act disallows such exemption for transactions in redeemable securities issued by a UIT or an open-end management company if any other security of the same class is currently being offered or sold by the issuer, or by or through an underwriter, in a public distribution. Because Creation Units will be redeemable, will be issued by an open-end management company and will be continually in distribution, the provisions cited above require the delivery of a statutory prospectus on or before the time of the confirmation of each secondary market sale involving a dealer.

The Distributor will coordinate the production and distribution of ETMF prospectuses and summary prospectuses to Brokers. It will be the responsibility of Brokers selling Shares in the secondary market to provide a prospectus or summary prospectus to secondary market purchasers. The ETMFs will provide semi-annual and annual reports to DTC Participants for distribution to Beneficial Owners through the standard processes at DTC.

IV. REQUEST FOR ETMF RELIEF

A. In Support of ETMF Relief

The ETMF Relief is requested pursuant to sections 6(c) and 17(b) of the Act. Section 6(c) provides that the Commission may exempt any person, security or transaction or any class of persons, securities or transactions from any provision of the Act:

if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act].

Section 17(b) provides that the Commission will grant an exemption from the provisions of section 17(a) if evidence establishes that the terms of the proposed transaction are reasonable and fair, including the consideration to be paid or received, and do not involve overreaching on the part of any person concerned, that the proposed transaction is consistent with the policy of each registered investment company concerned and that the proposed transaction is consistent with the general purposes of the Act.

Applicants believe that the proposed ETMF structure offers significant advantages over both traditional mutual funds and fully transparent ETFs as a delivery vehicle for active investment strategies. Applicants further believe that all transactions conducted between affiliates in the ETMF structure will be on terms that are reasonable and fair, including in terms of the consideration paid or received by ETMFs, and will not involve overreaching. Therefore, Applicants contend that ETMFs warrant the relief requested under sections 6(c) and 17(b).
Relative to traditional mutual funds, the ETMF structure offers the potential advantages of:

- **Protecting fund shareholders from the dilutive effects of other shareholders’ transactions.** A near-universal characteristic of mutual funds is that the costs of accommodating shareholder inflows and outflows are borne principally by a mutual fund’s continuing shareholders, rather than being isolated to purchasing and redeeming shareholders.\(^{32}\) The costs of accommodating shareholder flows have two main components: (a) the trading costs (commissions plus market impact) incurred by the fund in connection with securities transactions to resize its portfolio positions in response to growth or shrinkage in fund shares outstanding (“flow-related trading costs”) and (b) the foregone returns on portfolio cash held for flow-related reasons (“cash drag”).\(^{33}\) Taken together, flow-related trading costs and cash drag can significantly detract from fund performance.\(^{34}\) In the ETMF structure, flow-related fund costs will be substantially offset by imposing Transaction Fees on each creation and redemption of Shares, sized to cover the estimated cost to the ETMF of processing the transaction and converting the Basket to the desired portfolio composition.

- **Protecting fund shareholders from tax realizations in connection with other shareholders’ transactions.** A well-recognized adverse tax effect of mutual fund investing is that a fund’s sales of appreciated securities to raise cash to meet redemptions can trigger capital gains realizations for the fund’s nonredeeming shareholders. Like ETFs, ETMFs that utilize in-kind distributions of securities to meet redemptions could largely avoid this adverse tax effect. Section 852(b)(6) of the Code provides that a fund’s distributions of appreciated property to meet shareholder redemption requests do not result in recognition by the fund of capital gains on the distributed property. ETMFs utilizing in-kind redemptions are designed to take advantage of this Code provision and seek to achieve similar levels of tax efficiency as ETFs.

- **Realizing savings in shareholder servicing and other fund expenses.** One of the largest categories of ongoing operating expenses of retail mutual funds is transfer agency expenses—the cost of maintaining shareholder accounts and processing shareholder transactions. For most broadly held mutual funds, transfer agency costs are the largest expense other than investment advisory and distribution fees. According to a 2011 mutual fund industry survey,\(^ {35}\)

\(^{32}\) Redemption fees and, less commonly, purchase fees are imposed on transacting shareholders by some mutual funds to counteract the negative effects on fund performance of purchases and redemptions of fund shares and to discourage excessive trading in fund shares. Redemption fees that are imposed by funds typically apply only to shares redeemed within a short period (e.g., 90 days) after purchase.

\(^{33}\) Rather than staying fully invested at all times (i.e., buying corresponding amounts of portfolio securities in response to net inflows and selling corresponding amounts in response to net outflows), many fund managers choose to maintain cash holdings as a buffer against flow-related trading and the associated transaction costs. Holding flow-related cash hurts portfolio returns to the extent that the performance of the fund’s investment strategy exceeds cash returns on the portion of the fund’s net assets held uninvested for flow-related reasons.

\(^{34}\) The most comprehensive academic study of mutual fund trading costs found that investors in a broad sample of U.S. equity mutual funds incurred average flow-related trading costs of approximately 75 basis points (0.75%) per year over the 1995-2005 study period. See Edelen, Roger M., Richard Evans and Gregory B. Kadlec, “Scale Effects in Mutual Fund Performance: The Role of Trading Costs,” Unpublished Working Paper, March 17, 2007.

transfer agency costs averaged 19 basis points (0.19%) for retail mutual funds and 8 basis points (0.08%) for institutional mutual funds. Like ETFs, ETMFs would typically have very low transfer agency costs, generally less than 1 basis point (0.01%) of net assets annually. Different from conventional mutual funds, ETFs and ETMFs utilize the efficient DTC share settlement system.\textsuperscript{36}

In addition to transfer agency cost savings, ETMFs may also realize savings versus similarly constituted mutual funds in terms of custody costs—due to less flow-related securities trading—and registration fees—because of the single-class structure.

- **Enhancing the competitiveness of fund distribution.** In contrast to the fixed commission and distribution fee structure of mutual funds, the exchange-based distribution model of ETMFs will position Brokers to compete increasingly based on the prices they charge for services. In this regard, the ETMF structure comports with the July 2010 proposal by the Commission to amend rule 6c-10 under the Act. As proposed, rule 6c-10 would grant funds an exemption from section 22(d) of the Act to permit them to offer their shares to the public at a price other than the current public offering price stated in their prospectus, thereby promoting greater price competition in the fund market.\textsuperscript{37} Specifically, the change proposed under rule 6c-10 would allow Brokers to determine their own sales charges and servicing compensation and to compete for investors on the basis of such charges and servicing.\textsuperscript{38} Inasmuch as the exchange-based trading proposed for Shares would do the same thing—\textit{i.e.}, foster price competition among Brokers selling Shares—it would advance the Commission’s agenda with respect to mutual fund distribution practices.

- **Simplifying fund ownership and enhancing investor convenience.** Among the attractive features of ETFs are the simplicity of their structure—a single class of shares with no fund-imposed sales loads—and the convenience of owning them. ETFs of various sponsors can readily be held in a single brokerage account consolidated with direct holdings of securities and other investments. They are also freely transferable across accounts of different Beneficial Owners and among accounts held at different Brokers. ETMFs would share these simple and desirable characteristics.

Relative to fully transparent actively managed ETFs, the ETMF structure offers the potential advantages of:

- **Maintaining the confidentiality of portfolio trading activity.** The most controversial aspect of actively managed ETFs as approved by the Commission since 2008 is the requirement that they publicly disclose their full portfolio holdings as of the close of each Business Day prior to the market open on the next Business Day. The arbitrage mechanism that connects market

\textsuperscript{36} ETFs and ETMFs can take advantage of the DTC share settlement system because their shares are bought, sold and held like stocks through brokerage accounts.

\textsuperscript{37} See Mutual Fund Distribution Fees; Confirmations, Investment Company Act Release No. 29367, July 21, 2010 (\textit{“Proposal”}).

\textsuperscript{38} See Proposal at 86, 90-94.
prices of a conventionally traded ETF to its NAV requires market makers to know the composition of the ETF’s current holdings. But providing next-morning disclosure of portfolio holdings can invite profit-seeking traders to front-run portfolio trades that may be executed over multi-day periods and copycat investors to replicate the fund’s portfolio positioning. Active managers have to date largely rejected the transparent ETF model because they believe the required portfolio disclosures are not in the best interests of either fund shareholders or managers. By removing the requirement for portfolio transparency, ETMFs could enable investors to access a broad range of active strategies in a structure that provides the cost and tax efficiencies and shareholder protections of an exchange-traded fund. As discussed herein, the arbitrage mechanism that connects ETMF market trading prices to NAV does not require disclosure of non-Basket Portfolio Holdings to function effectively.

● Providing trade execution cost transparency and quality control to fund investors. Because ETMFs will trade at prices based on their NAV, investors will be able to buy and sell Shares at a known premium or discount to NAV, which they can control by transacting with limit orders. This feature of ETMFs distinguishes them from ETFs, whose shares can only be purchased and sold in the secondary market at prices whose variance from underlying portfolio value normally is not known to individual investors and cannot be controlled by them. In conventional ETF trading, most investors cannot be confident that their secondary market purchases and sales are executed at prices that closely track the ETF’s contemporaneous underlying portfolio value and cannot accurately measure the total cost of their trade executions. Transparency of trade execution costs is, by contrast, an inherent feature of the NAV-Based Trading methodology to be employed by ETMFs.

● Facilitating tighter bid-ask spreads and narrower premiums/discounts in secondary market trading. As described in Section III.C above, NAV-Based Trading facilitates maintaining tight bid-ask spreads and narrow premiums/discounts for ETMFs by providing market makers with a simpler and more reliable arbitrage profit opportunity than available for conventionally traded ETFs. In ETMF trading, a market maker assumes no intraday market risk in its Share inventory positions because all transaction prices are based on end-of-day NAV.

39 Using limit orders to buy or sell shares of a conventional ETF can result in poor trade executions unless the transacting investor is diligent about cancelling and resetting orders as the values of the ETF’s underlying holdings change. ETF investors who use limit orders are particularly susceptible to poor trading outcomes during periods of rapid market movement. ETMF investors, by contrast, can reliably use limit orders to control their trading costs relative to NAV under all market conditions.

40 The IIVs disseminated every 15 seconds throughout each Business Day for ETFs are, generally speaking, approximations of current value. IIV calculations are normally based on most recent transaction prices of portfolio securities, rather than contemporaneous bids and offers. Therefore, the IIVs of ETFs holding securities that do not trade continuously may move at a lag. In addition, for ETFs that hold securities traded on foreign exchanges that may be closed during ETF trading hours, disseminated IIVs normally do not reflect updated fair values of the underlying securities. Similarly, IIVs for fixed income ETFs are normally based on a matrix pricing approach that may not fully capture intraday changes in value of positions held. IIV calculation agents do not guarantee, or assume liability for, the accuracy of the disseminated values and cannot, given the practical time constraints, apply the same controls as used in determining end-of-day NAVs. ETMF IIVs will generally be subject to the same or similar limitations. In the context of ETMFs, however, IIVs are not relevant to the measurement or control of trade execution costs.
ETMF market makers therefore do not need to transact in the underlying Portfolio Holdings (or a representative hedge portfolio) at times and amounts corresponding to their intraday transactions in Shares to manage their market risk exposure, as normally required in ETF market-making.

On any Business Day, an ETMF market-maker can earn arbitrage profits by entering into transactions with the ETMF to purchase (redeem) the number of Creation Units corresponding to the net amount of Shares the market maker has sold (purchased) that day in the secondary market, buying (selling) the equivalent quantities of Basket securities and offloading any sub-Creation Unit Share inventory in market transactions prior to the close. The market maker’s profit will equal the aggregate net premium (discount) versus NAV at which the Shares are sold (bought) plus the aggregate net discount (premium) versus market-closing prices at which Basket securities are bought (sold), less the Transaction Fee that applies. No intraday hedging is necessary to manage the market maker’s risk position, and any required overnight hedging can be limited to amounts readily addressable on a macro basis by the ETMF maintaining relatively small Creation Unit sizes.

Because the arbitrage mechanism that underlies ETMF trading is simpler, more reliable and exposes market makers to less risk than conventional ETF arbitrage, market makers should require less profit inducement to establish and maintain tight markets in Shares than in similarly constituted ETFs, thereby enabling ETMFs to routinely trade at smaller premiums/discounts and narrower bid-ask spreads.

For the reasons articulated above, Applicants believe that ETMFs and Shares offer significant investor benefits that cannot otherwise be realized. Applicants believe the requested Order is necessary or appropriate and in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. As such, Applicants believe the ETMF Relief satisfies the standard set by section 6(c) for the ETMF Relief requested.

In addition, the sale and redemption of Shares of any ETMF will be offered on the same terms to all investors, whether or not an affiliate. In all cases, Shares will be issued and redeemed by the ETMF in Creation Unit quantities at NAV plus or minus the Transaction Fee that applies. Except for custom orders, the Basket used in creations and redemptions of an ETMF will be the same regardless of the identity of the purchaser or redeemer, and will be valued the same in all cases. Transactions on these terms do not involve “overreaching” by an affiliated person. Accordingly, Applicants believe the proposed transactions described herein meet the section 17(b) standards for relief: that the terms of such proposed transactions, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned; the proposed transactions are consistent with the Trust’s policies and that of each ETMF as described herein; and they are consistent with the general purposes of the Act.

B. Legal Analysis of ETMF Relief

Although ETMFs have features that distinguish them from ETFs, Applicants seek the same exemptive relief from the Act as ETFs seek—from sections 2(a)(32), 5(a)(1), 17(a) and 22(d) of the Act and rule 22c-1 under the Act. In addition, as is typically requested for ETFs...
investing in foreign securities, Applicants seek relief from section 22(e) of the Act for Global ETMFs.

1. Exemption from the Provisions of Sections 2(a)(32) and 5(a)(1)

Section 5(a)(1) of the Act defines an “open-end company” as a “management company which is offering for sale or has outstanding any redeemable security of which it is the issuer.” The term “redeemable security” is defined in section 2(a)(32) of the Act as:

any security, other than short-term paper, under the terms of which the holder is, upon its presentation to the issuer or to a person designated by the issuer, ... entitled (whether absolutely or only out of surplus) to receive approximately his proportionate share of the issuer’s current net assets, or the cash equivalent thereof.

Applicants believe that the Shares could be viewed as satisfying the section 2(a)(32) definition of a redeemable security and that, consequently, the ETMFs could be viewed as satisfying the definitional requirement of an open-end company offering for sale a redeemable security of which it is the issuer because Shares are securities “under the terms of which” an owner may receive his proportionate share of the ETMFs’ current net assets. The unusual aspect of Shares is that their terms provide for a right of redemption upon presentation to the issuer only when aggregated into one or more Creation Units. Because Shares are not individually redeemable, a possible question arises as to whether the definitional requirements of a “redeemable security” and “open-end company” are met. For avoidance of doubt, Applicants request an order to permit the Trust to register as an open-end management investment company and the ETMFs to issue Shares that are redeemable in Creation Unit quantities only.

Investors may purchase Shares in Creation Unit quantities from each ETMF. Creation Units are redeemable in accordance with the provisions of the Act. Owners of Shares may purchase the requisite number of Shares and tender the resulting Creation Unit for redemption. Moreover, all holders of Shares will have the ability to buy and sell Shares throughout the day in the secondary market at market prices that are directly linked to NAV. Applicants believe that ETMFs do not present any new issues with respect to the previously granted exemptions that allow for index-based and actively managed ETFs to redeem their shares only in Creation Unit quantities.

Applicants recognize that the Commission has long viewed contemporaneous portfolio holdings disclosure as necessary for efficient secondary market trading of ETFs. In conventional ETF trading, a tight relationship between an ETF’s market trading price and its underlying portfolio value cannot be assured unless market makers have sufficient knowledge of portfolio holdings to enable them to hedge the intraday market risk they assume as they take inventory positions in connection with their market-making activities. In ETMF trading, however, a market maker assumes no intraday market risk in its Share inventory positions because all

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41 The Master Funds do not require relief from sections 2(a)(32) and 5(a)(1) because they transact in individually redeemable interests.
transaction prices are based on end-of-day NAV. No intraday market risk means no requirement for market makers to engage in intraday hedging activity, and therefore no associated requirement for current Portfolio Holdings disclosure to maintain a tight relationship between Share trading prices and NAV. Because they will provide market makers with an opportunity to earn reliable, low-risk arbitrage profits without intraday hedging, ETMFs can be expected to trade at consistently tight spreads to NAV in the absence of full holdings disclosure.

For these reasons, Applicants believe that the proposal to permit Shares to be sold and redeemed as described in this application is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Accordingly, Applicants request that the Order be granted in respect of sections 2(a)(32) and 5(a)(1).

2. Exemption from the Provisions of Section 22(d) and Rule 22c-1

Section 22(d) of the Act provides that:

no registered investment company shall sell any redeemable security issued by it to any person except to or through a principal underwriter for distribution or at a current public offering price described in the prospectus, and, if such class of security is being currently offered to the public by or through an underwriter, no principal underwriter of such security and no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at current public offering price described in the prospectus.

Rule 22c-1 under the Act provides that:

no registered investment company issuing any redeemable security, no person designated in such issuer’s prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in, any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

Shares will be sold in Creation Unit quantities through the principal underwriter to Authorized Participants (and persons transacting through Authorized Participants) at the “current public offering price as described in the prospectus,” as required by section 22(d). In addition, Shares will trade in the secondary market at the “current public offering price described in the prospectus” (i.e., NAV) or at NAV plus or minus a market-determined premium/discount. Because this pricing will be described in an ETMF’s prospectus, Applicants believe that Shares
could be deemed to comply with section 22(d) and rule 22c-1.\textsuperscript{42}

For avoidance of doubt, however, Applicants request relief from the provisions of section 22(d) and rule 22c-1 to the extent necessary to permit the trading of Shares of each ETMF on an Exchange at prices that, as described in the application, are based on the ETMF’s NAV but also reflect the bid/offer market for Shares in NAV-Based Trading.

Applicants believe that the concerns sought to be addressed by section 22(d) and rule 22c-1 with respect to pricing are equally satisfied by the proposed method of pricing Shares. While there is little legislative history regarding section 22 (d), its provisions, as well as those of rule 22c-1, appear to have been intended (a) to prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) to prevent unjust discrimination or preferential treatment among buyers and (c) to ensure an orderly system of distribution by contract dealers by eliminating price competition from non-contract dealers who could offer investors shares at less than the published sales price and who could pay investors a little more than the published redemption price.\textsuperscript{43}

The first two purposes—preventing dilution caused by riskless-trading schemes and preventing unjust discrimination among buyers—do not seem to be relevant to secondary trading by dealers in Shares. Secondary market transactions in Shares would not cause dilution of ETMFs because such transactions would not directly involve fund assets. Similarly, secondary market trading in Shares should not create unjust discrimination or preferential treatment among buyers because, to the extent market trading prices vary over the course of a given trading day or from day to day, such variances would generally reflect market forces of supply and demand, and not result from unjust or discriminatory manipulation. With respect to the third possible purpose of section 22(d)—ensuring an orderly distribution system—the Applicants note that anyone may dispose of (acquire) Shares either by selling (purchasing) them on the Exchange or by redeeming (purchasing) a Creation Unit through an Authorized Participant. Therefore, no dealer should have a material advantage over any other dealer in the sale of Shares.

In addition, as described above, the potential for market makers and other arbitrageurs to

\textsuperscript{42} Applicants believe that Shares could be deemed to satisfy the requirements of rule 22c-1 for several reasons. First, when Shares trade at NAV, relief from rule 22c-1 would seem clearly to be unnecessary as Shares would be bought and sold at precisely the same price as mutual funds currently sell their shares. Second, when Shares trade at NAV plus or minus a premium/discount, they may still be deemed to trade at a price “based on the[ir] current net asset value,” as required by rule 22c-1. (Emphasis supplied.) Third, in all instances, consistent with the spirit of rule 22c-1, all transactions in Shares, whether on the secondary market or in Creation Units, will be subject to forward pricing, which is the key policy consideration relating to relief from rule 22c-1. Fourth, Applicants do not believe that the charging of various commission rates by Brokers in connection with secondary market transactions in Shares changes the analysis under rule 22c-1. Indeed, if the imposition of a commission on a mutual fund share transaction were to require relief from rule 22c-1, the Commission presumably would have proposed an exemption from rule 22c-1 in its proposed rule 6c-10(c). Instead, the Commission merely observed that Brokers could charge a commission in connection with transactions in mutual fund shares (with respect to funds relying on rule 6c-10(c)), including redemptions, and, when discussing the relevant exemptions provided by rule 6c-10(c), did not mention rule 22c-1.

earn an arbitrage profit between NAV and the secondary market price of Shares (i.e., NAV plus or minus a premium/discount) with limited risk and full cost transparency should facilitate arbitrage activity and ensure that differences between NAV and market prices remain small. Thus, secondary market transactions in Shares should generally occur at prices roughly equivalent to their NAV. If Shares are trading on the Exchange at a discount to NAV that exceeds the cost of redeeming, an arbitrageur need only accumulate enough individual Shares to constitute a Creation Unit in order to redeem such Shares at NAV at a profit. Similarly, if Shares are trading on the Exchange at a premium to NAV that exceeds the creation cost, an arbitrageur need only purchase a Creation Unit and sell the Shares at the prevailing market price for an arbitrage profit. On the basis of the foregoing, Applicants contend that the protections intended to be afforded by section 22 (d) are adequately addressed by the proposed methods for purchasing, redeeming and pricing Creation Units and buying, selling and pricing Shares.

In addition, Applicants believe that recent Commission rulemaking efforts support the requested relief from section 22 (d). Section 22(d) was adopted in 1940 principally to address past abuses in the industry that resulted from backward pricing. Since the adoption of rule 22c-1 in 1968 and its requirement for forward pricing, the rationale underlying section 22(d) has been questioned, and the Division of Investment Management (the “Division”) and the Commission have made several attempts to repeal or curtail section 22(d).

Most recently, in July 2010, the Commission proposed to amend rule 6c-10 to grant funds an exemption from section 22(d) to impose account-level sales charges, which would not be disclosed in a fund’s prospectus, in lieu of traditional sales charges disclosed in a fund’s prospectus. As the Commission described the Proposal,

[A] fund … could issue shares at net asset value (i.e., without a sales load) and dealers could impose their own sales charges based on their own schedules and in light of the value investors place on the dealer’s services.

More specifically, the Commission said,

Proposed Rule 6c-10(c) would permit a fund in certain circumstances to offer its shares or a class of its shares at a price other than the current public offering price stated in the prospectus.

44 See Protecting Investors at 292.

45 In the 1960s, the Commission found that section 22(d) had interfered with competition in the mutual fund industry and, in response, Congress considered repealing it but deferred action pending a Commission study. After the study, in 1974, the Commission did not recommend immediate repeal but rather an administrative program to introduce limited forms of price competition. In 1985, the Commission adopted rule 22d-1 to permit scheduled variations in front-end sales loads. Then, finally, in 1992, the Division recommended that the Commission “seek legislation to amend section 22(d) to unfix front-end sales loads.” See Protecting Investors at Ch. 8. In making this recommendation, the Division observed, “This action would introduce price competition among dealers. In addition, repeal of the price maintenance provision could facilitate the creation of new and innovative securities products that depend on free secondary markets.” See Protecting Investors at 297.

46 See Proposal at 86.
A fund class could offer shares to dealers who would then be free to establish and collect their own commissions or other types of sales charges to pay for distribution. The amount of these fees (and the times at which they would be collected) would not be governed by the Act. Thus, for example, this fee could be paid directly by the investor or could be charged to the investor’s brokerage account, depending on the arrangement between the intermediary and investor. The intermediary could charge this fee at the time of sale, over time, or upon redemption.47

In order to rely on proposed rule 6c-10(c) and its exemption from section 22(d), a fund would be required to meet two conditions. First, the fund could not impose ongoing sales charges (as defined in the Proposal),48 though the fund could charge a marketing and service fee of up to 25 basis points (0.25%) per year. Second, the fund would have to disclose in its registration statement its reliance on Rule 6c-10(c) to allow investors to better understand its distribution structure.

ETMFs would satisfy both of these conditions. ETMFs would not impose a sales load; rather, retail investors would have the transparency described above into the revenues being collected by their Brokers in connection with their purchase or sale of Shares on the secondary market.49 ETMFs would limit any fees they charge pursuant to rule 12b-1 to not more than 25 basis points (0.25%) per year. In addition, ETMFs would seek to make all of the disclosures necessary to explain to investors the unique aspects of their structure. In short, if the Commission were to adopt rule 6c-10(c), ETMFs may not be deemed by the Commission to require relief from section 22(d). Thus, having expressed support for such relief in the Proposal, the Division and Commission should support Applicants’ request for relief here.

On the basis of the foregoing, Applicants believe (a) that the protections intended to be afforded by section 22(d) and rule 22c-1 are adequately addressed by the proposed methods for purchasing, redeeming and pricing Creation Units and buying, selling and pricing Shares, and (b) that the relief requested is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Accordingly, Applicants hereby request the Order be granted in respect of section 22(d) and rule 22c-1.50

47 See Proposal at 90.

48 Under the Proposal “ongoing sales charges” are essentially asset-based distribution charges in excess of 25 basis points (0.25%) per year.

49 As with ETFs, Authorized Participants and investors transacting through them in Creation Units would pay a Transaction Fee.

50 The Master Funds do not require relief from section 22(d) or rule 22c-1 because they will operate as traditional mutual funds and interests therein will only be sold at the “current public offering price described in the prospectus.” Unlike ETMF Shares, Master Fund interests will not trade in the secondary market at negotiated prices.
3. Exemption from the Provisions of Section 22(e)

Section 22(e) provides in relevant part that:

No registered company shall suspend the right of redemption, or postpone the date of payment or satisfaction upon redemption of any redeemable security in accordance with its terms for more than seven days after the tender of such security to the company or its agent designated for that purpose for redemption…

Applicants observe that the settlement of redemptions from Global ETMFs will be contingent not only on the settlement cycle of the U.S. securities markets but also on the delivery cycles present in foreign markets in which they invest to the extent that Applicants seek to incorporate, as they intend to do, foreign-traded securities in Baskets distributed to redeeming shareholders. Applicants have been advised that, under certain circumstances, the delivery cycles for transferring foreign-traded securities to redeeming shareholders, coupled with local market holiday schedules, may require a delivery process of up to 14 calendar days, rather than the seven calendar days required by section 22(e). Applicants therefore request relief from section 22(e) in order to provide payment or satisfaction of redemptions within the maximum number of calendar days required for such payment or satisfaction in the principal local markets where transactions in the foreign-traded Basket securities of each Global ETMF customarily clear and settle, but in all cases no later than 14 days following the tender of a Creation Unit of Shares.51

An ETMF’s SAI will identify those instances in a given year where, due to local holidays, more than seven days will be needed to deliver redemption proceeds and will list such holidays and the maximum number of days, but in no case more than 14 calendar days. If the requested relief is granted, Applicants intend to disclose in the SAI and all relevant sales literature that redemption payments will be effected within the specified number of calendar days following the date on which a request for redemption in proper form is made.

Applicants submit that Congress adopted section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds. Applicants contend that allowing redemption payments for Shares of a Global ETMF to be made within the number of days indicated above would be consistent with the spirit and intent of section 22(e) and afford adequate investor protection.

Currently, Applicants believe that no significant additional system or operational procedures (beyond those already in place in relevant jurisdictions) will be needed to effect in-kind redemptions of Global ETMFs using foreign-traded Basket securities. Applicants believe

51 Mutual Fund Feeders may need to separately seek relief from section 22(e) if they intend to permit or require their shareholders to redeem in kind. Mutual Fund Feeders are not seeking, and will not rely on, the section 22(e) relief requested herein.

52 Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations that Applicants may otherwise have under rule 15c6-1 under the Exchange Act. Rule 15c6-1 requires that most securities transactions be settled within three business days of the trade date.
that using in-kind redemptions can enhance an ETMF’s tax efficiency and promote more efficient secondary market trading by reducing Transaction Fees applicable to redeeming shareholders.

As noted above, Applicants may utilize all-cash redemptions for certain Global ETMFs. Applicants are not seeking relief from section 22(e) with respect to Global ETMFs that do not effect redemptions in kind.

For ETMF Feeders, only in-kind redemptions may proceed on a delayed basis pursuant to the relief requested from section 22(e). In the event of an in-kind redemption, a Global ETMF that is an ETMF Feeder will make a corresponding Master Fund redemption. Applicants do not believe use of the master-feeder structure would have any impact on the securities delivery cycle.

Given the rationale for what amounts to a delay typically of a few days in the redemption process on certain occasions and given the facts as recited above, Applicants believe that the protections intended to be afforded by section 22(e) are adequately addressed by the proposed method and securities delivery cycles for redeeming Shares and that the redemption mechanism described above will not lead to unreasonable, undisclosed or unforeseen delays in the redemption process. Given the facts recited above, Applicants believe that the granting of the requested relief is consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants note that substantially identical exemptive relief from section 22(e) has been granted by the Commission to numerous ETFs.53 Accordingly, Applicants hereby request that an order of exemption be granted under section 6(c) in respect of section 22(e) with respect to the affected Global ETMFs (and, in the case of ETMF Feeders, their Master Funds).

4. Exemption from the Provisions of Section 17(a)

Section 17(a)(1) of the Act, among other things, makes it unlawful

for any affiliated person or promoter of or principal underwriter for a registered investment company... or any affiliated person of such a person, promoter, or principal underwriter, acting as principal, knowingly to sell any security or other property to such registered company or to any company controlled by such registered company, unless such sale involves solely (A) securities of which the buyer is the issuer, (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities or (C) securities deposited with a trustee of a unit investment trust... by the depositor thereof.

53 See, e.g., EGA Order; T. Rowe Order.

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Section 17(a)(2) makes it unlawful for any affiliated person or promoter of or principal underwriter for a registered investment company ... or any affiliated person of such a person, promoter, or principal underwriter, acting as principal-- knowingly to purchase from such registered company, or from any company controlled by such registered company, any security or other property (except securities of which the seller is the issuer).

An “affiliated person” of a person, pursuant to section 2(a)(3)(A) of the Act, includes “any person directly or indirectly owning, controlling, or holding with the power to vote, 5 per centum or more of the outstanding voting securities of such other person” and pursuant to section 2(a)(3)(C) of the Act “any person, directly or indirectly, controlling, controlled by or under common control with, such other person.” Section 2(a)(9) of the Act defines “control” as

…the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company.

The ETMFs may be deemed to be controlled by the Adviser and hence affiliated persons of each other. In addition, the ETMFs may be deemed to be under common control with any other registered investment company, or series thereof, advised by the Adviser (an “Affiliated Fund”). A large institutional investor could own more than 5% of an ETMF, or in excess of 25% of an ETMF, making that investor a first-tier affiliate of the ETMF under section 2(a)(3)(A) or (C). In addition, there exists a possibility that, with respect to Affiliated Funds, a large institutional investor could own 5% or more, or in excess of 25%, of such other Affiliated Fund, making that investor a second-tier affiliate of an ETMF. For so long as such an investor was deemed to be an affiliate, section 17(a)(1) and 17(a)(2) could be read to prohibit such person from purchasing and redeeming Shares through in-kind transactions with the ETMF.

Section 17(b) provides that the Commission will grant an exemption from the provisions of section 17(a) if evidence establishes that the terms of the proposed transaction are reasonable and fair, including the consideration to be paid or received, and do not involve overreaching on the part of any person concerned, that the proposed transaction is consistent with the policy of each registered investment company concerned, and that the proposed transaction is consistent with the general purposes of the Act. Applicants seek an exemption from sections 17(a)(1) and 17(a)(2).

54 Because section 17(b) could be interpreted to exempt only a single transaction from section 17(a) and because there may be a number of transactions by persons who may be deemed to be affiliated persons or second-tier affiliates, Applicants are also requesting an exemption under section 6(c) of the Act. See, e.g., Keystone Custodian Funds, Inc., 21 S.E.C. 295 (1945).
17(a)(2) pursuant to sections 6(c) and 17(b) to permit persons that are first-tier affiliates or second-tier affiliates of the ETMFs solely by virtue of: (a) holding 5% or more, or in excess of 25%, of the outstanding Shares of one or more ETMFs; (b) having an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25% of the Shares of one or more Affiliated Funds, to effectuate purchases and redemptions in kind.

Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making in-kind purchases or in-kind redemptions of Shares of an ETMF. Both the deposit procedures for in-kind purchases of Creation Units of Shares and the redemption procedures for in-kind redemptions will be effectuated in exactly the same manner for all purchases and redemptions and for all purchasers and redeemers. There will be no discrimination among purchasers or redeemers. Except in the case of custom orders, the Basket composition will be the same regardless of the identity of the purchaser or redeemer.

The Basket securities will be valued in the same manner as they are valued for purposes of calculating the ETMF’s NAV, and such valuation will be made in the same manner regardless of the identity of the purchaser or redeemer. Further, the total consideration paid for the purchase or redemption of a Creation Unit of Shares will be based on the NAV of such ETMF, as calculated in accordance with the policies and procedures set forth in its registration statement. The Basket will consist of securities that are appropriate, in type and amount, for inclusion in light of the ETMF’s investment objectives and policies, current Portfolio Holdings and current trading program. Because the Portfolio will not be transparent, Applicants believe that there is restricted opportunity for redeeming shareholders to select particular Portfolio Holdings to be included in the Basket (i.e., “cherry picking”). Further, because securities will not be represented in an ETMF’s Basket until after the Adviser has added the securities to its Portfolio in the first instance, a person purchasing Shares could not cause the ETMF to include unwanted securities in the Basket. Under these circumstances, Applicants do not believe that in-kind purchases and redemptions will result in abusive self-dealing or overreaching of an ETMF by any Creation Unit investor.

Moreover, Applicants note that the ability of an ETMF to take deposits and make redemptions in kind may aid in achieving the ETMF’s investment objectives by allowing it to be more fully invested, minimizing cash drag and reducing flow-related trading costs. In-kind transactions may also increase an ETMF’s tax efficiency and promote efficient secondary market trading in Shares by reducing Transaction Fees applicable to purchases and redemptions of Shares.

For the reasons set forth above, Applicants contend that, with respect to the relief requested pursuant to section 17(b), the terms of the proposed transactions, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transactions are consistent with the policy of each registered investment company concerned and with the general purposes of the Act. Applicants also contend that, with respect to the relief requested pursuant to section 6(c), the requested exemption for the proposed transactions is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Thus, Applicants request the Order under section 6(c) and 17(b) in respect of sections 17(a)(1) and 17(a)(2).
V. REQUEST FOR MASTER-FEEDER RELIEF

A. In Support of Master-Feeder Relief

Applicants request an exemption under sections 6(c) and 17(b) from sections 17(a)(1) and (2) to permit in-kind transactions between Feeder Funds and their Master Funds. As discussed below, the requested relief may be necessary because the Feeder Funds and the Master Funds will both be advised by the Adviser and therefore may be deemed to be under common control and affiliated persons of each other.

Efficiencies in the management and administration of two or more mutual funds of the same sponsor that follow similar investment programs may be achieved by the funds investing in a common underlying investment vehicle using a master-feeder arrangement. Applicants anticipate that, under certain circumstances, it may be desirable for the same purpose for an ETMF and one or more mutual funds to invest as Feeder Funds in the same Master Fund. The ETMF Feeder and Mutual Fund Feeders would be in the same “group of investment companies” as the Master Fund, and would invest in the Master Fund in reliance on section 12(d)(1)(G) of the Act and rule 12d1-2 under the Act, which would permit the Feeder Funds to hold interests in one or more Master Funds, as well as other securities. The Adviser would serve as the investment adviser to both the Feeder Funds and the Master Funds.

To treat its investors fairly and consistently, a Master Fund with one or more ETMF Feeders and one or more Mutual Fund Feeders should transact with each Feeder Fund on a basis that protects the Master Fund (and, indirectly, other Feeder Funds) against the costs of accommodating the Feeder Fund’s inflows and outflows. The Master Fund would accomplish this by imposing a Master Fund Transaction Fee on Feeder Fund inflows and outflows, sized to cover the estimated cost to the Master Fund of converting the transferred cash and securities to or from the desired composition. The Master Fund Transaction Fee will be limited to amounts that have been authorized by the Board and determined by the Adviser to be appropriate. Further, it will be applied to all Feeder Funds in the same manner so as to avoid discrimination by the Master Fund among Feeder Funds. A Feeder Fund that transacts with the Master Fund primarily in kind through the transfer of securities as selected or approved by the Master Fund would generally be subject to lower Master Fund Transaction Fees than another Feeder Fund that transacts with the Master Fund in cash.

Under the proposed master-feeder arrangement, Feeder Funds will acquire interests in a Master Fund using in-kind transfers of securities as selected or approved by the Master Fund and/or cash (“Master Fund Deposit”). When a Feeder Fund receives cash invested by its shareholders, it can convert that investment into securities acceptable to the Master Fund by buying the securities at the Feeder Fund level and then use the securities to make an in-kind investment in the Master Fund. Alternatively, the Feeder Fund can invest the cash it receives

\[55\] Methods for combining mutual fund and exchange-traded fund assets in a shareholder-protective master-feeder arrangement are subject to a pending Eaton Vance patent application.

\[56\] In all cases, the Master Fund Transaction Fees will be limited in accordance with the requirements of the Commission applicable to open-end management investment companies offering redeemable securities.
from shareholders directly in the Master Fund and pay the higher Master Fund Transaction Fees that would generally apply to cash purchases of Master Fund interests. In addition, when a Feeder Fund receives an in-kind investment of securities acceptable to the Master Fund, it can use the securities to make an in-kind investment in the Master Fund. A Feeder Fund may hold interests in one or more Master Funds and may hold a portion of its investment directly.\textsuperscript{57} For an ETMF Feeder that invests in only a single Master Fund and holds only transitory direct positions in securities, the Basket used in creations and redemptions will generally include only securities acceptable to the Master Fund and positions in cash, reflecting the fact that the Master Fund and the ETMF Feeder have the same underlying (direct and indirect) Portfolio Holdings, share the same current Portfolio trading program and have the same investment objectives and Adviser.

The purchase and sale of Shares in the secondary market and the purchase and redemption of Creation Units of Shares in transactions directly with the issuing fund will occur in exactly the same manner for ETMF Feeders as for stand-alone ETMFs. Similarly, the purchase and redemption of shares of a Mutual Fund Feeder will take place in the same manner and pursuant to the same procedures as apply to other mutual funds advised by the Adviser.

Master Fund interests will carry all of the same rights, and no investor in any Master Fund will have preferential rights relative to other investors in the same Master Fund. Accordingly, Applicants do not believe that the proposed master-feeder structure gives rise to any senior security issues or otherwise raises concerns under section 18 of the Act.

\textbf{B. Legal Analysis of Master-Feeder Relief}

Section 17(a)(1), in pertinent part, makes it unlawful for any affiliated person of a registered investment company, acting as principal, knowingly to sell any security or other property to such registered company unless, among other circumstances not relevant here, such sale involves solely securities of which the buyer is the issuer. Similarly, section 17(a)(2) makes it unlawful for any affiliated person of a registered investment company knowingly to purchase from such registered company any securities except those of which the seller is the issuer. Section 2(a)(3)(A) defines an affiliated person to include any person that owns 5% or more of another person’s outstanding voting securities. Section 2(a)(3)(B) defines an affiliated person to include any person, 5% or more of whose outstanding voting securities are owned by such person. Section 2(a)(3)(C) defines an affiliated person of a registered investment company to include any person under common control with the company. Section 17(b) provides that the Commission may exempt a transaction from section 17(a) if it finds that the terms of the proposed transaction are reasonable and fair and do not involve any overreaching on the part of any person concerned, and that the proposed transaction is consistent with the policy of each registered investment company concerned and with the general purposes of the Act. The Commission may also grant relief under section 6(c) from section 17(a).

\textsuperscript{57} Many master-feeder arrangements operate in reliance on section 12(d)(1)(E) of the Act, which permits an investment company to invest in another registered investment company only if such security is the only investment security held by the investing fund. Because the proposed master-feeder arrangement will operate in reliance on section 12(d)(1)(G) of the Act and rule 12d1-2 under the Act, Feeder Funds could hold other investments in addition to shares of the Master Fund.
Applicants request an exemption under sections 6(c) and 17(b) from sections 17(a)(1) and (2) to permit in-kind transactions between a Feeder Fund and a Master Fund in which it invests.\(^{58}\) The relief may be necessary because the Feeder Fund and the Master Fund will both be advised by the Adviser and, therefore, may be deemed to be under the common control of the Adviser. Accordingly, they may be deemed to be affiliates of each other under section 2(a)(3)(C). In addition, because a Feeder Fund may own more than 5% of the shares of a Master Fund, the Feeder Fund and Master Fund may be affiliates of each other under sections 2(a)(3)(A) and (B). Thus, under sections 17(a)(1) and (2), the Feeder Fund and Master Fund may be prohibited from engaging in in-kind transactions without relief.

More specifically, section 17(a)(1) may make it unlawful for a Feeder Fund to “sell” securities to a Master Fund in exchange for interests in the Master Fund because that provision makes it unlawful for any affiliated person (i.e., the Feeder Fund) of a registered investment company (i.e., the Master Fund) to sell the company securities, other than securities (or interests) of the Master Fund itself. In addition, section 17(a)(2) may make it unlawful for a Master Fund to purchase the securities in the Master Fund Deposit because that provision makes it unlawful for any affiliated person (i.e., the Master Fund) of a registered investment company (i.e., the Feeder Fund) to purchase any securities from the company, other than the company’s own interests. Thus, in addition to the relief from the requirements of section 17(a)(1) and (2) sought as part of the ETMF Relief, to the extent that an ETMF operates in a master-feeder structure, Applicants also request relief from section 17(a)(1) and (2) as part of the Master-Feeder Relief to permit each Feeder Fund to engage in in-kind purchase transactions with a Master Fund.\(^{59}\)

Applicants assert that the relief requested to permit the Feeder Funds to purchase interests in a Master Fund in kind should be granted on the basis that, pursuant to the terms and conditions of the application, such transactions will be reasonable and fair, not involve overreaching on the part of any person concerned, and will be consistent with the policy of each Feeder Fund and Master Fund and with the general purposes of the Act. Applicants propose for Feeder Funds to be permitted to transact with Master Funds in kind because in-kind transfers of securities as selected or approved by the Master Fund will, by their nature, protect the Master Fund (and, indirectly, other Feeder Funds) against the costs of accommodating the Feeder Fund’s inflows and outflows. A Feeder Fund that transacts with the Master Fund primarily in kind would generally be subject to lower Master Fund Transaction Fees than a Feeder Fund that transacts with the Master Fund in cash. All Feeder Funds would pay the same Master Fund Transaction Fee in connection with the same Master Fund Deposit. Applicants note that because the investment performance of a Feeder Fund depends on the performance of the Master Fund, a Feeder Fund (as affiliated person of a Master Fund) would have no incentive to overreach a Master Fund. Similarly, because the Feeder Funds are the only investors in a Master Fund, a

\(^{58}\) Applicants seek the exemption under section 6(c), in addition to section 17(b), because the Commission’s authority under section 17(b) may be interpreted as extending only to a single transaction and not to a series of transactions. See supra note 54.

\(^{59}\) The Feeder Funds and Master Funds also expect to engage in in-kind redemptions of interests in the Master Funds, but Applicants believe that such redemptions would fall within the relief previously provided by the SEC Staff in the Signature Financial Letter.
Master Fund (as an affiliated person of the Feeder Funds) would have no incentive to overreach a Feeder Fund.

To help ensure that the in-kind purchases of Master Fund interests by a Feeder Fund do not favor either the Master Fund or the Feeder Fund or disadvantage either the Master Fund or the Feeder Fund, Applicants propose that a Feeder Fund will engage in an in-kind purchase of Master Fund interests only when conditions B.1 through B.8, as set forth in Section VII.B hereof, are satisfied.60

Applicants believe that the requested exemption meets the standard for relief pursuant to section 17(b) and that the terms of the proposed arrangement are fair and reasonable and do not involve overreaching. Under condition B.3, the Master Fund and the Feeder Fund will follow the same valuation procedures for determining their NAVs and the value of Master Fund Deposit securities transferred in connection with an in-kind purchase by the Feeder Fund of interests in the Master Fund. As a result, the purchase will be effected at the NAV of the Master Fund and will not result in the dilution of the interests of the holders of the Master Fund or the Feeder Fund, as required by condition B.1.

Second, the proposed transactions between the Feeder Fund and a Master Fund will be consistent with the policies of each fund. Under condition B.2, each Master Fund Deposit will include only securities that are appropriate, in type and amount, for investment by the Master Fund in light of its investment objectives and policies, and current holdings and trading.

Third, Applicants believe that the proposed transactions are consistent with the general purposes of the Act. As discussed above, Applicants propose for each Feeder Fund to be permitted to purchase interests in a Master Fund in kind as a means for isolating the Feeder Fund’s flow-related trading costs to itself (rather than exposing the Master Fund and, indirectly, other Feeder Funds to such costs), while minimizing the amount of Master Fund Transaction Fees to which the Feeder Fund is subjected.

For these reasons, Applicants submit that the exemption is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants accordingly seek the Order under sections 6(c) and 17(b) in respect of sections 17(a)(1) and 17(a)(2).

VI. REQUEST FOR FUND OF FUNDS RELIEF

A. In Support of Fund of Funds Relief

Applicants request, pursuant to section 12(d)(1)(J) of the Act, an exemption from section 60 These conditions generally parallel the circumstances under which the SEC Staff has agreed not to recommend enforcement action to the Commission under section 17(a) of the Act if certain registered funds that rely on section 12(d)(1) (G) of the Act purchase shares of other registered funds within their same group of investment companies through in-kind purchases. See ING Letter; Old Mutual Letter. These circumstances reflect that the in-kind transactions between the Feeder Funds and Master Fund will be on an ongoing basis, rather than one-time transactions as contemplated in the ING Letter and Old Mutual Letter.
12(d)(1)(A) to permit Acquiring Funds to acquire Shares of ETMFs beyond the limits of section 12(d)(1)(A). Applicants also request an exemption from section 12(d)(1)(B) to permit the ETMFs, their principal underwriters and Brokers to sell Shares of ETMFs to Acquiring Funds beyond the limits of section 12(d)(1)(B). In addition, pursuant to sections 6(c) and 17(b), Applicants request an exemption from section 17(a) of the Act to permit an ETMF to sell its Shares to, and redeem its Shares from, an Acquiring Fund of which the ETMF is a first-tier or second-tier affiliate as described below, and to engage in any accompanying in-kind transactions.

The Acquiring Funds will be registered management investment companies and UITs that enter into written participation agreements with any ETMF (“Acquiring Fund Agreement”) in which they seek to invest in reliance on the Order. No Acquiring Fund will be part of the same group of investment companies as an ETMF in which it invests. Each Acquiring Trust will have a sponsor (“Sponsor”) and each Acquiring Management Company will have an investment adviser within the meaning of section 2(a)(20)(A) of the Act (“Acquiring Fund Adviser”) that does not control, is not controlled by or under common control with the Adviser. Each Acquiring Management Company may also have one or more subadvisers within the meaning of section 2(a)(20)(B) of the Act (each, an “Acquiring Fund Subadviser”). Each Acquiring Fund Adviser and any Acquiring Fund Subadviser will be registered as an investment adviser under the Advisers Act.

The Acquiring Fund Agreement will allow Applicants to seek to ensure that the Acquiring Funds understand and can comply with the terms and conditions of the requested Order (see condition C.8 in Section VII below). In this respect, among other things, the Acquiring Fund Agreement will include an acknowledgment from the Acquiring Fund that it may rely on the Order only to invest in a specified ETMF, and not in any other investment company. Each Acquiring Fund will further be required to represent in the Acquiring Fund Agreement that the Acquiring Fund intends at all times to fulfill its responsibilities under the requested Order.61

In addition, Applicants propose that the requested Fund of Funds Relief be conditioned upon certain additional requirements that are designed to address the potential for abuse of ETMFs by Acquiring Funds. These conditions require that any member of an Acquiring Fund’s Advisory Group (as defined below) individually or the Acquiring Fund’s Advisory Group in the aggregate not control an ETMF within the meaning of section 2(a)(9) (see condition C.1 below). Similarly, no member of an Acquiring Fund’s Subadvisory Group (as defined below) individually or the Acquiring Fund’s Subadvisory Group in the aggregate may control an ETMF within the meaning of section 2(a)(9) of the Act (see condition C.1 below).

Further, no Acquiring Fund or Acquiring Fund Affiliate is permitted under the conditions to cause any existing or potential investment in an ETMF to influence the terms of any services

61 Applicants acknowledge that the receipt of compensation by (a) an affiliated person of an Acquiring Fund, or an affiliated person of such person, for the purchase by the Acquiring Fund of Shares of the ETMF or (b) an affiliated person of an ETMF, or an affiliated person of such person, for the sale by the ETMF of its Shares to an Acquiring Fund, may be prohibited by section 17(e)(1) of the Act. The Acquiring Fund Agreement will include this acknowledgment.
or transactions between the Acquiring Fund or an Acquiring Fund Affiliate\textsuperscript{62} and the ETMF or an ETMF Affiliate\textsuperscript{63} (see condition C.2 below). To guard against the likelihood of this happening, each Acquiring Management Company’s board, including a majority of the independent board members, are required by the conditions to adopt procedures reasonably designed to assure that the Acquiring Fund Adviser and any Acquiring Fund Subadviser are conducting the investment program of the Acquiring Management Company without taking into account any consideration received by the Acquiring Management Company or an Acquiring Fund Affiliate from the ETMF or an ETMF Affiliate in connection with any services or transactions (see condition C.3 below). In addition, no Acquiring Fund or Acquiring Fund Affiliate (except as an investment adviser) is permitted to cause an ETMF to purchase a security from an Affiliated Underwriting\textsuperscript{64} (see condition C.5 below).

Concerns about control of an underlying fund by an investing fund were not the only policy concerns underlying section 12(d)(1)(A) and (B), however. Another concern pertained to complex structures. To mitigate the possibility of complex structures due to an investment by an Acquiring Fund in an ETMF, the conditions forbid ETMFs that sell their Shares to Acquiring Funds from acquiring securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act (see condition C.11 below). There are limited carve-outs to this restriction, but only in instances where the ETMF (a) acquires such securities in compliance with section 12(d)(1)(E) of the Act, (b) acquires shares of a Master Fund, (c) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act) or (d) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting it to (i) acquire securities of one or more investment companies for short-term cash management purposes or (ii) engage in interfund borrowing and lending transactions.

Although Acquiring Funds could purchase and redeem Shares in Creation Units directly with an ETMF, Applicants anticipate that most, if not all, transactions effected by Acquiring Funds pursuant to the requested Order would be secondary market transactions. Investors, including Acquiring Funds, who buy and sell Shares in secondary market transactions may pay brokerage commissions and other charges. For transactions in Creation Units, Transaction Fees may be charged to Acquiring Funds to offset the ETMF’s costs associated with the issuance and

\textsuperscript{62} An “Acquiring Fund Affiliate” is defined as the Acquiring Fund Adviser, Acquiring Fund Subadviser, any Sponsor, promoter or principal underwriter of an Acquiring Fund and any person controlling, controlled by or under common control with any of these entities.

\textsuperscript{63} A “Fund Affiliate” is defined as the investment adviser, promoter or principal underwriter of an ETMF (or, in the case of an ETMF Feeder, any Master Fund) and any person controlling, controlled by or under common control with any of these entities.

\textsuperscript{64} An “Affiliated Underwriting” is an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate. An “Underwriting Affiliate” is defined as a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Acquiring Fund Adviser, Acquiring Fund Subadviser, Sponsor, or employee of the Acquiring Fund, or a person of which any such officer, director, member of an advisory board, Acquiring Fund Adviser, Acquiring Fund Subadviser, Sponsor, or employee is an affiliated person, except any person whose relationship to the ETMF is covered by section 10(f) of the Act is not an Underwriting Affiliate.
redemption of Creation Units. Acquiring Funds (and, therefore, their shareholders) would indirectly pay their proportionate share of an ETMF’s fees and other operating expenses. However, Shares would be sold without sales loads and, as discussed below, certain conditions would limit the fees and expenses charged by Acquiring Funds.

An ETMF may choose to reject any direct purchase of Creation Units by an Acquiring Fund. An ETMF also retains the right to reject any initial investment by an Acquiring Fund in excess of the limits in section 12(d)(1)(A) by declining to execute an Acquiring Fund Agreement with the Acquiring Fund.

B. Legal Analysis of Fund of Funds Relief

1. Exemption from the Provisions of Sections 12(d)(1)(A) and (B)

Section 12(d)(1)(A) prohibits a registered investment company from acquiring securities of another investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) prohibits a registered open-end investment company, its principal underwriter and any other Broker from knowingly selling an investment company’s shares to another registered investment company if the sale will cause the acquiring company to own more than 3% of the acquired company’s voting stock, or if the sale will cause more than 10% of the acquired company’s voting stock to be owned by investment companies generally.

The National Securities Markets Improvement Act of 1996 (“NSMIA”) added section 12(d)(1)(J) to the Act. Section 12(d)(1)(J) provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1), if the exemption is consistent with the public interest and the protection of investors. The legislative history of NSMIA directs the Commission to consider, among other things, when granting relief under section 12(d)(1)(J),

the extent to which a proposed arrangement is subject to conditions that are designed to address conflicts of interest and overreaching by a participant in the arrangement, so that the abuses that gave rise to the initial adoption of the Act’s restrictions against investment companies investing in other investment companies are not repeated.\textsuperscript{65}

Applicants submit that the proposed conditions to the Fund of Funds Relief requested herein, including the requirement that Acquiring Funds enter into an Acquiring Fund Agreement, adequately address the concerns underlying the applicable limits in section 12(d)(1), and that the requested exemption is consistent with the public interest and the protection of investors.

Congress enacted what is now section 12(d)(1) in 1940 to prevent one investment

company from buying control of another investment company. In enacting section 12(d)(1), Congress sought to ensure that the acquiring investment company had no “effective voice” in the other investment company. As originally proposed, section 12(d)(1) would have prohibited any investment by an investment company in another investment company, but this provision was softened prior to enactment so funds were not prohibited from taking advantage of a good investment just because the investment was another investment company.

Then, in 1970, to address certain abuses perceived to be associated with the development of fund holding companies (i.e., funds that primarily invest in other investment companies), Congress tightened section 12(d)(1). The perceived abuses included: (a) the threat of large scale redemptions of the acquired fund’s shares; (b) layering of fees and expenses (such as sales loads, advisory fees and administrative costs); and (c) unnecessary complexity. Applicants submit that their proposed conditions address these concerns.

With respect to the threat of large-scale redemptions, particularly those regarding the potential for undue influence, condition C.1 limits the ability of an Acquiring Fund’s Advisory Group and an Acquiring Fund’s Subadvisory Group to control an ETMF within the meaning of section 2(a)(9). For purposes of this application and this restriction, an “Acquiring Fund’s Advisory Group” is defined as:

the Acquiring Fund Adviser, Sponsor, any person controlling, controlled by or under common control with the Acquiring Fund Adviser or Sponsor, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act, that is advised or sponsored by the Acquiring Fund Adviser, Sponsor or any person controlling, controlled by or under common control with the Acquiring Fund Adviser or Sponsor.

Similarly, an “Acquiring Fund’s Subadvisory Group” is defined as:

any Acquiring Fund Subadviser, any person controlling, controlled by, or under common control with the Acquiring Fund Subadviser, and any investment company or issuer that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Acquiring Fund Subadviser or any person controlling, controlled by or under common control with the Acquiring Fund Subadviser.

Other conditions to the requested Fund of Funds Relief address concerns about the potential for the exercise of undue influence by an Acquiring Fund over an ETMF. Condition C.2, for example, prohibits Acquiring Funds and Acquiring Fund Affiliates from causing an

66 House Hearings, 76th Cong., 3d Sess., at 113 (1940).


investment by an Acquiring Fund in an ETMF to influence the terms of services or transactions between an Acquiring Fund or an Acquiring Fund Affiliate and the ETMF or an ETMF Affiliate. In addition, conditions C.4 through C.8 are specifically designed to address the potential for an Acquiring Fund and Acquiring Fund Affiliates to exercise undue influence over an ETMF and ETMF Affiliates. For this reason, they forbid an Acquiring Fund or Acquiring Fund Affiliate (except as an investment adviser) from causing an ETMF to purchase a security from an Affiliated Underwriting.

The requested Fund of Funds Relief also includes conditions that are designed to address the concern regarding layering of fees and expenses. Condition C.9 of the requested Order is designed to prevent any unnecessary duplication or layering of sales charges and other costs imposed on investors. Condition C.10 prevents any sales charges or service fees on shares of an Acquiring Fund from exceeding the limits applicable to a fund of funds set forth in NASD Conduct Rule 2830. 69 Condition C.12 requires the board, including a majority of the independent board members, of any Acquiring Management Company to find that any fees charged under the Acquiring Management Company’s advisory contract are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract of any ETMF (or, in the case of an ETMF Feeder, any Master Fund) in which the Acquiring Management Company may invest. Because any Acquiring Trust, as a UIT, would not pay advisory fees, there is no potential for the imposition of duplicative advisory fees on its investors.

Other conditions of the requested Fund of Funds Relief address the expressed policy concerns underlying section 12 (d)(1) regarding complex structures. Specifically, pursuant to condition C.11, no ETMF (or, in the case of an ETMF Feeder, any Master Fund) is permitted to acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that (a) the ETMF acquires such securities in compliance with section 12(d)(1)(E) of the Act, (b) the ETMF acquires shares of a Master Fund, (c) the ETMF (or, in the case of an ETMF Feeder, any Master Fund) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act) or (d) the ETMF (or, in the case of an ETMF Feeder, any Master Fund) acquires (or is deemed to have acquired) securities of another investment company pursuant to exemptive relief from the Commission permitting such ETMF (or, in the case of an ETMF Feeder, any Master Fund) to (i) acquire securities of one or more investment companies for short-term cash management purposes or (ii) engage in interfund borrowing and lending transactions.

Applicants note that many mutual funds and ETFs today operate pursuant to exemptive orders that grant relief virtually identical to the Fund of Funds Relief requested here, except that the funds involved are not ETMFs.70 Applicants are not aware of any problems or difficulties.

69 Any references to NASD Conduct Rule 2830 include any successor or replacement rule to NASD Conduct Rule 2830 that may be adopted by FINRA.

70 See, e.g., Fund of Funds Precedent, supra note 3.
encountered by funds relying upon such orders. Applicants believe that the experience of ETMFs (including, in the case of ETMF Feeders, their Master Funds) and the Acquiring Funds will be the same. Accordingly, Applicants submit that a grant by the Commission of the Fund of Funds Relief requested is consistent with the public interest and the protection of investors and seek the Order under section 12(d)(1)(J).

2. Exemption from the Provisions of Section 17(a)

Applicants seek relief from section 17(a) pursuant to sections 17(b) and 6(c) to permit an ETMF, to the extent that the ETMF is an affiliated person of an Acquiring Fund, as defined in section 2(a)(3)(B) of the Act, to issue Shares to, and redeem Shares from, an Acquiring Fund and to effect such transactions in kind. Applicants anticipate that there may be Acquiring Funds that are not part of the same group of investment companies as the ETMFs, but may be subadvised by an Adviser. Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where an ETMF could be deemed an affiliated person, or an affiliated person of an affiliated person, of an Acquiring Fund because the Adviser provides investment advisory services to that Acquiring Fund.

Section 17(a) generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3) defines an “affiliated person” of another person to include any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person and any person 5% or more of whose outstanding voting securities are owned by another person. An Acquiring Fund relying on the Fund of Funds Relief could own 5% or more of the outstanding voting securities of an ETMF. Under such circumstances and others, an ETMF and an Acquiring Fund could become affiliated persons, or second-tier affiliates, and in-kind purchases and redemptions of Creation Units of the ETMF’s Shares between an ETMF and the Acquiring Fund could be prohibited. Although Applicants expect that most Acquiring Funds will purchase Shares in the secondary market rather than purchasing Creation Units directly from an ETMF, and do not need section 17(a) relief for such secondary market transactions, Applicants seek an exemption under sections 17(b) and 6(c) for Creation Unit transactions between an ETMF and an Acquiring Fund.

Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that: the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned; the proposed transaction is consistent with the policy of each registered investment company concerned; and the proposed transaction is consistent with the general purposes of the Act. Section 6(c) permits the Commission to exempt any person or transactions, or any class of persons or transactions, from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants seek the exemption under section 6(c), in addition to section 17(b), because the Commission’s authority under section 17(b) may be interpreted as extending only to a single
transaction and not to a series of transactions.\textsuperscript{71}

Applicants believe that an exemption is appropriate under sections 17(b) and 6(c) because the proposed arrangement meets the standards set forth in those sections. First, the terms of the proposed arrangement are fair and reasonable and do not involve overreaching. Any consideration paid for the purchase or redemption of Creation Units directly from an ETMF will be based on the NAV of the ETMF in accordance with policies and procedures set forth in its registration statement.\textsuperscript{72}

Second, the proposed transactions directly between ETMFs and Acquiring Funds will be consistent with the policies of each Acquiring Fund. The purchase of Creation Units by an Acquiring Fund will be accomplished in accordance with the investment restrictions of the Acquiring Fund and will be consistent with the investment policies set forth in the Acquiring Fund’s registration statement. The Acquiring Fund Agreement will require any Acquiring Fund that purchases Creation Units directly from an ETMF to represent such.

Third, Applicants believe that the proposed transactions are consistent with the general purposes of the Act. As discussed above, Applicants believe that the requested exemptions are appropriate in the public interest, as ETMFs may offer Acquiring Funds an expanded array of actively managed exchange-traded instruments in which to invest. By avoiding the front-running and free-riding concerns that can arise with full transparency of Portfolio Holdings, ETMFs may be suitable for a broader range of investment strategies that fully transparent active ETFs. For these reasons, Applicants also submit that the exemption is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants accordingly seek the Order under sections 6(c) and 17(b) in respect of sections 17(a)(1) and 17(a)(2).

VII. CONDITIONS TO THE APPLICATION

A. ETMF Relief

Applicants agree that any Order of the Commission granting the requested ETMF Relief will be subject to the following conditions:

1. As long as an ETMF operates in reliance on the requested order, its Shares will be listed on an Exchange.

2. Neither the Trust nor any ETMF will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Shares are not

\textsuperscript{71} See supra note 54.

\textsuperscript{72} The requested relief would apply to direct sales of Shares in Creation Unit quantities by an ETMF to an Acquiring Fund and redemptions of those Shares and is also intended to cover the in-kind transactions that accompany such sales and redemptions. Relief from section 17(a) would not be necessary for purchases and sale of Shares of an ETMF by an Acquiring Fund in the secondary market.
individually redeemable and that owners of Shares may acquire those Shares from an ETMF and tender those Shares for redemption to an ETMF in Creation Unit quantities only.

3. The website for the ETMFs, which will be publicly accessible at no charge, will contain, on a per Share basis for each ETMF, the prior Business Day’s NAV, the Bid/Ask Price, and a calculation of the premium or discount of the Bid/Ask Price against such NAV.

4. The Adviser or Subadviser, directly or indirectly, will not cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the ETMF) to acquire any Deposit Instrument for the ETMF through a transaction in which the ETMF could not engage directly.

B. Master-Feeder Relief

Applicants agree that any Order of the Commission granting the requested Master-Feeder Relief will be subject to the following conditions:

1. Transfers of a Master Fund Deposit will not dilute the interests of the shareholders of either the Feeder Fund or the Master Fund.

2. The transferred Master Fund Deposit will consist of assets that are appropriate, in type and amount, for investment by the Master Fund in light of its investment objectives and policies, and current holdings.

3. A Master Fund and a Feeder Fund that invests in the Master Fund have the same policies and procedures for determining their net asset values, and will follow those policies and procedures in determining the value of interests in the Master Fund that are acquired or redeemed by the Feeder Fund. The Feeder Fund and the corresponding Master Fund will ascribe the same value to the securities in the Master Fund Deposit.

4. The transfer of a Master Fund Deposit from a Feeder Fund to a Master Fund will be effected simultaneously with the transfer of interests in the Master Fund to the Feeder Fund.

5. The Master Funds and Feeder Funds will effect the in-kind purchases pursuant to procedures adopted by their Boards, including a majority of the independent members, that are reasonably designed to provide that the purchases in kind are effected in a manner consistent with conditions B.1 through B.4.

6. On a quarterly basis, the Boards of the Master Funds and Feeder Funds, including a majority of the independent members, will determine that the in-kind purchases: (a) were effected in accordance with the procedures described in condition B.5 (“In-Kind Purchase Procedures”); (b) did not favor a Feeder Fund to the detriment of any other investor in the Master Fund (i.e., another Feeder Fund) and did not favor the Master Fund to the detriment of any Feeder Fund; and (c) were in the best interests of the Master Fund and each Feeder Fund.

7. The Master Funds and Feeder Funds will maintain and preserve for a period of not less than six years from the end of the fiscal year in which an in-kind purchase occurred, the first two years in an easily accessible place, a copy of their In-Kind Purchase Procedures, as well
as other records related to the in-kind purchase, setting forth the identity of the Feeder Fund involved, a description of the composition of the Master Fund’s and Feeder Fund’s portfolio (including each asset’s value) immediately prior and after the in-kind purchase, a description of each security in the Master Fund Deposit, the terms of the in-kind purchase, and the information or materials upon which the asset valuations were made.

8. The Adviser will, consistent with its fiduciary duties, disclose to the independent members of the Boards of the Master Funds and Feeder Funds the existence of, and all of the material facts relating to, any conflicts of interest between the Adviser and a Master Fund and/or Feeder Fund with respect to a Master Fund Deposit, to allow the independent members to make the quarterly determinations required by condition B.6 on a fully informed basis.

C. Fund of Funds Relief

Applicants agree that any Order of the Commission granting the requested Fund of Funds Relief will be subject to the following conditions:

1. The members of an Acquiring Fund’s Advisory Group will not control (individually or in the aggregate) an ETMF (or, in the case of an ETMF Feeder, any Master Fund) within the meaning of section 2(a)(9) of the Act. The members of an Acquiring Fund’s Subadvisory Group will not control (individually or in the aggregate) an ETMF (or, in the case of an ETMF Feeder, any Master Fund) within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of the ETMF, the Acquiring Fund’s Advisory Group or the Acquiring Fund’s Subadvisory Group, each in the aggregate, becomes a holder of more than 25% of the outstanding voting securities of an ETMF, it will vote its Shares of the ETMF in the same proportion as the vote of all other holders of such Shares. This condition does not apply to the Acquiring Fund’s Subadvisory Group with respect to an ETMF (or, in the case of an ETMF Feeder, any Master Fund) for which the Acquiring Fund’s Subadviser or a person controlling, controlled by, or under common control with the Acquiring Fund’s Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Acquiring Fund or Acquiring Fund Affiliate will cause any existing or potential investment by the Acquiring Fund in an ETMF to influence the terms of any services or transactions between the Acquiring Fund or an Acquiring Fund Affiliate and the ETMF (or, in the case of an ETMF Feeder, any Master Fund) or an ETMF Affiliate.

3. The board of an Acquiring Management Company, including a majority of the independent members, will adopt procedures reasonably designed to ensure that the Acquiring Fund Adviser and any Acquiring Fund Subadviser are conducting the investment program of the Acquiring Management Company without taking into account any consideration received by the Acquiring Management Company or an Acquiring Fund Affiliate from an ETMF (or, in the case of an ETMF Feeder, any Master Fund) or an ETMF Affiliate in connection with any services or transactions.

4. Once an investment by an Acquiring Fund in Shares exceeds the limits in section 12(d)(1)(A)(i) of the Act, the Board of the ETMF (or, in the case of an ETMF Feeder, any
Master Fund), including a majority of the independent members, will determine that any consideration paid by the ETMF (or, in the case of an ETMF Feeder, any Master Fund) to an Acquiring Fund or an Acquiring Fund Affiliate in connection with any services or transactions: (a) is fair and reasonable in relation to the nature and quality of the services and benefits received by the ETMF (or, in the case of an ETMF Feeder, any Master Fund); (b) is within the range of consideration that the ETMF (or, in the case of an ETMF Feeder, any Master Fund) would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply to any services or transactions between an ETMF (or, in the case of an ETMF Feeder, any Master Fund) and its Adviser or Subadviser, or any person controlling, controlled by or under common control with the Adviser or Subadviser.

5. No Acquiring Fund or Acquiring Fund Affiliate (except to the extent it is acting in its capacity as Adviser or Subadviser to an ETMF (or, in the case of an ETMF Feeder, any Master Fund) will cause an ETMF (or, in the case of an ETMF Feeder, any Master Fund) to purchase a security in any Affiliated Underwriting.

6. The Board of an ETMF (or, in the case of an ETMF Feeder, any Master Fund), including a majority of the independent members, will approve procedures reasonably designed to monitor any purchases of securities by the ETMF (or, in the case of an ETMF Feeder, any Master Fund) in Affiliated Underwritings, once an investment by an Acquiring Fund in the securities of the ETMF exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Acquiring Fund in the ETMF. The Board will consider, among other things: (a) whether the purchases were consistent with the investment objectives and policies of the ETMF (or, in the case of an ETMF Feeder, any Master Fund); (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the ETMF (or, in the case of an ETMF Feeder, any Master Fund) in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders.

7. Each ETMF (or, in the case of an ETMF Feeder, any Master Fund) will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings, once an investment by an Acquiring Fund in the securities of the ETMF exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate’s members, the terms of the purchase, and the information or materials upon which the determinations of the Board were made.
8. Before investing in an ETMF in excess of the limits in section 12(d)(1)(A), an Acquiring Fund and the ETMF will execute an Acquiring Fund Agreement stating that their boards and their investment adviser, or Trustee and Sponsor, as applicable, understand the terms and conditions of the Order, and agree to fulfill their responsibilities under the Order. At the time of its investment in Shares in excess of the limit in section 12(d)(1)(A)(i), an Acquiring Fund will notify the ETMF of the investment. At such time, the Acquiring Fund will also transmit to the ETMF a list of the names of each Acquiring Fund Affiliate and Underwriting Affiliate. The Acquiring Fund will notify the ETMF of any changes to the list of the names as soon as reasonably practicable after a change occurs. The ETMF and the Acquiring Fund will maintain and preserve a copy of the Order, the Acquiring Fund Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

9. The Acquiring Fund Adviser, Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Acquiring Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted under Rule 12b-1 under the Act) received from an ETMF (or, in the case of an ETMF Feeder, any Master Fund) by the Acquiring Fund Adviser, Trustee or Sponsor, or an affiliated person of the Acquiring Fund Adviser, Trustee or Sponsor, other than any advisory fees paid to the Acquiring Fund Adviser, Trustee or Sponsor, or its affiliated person by the ETMF (or, in the case of an ETMF Feeder, any Master Fund), in connection with the investment by the Acquiring Fund in the ETMF. Any Acquiring Fund Subadviser will waive fees otherwise payable to the Acquiring Fund Subadviser, directly or indirectly, by the Acquiring Management Company in an amount at least equal to any compensation received from an ETMF (or, in the case of an ETMF Feeder, any Master Fund) by the Acquiring Fund Subadviser, or an affiliated person of the Acquiring Fund Subadviser, other than any advisory fees paid to the Acquiring Fund Subadviser or its affiliated person by the ETMF (or, in the case of an ETMF Feeder, any Master Fund), in connection with any investment by the Acquiring Management Company in the ETMF made at the direction of the Acquiring Fund Subadviser. In the event that the Acquiring Fund Subadviser waives fees, the benefit of the waiver will be passed through to the Acquiring Management Company.

10. Any sales charges and/or service fees charged with respect to shares of an Acquiring Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

11. No ETMF (or, in the case of an ETMF Feeder, any Master Fund) will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits in section 12(d)(1)(A) of the Act, except to the extent that the ETMF acquires such securities in compliance with section 12(d)(1)(E) of the Act or acquires shares of a Master Fund; or the ETMF (or, in the case of an ETMF Feeder, any Master Fund) (a) receives securities of another investment company as a dividend or as a result of a plan of reorganization of a company (other than a plan devised for the purpose of evading section 12(d)(1) of the Act), or (b) acquires securities of another investment company pursuant to exemptive relief from the Commission permitting such ETMF (or, in the case of an ETMF Feeder, any Master Fund) to (i) acquire securities of one or more investment companies for short-term cash management purposes or (ii) engage in interfund borrowing and lending transactions.
12. Before approving any advisory contract under section 15 of the Act, the board of each Acquiring Management Company, including a majority of the independent members, will find that the advisory fees charged under such advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contracts of any ETMF (or, in the case of an ETMF Feeder, any Master Fund) in which the Acquiring Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Acquiring Management Company.

VIII. NAMES AND ADDRESSES

Pursuant to rule 0-2(f) under the Act, Applicants state that their addresses are as indicated on the first page of this application. Applicants further state that all written or oral communications concerning this application should be directed to the persons listed on the cover.

IX. PROCEDURAL MATTERS, CONCLUSION AND SIGNATURES

Applicants file this application in accordance with rule 0-2 under the Act. Applicants have attached the required verifications to the application. In accordance with Rule 0-2(c) under the Act, Applicants state that all actions necessary to authorize the execution and filing of this application have been taken, and the persons signing and filing this document are authorized to do so on behalf of the Applicants. In accordance with rule 0-5 under the Act, Applicants request that the Commission issue the requested Order without holding a hearing.

Based on the facts, analysis and conditions in the application, Applicants respectfully request that the Commission issue an Order under sections 6(c), 17(b) and 12(d)(1)(J) of the Act granting the relief requested by this application.

EATON VANCE MANAGEMENT

By: /s/ Thomas E. Faust Jr.
Name: Thomas E. Faust Jr.
Title: Chairman and Chief Executive Officer

EATON VANCE ETMF TRUST

By: /s/ Stephen W. Clarke
Name: Stephen W. Clarke
Title: Vice President

Dated: March 27, 2013
Verification of Eaton Vance Management

In accordance with Rule 0-2(d) under the Act, the undersigned, being duly sworn, deposes and says that he has duly executed the attached application for an order for, and on behalf of, Eaton Vance Management; that he is Chairman and Chief Executive Officer of such company; and that all actions taken by the directors or other persons necessary to authorize deponent to execute and file such instrument this 27th day of March 2013, have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

By: /s/ Thomas E. Faust, Jr.
Name: Thomas E. Faust, Jr.
Title: Chairman and Chief Executive Officer

Verification of EATON VANCE ETMF TRUST

In accordance with Rule 0-2(d) under the Act, the undersigned, being duly sworn, deposes and says that he has duly executed the attached application for an order for, and on behalf of, the Eaton Vance ETMF Trust; that he is the Vice President of such entity; and that all actions taken by the trustees or other persons necessary to authorize deponent to execute and file such instrument this 27th day of March 2013, have been taken. Deponent further says that he is familiar with such instrument, and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

By: /s/ Stephen W. Clarke
Name: Stephen W. Clarke
Title: Vice President
RESOLVED: That the Trust be, and it hereby is, authorized to prepare and file with the SEC an application for an exemptive order (“Order”), and any and all amendments thereto, pursuant to section 6(c) of the Investment Company Act of 1940, granting an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c-1 under the Act, pursuant to sections 6(c) and 17(b) of the Act from section 17(a) of the Act and pursuant to section 12(d)(1)(J) of the Act from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

RESOLVED: That any and all actions previously taken in connection with the preparation and filing with the SEC of an application for the Order, and any and all amendments thereto, pursuant to section 6(c) of the Investment Company Act of 1940, granting an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c-1 under the Act, pursuant to sections 6(c) and 17(b) of the Act from section 17(a) of the Act and pursuant to section 12(d)(1)(J) of the Act from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act be, and they hereby are, ratified.

RESOLVED: That each initial Trustee and officer of the Trust be, and hereby is, authorized to take any and all actions as are reasonable or necessary to obtain the Order.

RESOLVED: That each initial Trustee and officer of the Trust be, and hereby is, authorized and directed to do and perform any and all further acts and things which are necessary or appropriate to carry out the foregoing resolutions.
APPENDIX A

The Initial ETMF

Under normal market conditions, the Initial ETMF invests primarily in value stocks of large-cap companies. Value stocks are common stocks that, in the opinion of the investment adviser, are inexpensive or undervalued relative to the overall stock market. The portfolio managers generally consider large-cap companies to be those having market capitalizations at or above the median capitalization of the Russell 1000 Value Index. The Initial ETMF normally invests at least 80% of its net assets in equity securities of large-cap companies. The Initial ETMF may invest up to 25% of its total assets in foreign securities, some of which may be located in emerging market countries. The Initial ETMF may lend its securities.

The Initial ETMF’s investment decisions are made primarily on the basis of fundamental research. The portfolio managers utilize information provided by, and the expertise of, the investment adviser’s research staff in making investment decisions. In selecting investments to buy, the portfolio managers consider, among other factors, a company’s earnings or cash flow capabilities, dividend prospects, financial strength, growth potential, strength of business franchises and management team, sustainability of competitive advantages and estimates of fair value. The portfolio managers may sell an investment when their price target for the investment is reached, the fundamentals of the company deteriorate or to pursue more attractive investment options. The portfolio managers seek to manage investment risk by maintaining broad issuer and industry diversification among the Initial ETMF’s holdings, and by utilizing fundamental analysis to understand and monitor the principal risks of portfolio investments.
Exchange-Traded Funds

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (“Commission” or “SEC”) is proposing a new rule under the Investment Company Act of 1940 that would exempt exchange-traded funds (“ETFs”) from certain provisions of that Act and our rules. The rule would permit certain ETFs to begin operating without the expense and delay of obtaining an exemptive order from the Commission. The rule is designed to eliminate unnecessary regulatory burdens, and to facilitate greater competition and innovation among ETFs. The Commission also is proposing amendments to our disclosure form for open-end investment companies, Form N-1A, to provide more useful information to investors who purchase and sell ETF shares on national securities exchanges. In addition, the Commission is proposing a new rule to allow mutual funds (and other types of investment companies) to invest in ETFs to a greater extent than currently permitted under the Investment Company Act.

DATES: Comments should be received on or before May 19, 2008.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission’s Internet comment form
Send an e-mail to rule-comments@sec.gov. Please include File Number S7-07-08 on the subject line; or

- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

**Paper Comments:**

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-07-08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission’s Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** With respect to proposed rule 6c-11 and amendments to Form N-1A, Dalia Osman Blass, Senior Counsel, or Penelope Saltzman, Acting Assistant Director, (202) 551-6792, with respect to proposed rule 12d1-4 and proposed amendments to rule 12d1-2, Adam Glazer, Senior Counsel, or Penelope Saltzman, Acting Assistant Director, (202) 551-6792, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE, Washington, DC

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¹ 15 U.S.C. 80a. Unless otherwise noted, all references to rules under the Investment Company Act will be to Title 17, Part 270 of the Code of Federal Regulations [17 CFR 270], and all references to statutory sections are to the Investment Company Act.

² 17 CFR 239.15A, 17 CFR 274.11A.

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I. INTRODUCTION

Exchange-traded funds are an increasingly popular investment vehicle.\(^4\) Last year, the number of ETFs traded in U.S. markets increased by 67 percent, from 357 to 601, and the assets held by ETFs increased by about 42 percent, to approximately $580 billion.\(^5\) Although aggregate ETF assets are less than seven percent of assets held by traditional mutual funds (i.e., open-end investment companies),\(^6\) they are growing more rapidly.\(^7\)

ETFs offer public investors an undivided interest in a pool of securities and other assets

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\(^4\) When we refer to an ETF in this release, we refer to an ETF that meets the definition of “investment company” and is registered under the Investment Company Act generally because it issues securities and is primarily engaged or proposes to primarily engage in the business of investing in securities. Some other types of exchange-traded funds, which we will not discuss in this release, invest primarily in commodities or commodity-based instruments, such as crude oil and precious metal (“commodity ETFs”). Commodity ETFs are typically organized as trusts, and issue shares that trade on a securities exchange like other ETFs, but they are not “investment companies” under the Investment Company Act. See section 3(a)(1) (defining the term “investment company” as a company that “(A) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities; (B) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or (C) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.”). 15 U.S.C. 80a-3(a)(1).


\(^6\) In 2007, net new investment in ETFs was approximately $142 billion compared to $212 billion in traditional mutual funds, or 67 percent of net new investment in traditional mutual funds. ICI ETF Statistics 2007, supra note 5; ICI, Trends in Mutual Fund Investing December 2007, Jan. 30, 2008 (“ICI Trends December 2007”).

\(^7\) ICI ETF Assets 2007, supra note 5. As of December 2007, assets held by traditional equity and bond mutual funds were $8.9 trillion. ICI Trends December 2007, supra note 6. In 2007, ETF assets grew 42 percent (from $407.9 billion to $579.5 billion) while traditional equity and bond mutual fund assets grew 9.7 percent (from $8.06 trillion to $8.9 trillion). See ICI ETF Statistics 2007, supra note 5; ICI Trends December 2007, supra note 6.
and thus are similar in many ways to traditional mutual funds, except that shares in an ETF can be bought and sold throughout the day like stocks on an exchange through a broker-dealer.\textsuperscript{8} ETFs therefore possess characteristics of traditional mutual funds, which issue redeemable shares, and of closed-end investment companies, which generally issue shares that trade at negotiated market prices on a national securities exchange and are not redeemable.\textsuperscript{9}

Since they were first developed in the early 1990s, ETFs have evolved. The first ETFs held a basket of securities that replicated the component securities of broad-based stock market indexes, such as the S&P 500.\textsuperscript{10} Many of the newer ETFs are based on more specialized indexes,\textsuperscript{11} including indexes that are designed specifically for a particular ETF,\textsuperscript{12} bond indexes,\textsuperscript{13}

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\textsuperscript{8} ETF shares represent an undivided interest in the portfolio of assets held by the fund. ETFs are registered with the Commission and are organized either as open-end investment companies or unit investment trusts (“UITs”). See section 5(a)(1) of the Investment Company Act (defining “open-end company” as a management company that is offering for sale or has outstanding any redeemable security of which it is the issuer); section 4(2) of the Act (defining “unit investment trust” as an investment company that (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument, (B) does not have a board of directors, and (C) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities, but does not include a voting trust). 15 U.S.C. 80a-5(a)(1).

\textsuperscript{9} ETFs today have certain characteristics that have made them attractive to investors. Many have lower expense ratios and certain tax efficiencies compared to traditional mutual funds, and they allow investors to buy and sell shares at intra-day market prices. Moreover, investors can sell ETF shares short, write options on them, and set market, limit, and stop-loss orders on them. The shares of many ETFs often trade on the secondary market at prices close to the net asset value (“NAV”) of the shares, rather than at discounts or premiums.


\textsuperscript{11} ETF providers offer ETFs that track the performance of indexes related to particular industries or market sectors. In 2007, domestic sector/industry ETFs increased by 62% from 135 to 219. ICI ETF Assets 2007, supra note 5.

\textsuperscript{12} Many of these indexes are essentially portfolios of assets that are compiled (and change) on the basis of criteria that the index provider has designed for the particular ETF. Some indexes, for example, are “fundamental” indexes or rules-based indexes, in which the securities are chosen on criteria such as dividends and core earnings. See, e.g., PowerShares Exchange-Traded Fund (footnote continued)
and international indexes.\textsuperscript{14} Originally marketed as opportunities for investors to participate in tradable portfolio or basket products, ETFs are held today in increasing amounts by institutional investors (including mutual funds) and other investors as part of sophisticated trading and hedging strategies.\textsuperscript{15} Shares of ETFs can be bought and held (sometimes as a core component of a portfolio),\textsuperscript{16} or they can be traded frequently as part of an active trading strategy.\textsuperscript{17}

Like money market funds first offered in the 1970s, ETFs represent a new type of


\textsuperscript{14} The first international equity ETFs were introduced in 1996. As of December 2007, there were 159 ETFs that provide exposure to international equity markets. ICI, \textit{Exchange-Traded Fund Assets December 2007}, Jan. 30, 2008. International index-based ETFs increased by 87% from 85 in 2006 to 159 in 2007. \textit{Id.}

\textsuperscript{15} David Hoffman, \textit{Funds’ grip loosens as ETFs gain}, InvestmentNews, Apr. 28, 2006 (reporting that in 2004, 44% of 821 advisory firms polled by Financial Research Corp. of Boston said they collectively allocated an average of 12% of total assets under management to ETFs as compared with 2003, in which only 34% used ETFs and collectively allocated an average of 8% of assets under management).

\textsuperscript{16} \textit{See, e.g.}, iShares Trust, Investment Company Act Release No. 25969 (Mar. 21, 2003) [68 FR 15010 (Mar. 27, 2003)].

\textsuperscript{17} \textit{See GARY L. GASTINEAU, EXCHANGE-TRADED FUNDS MANUAL, 2 (2002) (“GASTINEAU”) (ascribing the popularity of ETFs among active traders to high trading volume, competitive market makers, and active arbitrage pricing.). Morgan Stanley, Exchange-Traded Funds Quarterly Report, Nov. 16, 2006, at 13 (“They can be used by market timers wishing to gain or reduce exposure to entire markets or sectors throughout the trading day.”).}
registered investment company ("fund"). And like money market funds, they have required exemptions from certain provisions of the Act before they can commence operations.\textsuperscript{18} Since 1992, the Commission has issued 61 orders to ETFs and their sponsors.\textsuperscript{19}

In this release, we propose a new rule that would codify the exemptive orders we have issued to ETFs. Proposed rule 6c-11 would allow new competitors (\textit{i.e.}, those sponsors who do not already have exemptive orders) to enter the market more easily. We also are proposing amendments to our registration form for open-end funds, Form N-1A, to provide more useful information to individual investors who purchase and sell ETF shares on national securities exchanges. Finally, we are proposing a new rule to allow funds to invest in ETFs to a greater extent than currently permitted under the Act and our rules.

**II. Operation of Exchange-Traded Funds**

All ETFs trading today operate in a similar way.\textsuperscript{20} Unlike traditional mutual funds, ETFs

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\textsuperscript{18} See rule 2a-7 under the Act, which codified the standards for granting the applications filed by money market funds for exemptions from the pricing and valuation provisions of the Act. For a discussion of the administrative history of rule 2a-7, see Valuation of Debt Instruments and Computation of Current Price per Share by Certain Open-End Investment Companies (Money Market Funds), Investment Company Act Release No. 12206 (Feb. 1, 1982) [47 FR 5428 (Feb. 5, 1982)].

\textsuperscript{19} Since 2000, the Commission has provided ETF sponsors relief for any ETFs created in the future in connection with their exemptive orders so that the sponsors can introduce new ETFs if the ETFs meet the terms and conditions contained in the exemptive orders. See, \textit{e.g.}, Barclays Global Fund Advisors, Investment Company Act Release Nos. 24394 (Apr. 17, 2000) [65 FR 21219 (Apr. 20, 2000)] (notice) and 24451 (May 12, 2000) (order).

\textsuperscript{20} Until recently, all ETFs had an investment objective of seeking returns that are correlated to the returns of a securities index, and in this respect operated much like traditional index funds. Recently, we issued orders approving actively managed ETFs. See WisdomTree Trust, \textit{et al.}, Investment Company Act Release Nos. 28147 (Feb. 6, 2008) [73 FR 7776 (Feb. 11, 2008)] (notice) ("WisdomTree Actively Managed ETF Notice") and 28174 (Feb. 27, 2008) (order) ("WisdomTree Actively Managed ETF"); Barclays Global Fund Advisors, \textit{et al.}, Investment Company Act Release Nos. 28146 (Feb. 6, 2008) [73 FR 7771 (Feb. 11, 2008)] (notice) and 28173 (Feb. 27, 2008) (order) ("Barclays Actively Managed ETF"); Bear Sterns Asset Management, Inc., \textit{et al.}, Investment Company Act Release Nos. 28143 (Feb. 5, 2008) [73 FR 7768 (Feb. 11, 2008)] (notice) and 28172 (Feb. 27, 2008) (order) ("Bear Sterns Actively Managed ETF"); PowerShares Capital Management LLC, \textit{et al.}, Investment Company Act (footnote continued)
do not sell or redeem their individual shares (“ETF shares”) at net asset value (“NAV”). Instead, financial institutions purchase and redeem ETF shares directly from the ETF, but only in large blocks called “creation units.”

A financial institution that purchases a creation unit of ETF shares first deposits with the ETF a “purchase basket” of certain securities and other assets identified by the ETF that day, and then receives the creation unit in return for those assets. The basket generally reflects the contents of the ETF’s portfolio and is equal in value to the aggregate NAV of the ETF shares in the creation unit. After purchasing a creation unit, the financial institution may hold the ETF shares, or sell some or all in secondary market transactions.

Like operating companies and closed-end funds, ETFs register offerings and sales of ETF shares under the Securities Act and list their shares for trading under the Securities Exchange Act of 1934 (“Exchange Act”). As with any listed security, investors may trade ETF shares at market prices. ETF shares purchased in secondary market transactions are not redeemable from the ETF except in creation units.

The redemption process is the reverse of the purchase process. The financial institution acquires (through purchases on national securities exchanges, principal transactions, or private transactions) the number of ETF shares that comprise a creation unit, and redeems the creation unit.

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21 As discussed further below, creation units typically consist of at least 25,000 ETF shares. See infra note 113.

22 We note that depending on the facts and circumstances, broker-dealers that purchase a creation unit and sell the shares may be deemed to be participants in a distribution, which could render them statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. See 15 U.S.C. 77b(a)(11).

unit from the ETF in exchange for a “redemption basket” of securities and other assets. An investor holding fewer ETF shares than the amount needed to constitute a creation unit (most retail investors) may dispose of those ETF shares by selling them on the secondary market. The investor receives market price for the ETF shares, which may be higher or lower than the NAV of the shares, and pays customary brokerage commissions on the sale.

The ability of financial institutions to purchase and redeem creation units at each day’s NAV creates arbitrage opportunities that may help keep the market price of ETF shares near the NAV per share of the ETF. For example, if ETF shares begin trading on national securities exchanges at a price below the fund’s NAV per share, financial institutions can purchase ETF shares in secondary market transactions and, after accumulating enough shares to comprise a creation unit, redeem them from the ETF in exchange for the more valuable securities in the ETF’s redemption basket. Those purchases create greater market demand for the ETF shares, and thus tend to drive up the market price of the shares to a level closer to NAV. Conversely, if the market price for ETF shares exceeds the NAV per share of the ETF itself, a financial institution can deposit a basket of securities in exchange for the more valuable creation unit of ETF shares, and then sell the individual shares in the market to realize its profit. These sales would increase the supply of ETF shares in the secondary market, and thus tend to drive down the price of the ETF shares to a level closer to the NAV of the ETF share.

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24 ETFs sometimes provide cash-in-lieu payments on some (or all) purchases or redemptions. See infra notes 120-121 and accompanying text.

25 The purchase of the ETF shares on the secondary market combined with the sale of the redemption basket securities also may create upward pressure on the price of ETF shares and/or downward pressure on the price of redemption basket securities, driving the market price and ETF NAV closer together.

26 The institution’s purchase of the purchase basket securities combined with the sale of ETF shares also may create downward pressure on the price of ETF shares and/or upward pressure on the (footnote continued)
Arbitrage activity in ETF shares is facilitated by the transparency of the ETF’s portfolio. Each day, the ETF publishes the identities of the securities in the purchase and redemption baskets, which are representative of the ETF’s portfolio. Each exchange on which the ETF shares are listed typically discloses an approximation of the current value of the basket on a per share basis (“Intraday Value”) at 15 second intervals throughout the day and, for index-based ETFs, disseminates the current value of the relevant index. This transparency can contribute to the efficiency of the arbitrage mechanism because it helps arbitrageurs determine whether to purchase or redeem creation units based on the relative values of ETF shares in the secondary market and the securities contained in the ETF’s portfolio.

Arbitrage activity in ETF shares also appears to be affected by the liquidity of the securities in an ETF’s portfolio. Most ETFs represent in their applications for exemptive relief price of purchase basket securities, driving the market price and the ETF’s NAV closer together. ETF sponsors and market participants report that the average deviation between the daily closing price and the daily NAV of ETFs that track domestic indexes is generally less than 2%. See, e.g., Vanguard U.S. Stock ETFs, Prospectus 56-59 (Apr. 27, 2007). ETFs that track foreign indexes may have a more significant deviation. See, e.g., iShares FTSE/Xinhua China 25 Index Fund, Prospectus 19 (Dec. 1, 2006).

With respect to index-based ETFs, portfolio transparency is enhanced by the transparency of the underlying index. Index providers publicly announce the components of their indexes. Because an index-based ETF seeks to track the performance of an index, often by replicating the component securities of the index, the transparency of the underlying index results in a high degree of transparency in the ETF’s investment operations. Similarly, each of the actively managed ETFs operating under the recent exemptive orders approved by the Commission is required to make public each day the securities and other assets in its portfolio. See Actively Managed ETF Orders, supra note 20.

The Intraday Value also is referred to as the Intraday Indicative Value, Indicative Optimized Portfolio Value, Indicative Fund Value, Indicative Trust Value, or Indicative Partnership Value. National securities exchanges are permitted to disseminate this information at 60 second intervals for ETFs that track non-U.S. indexes. See, e.g., Commentary .01(b)(2) to NYSE Aera Equities Rule 5.2(j)(3); Commentary 0.2(a)(C)(c) to American Stock Exchange Constitution and Rules & Arbitration Awards Rule 1000A.
that they invest in highly liquid securities. Effective arbitrage depends in part on the ability of financial institutions to readily assemble the basket for purchases of creation units and to sell securities received upon redemption of creation units, and liquidity appears to be a factor in this process. An ETF’s investment in less liquid securities may reduce arbitrage efficiency and thereby increase both the likelihood that a deviation between ETF share market price and NAV per share may occur and the amount of any deviation that does occur.

III. EXEMPTIONS PERMITTING FUNDS TO FORM AND OPERATE AS ETFs

Today we are proposing for public comment a new rule that would codify much of the relief and many of the conditions of orders that we have issued to index-based ETFs in the past, and more recently to certain actively managed ETFs. The proposed rule is designed to enable most ETFs to begin operations without the need to obtain individual exemptive relief from the Commission.

A. Scope of Proposed Rule 6c-11

1. Index-Based ETFs

Proposed rule 6c-11, like our orders, would provide exemptions for ETFs that have a stated investment objective of maintaining returns that correspond to the returns of a securities

\[\text{Index-based ETFs track indexes that have specified methodologies for selecting their component securities. The methodologies generally ensure that an index consists of securities that will be highly liquid. See, e.g., Barclays High Yield Notice, supra note 13 ("The Underlying Index is a rules-based index designed to reflect the 50 most liquid U.S. dollar-denominated high-yield corporate bonds registered for sale in the U.S. or exempt from registration."). Because index-based ETFs either replicate or sample the indexes, their portfolio securities also should possess these characteristics. The actively managed ETFs also appear to invest in highly liquid securities. See WisdomTree Actively Managed ETF, supra note 20 (investing in U.S. and foreign money market securities); Barclays Actively Managed ETF, supra note 20 (investing in foreign money market securities); Bear Sterns Actively Managed ETF, supra note 20 (investing primarily in investment-grade fixed income securities); PowerShares Actively Managed ETF, supra note 20 (investing in large cap companies or U.S. government and corporate debt securities).}\]
index whose provider discloses on its Internet Web site the identities and weightings\(^{31}\) of the component securities and other assets of the index.\(^{32}\) In this respect, the rule would codify our previous exemptive orders. Our experience is that the conditions included in the index-based ETF orders have effectively preserved the statutory purposes of the Act.

The proposed rule would not limit the types of indexes that an ETF may track or the types of securities that comprise any index. Thus, the rule would not limit the exemption to ETFs investing in liquid securities or assets, although existing ETFs generally have represented to us that their portfolios are comprised of highly liquid securities,\(^{33}\) and, as open-end funds, are required to comply with the liquidity guidelines applicable to all open-end funds.\(^{34}\)

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\(^{31}\) Proposed rule 6c-11(e)(9) defines “weighting of the component security” as “the percentage of the index’s value represented, or accounted for, by such component security.”

\(^{32}\) Proposed rule 6c-11(e)(4)(v)(B) (defining “exchange-traded fund”); see infra Section III.B.1 for a discussion of this index transparency requirement. Index-based ETFs obtain returns that correspond to those of an underlying index by replicating or sampling the component securities of the index. An ETF that uses a replicating strategy generally invests in the component securities of the underlying index in the same approximate proportions as in the underlying index. See, e.g., First Trust Exchange-Traded Fund, Investment Company Act Release No. 27051 (Aug. 26, 2005) [70 FR 52450 (Sept. 2, 2005)] (“First Trust Notice”) at n.1. If, however, there are practical difficulties or substantial costs involved in holding every security in the underlying index, the ETF may use a representative sampling strategy pursuant to which it will invest in some but not all of the relevant component securities. An ETF that uses a sampling strategy includes in its portfolio securities that are designed, in the aggregate, to reflect the underlying index’s capitalization, industry, and fundamental investment characteristics, and to perform like the index. The ETF implements the sampling strategy by acquiring a subset of the component securities of the underlying index, and possibly some securities that are not included in the corresponding index that are designed to help the ETF track the performance of the index. See, e.g., id.

\(^{33}\) See supra note 30 and accompanying and following text. See also WisdomTree Notice, supra note 12 at n.8 and accompanying text.

\(^{34}\) Long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. See Statement Regarding “Restricted Securities,” Investment Company Act Release No. 5847 (Oct. 21, 1969) [35 FR 19989 (Dec. 31, 1970)]; Revisions of Guidelines to Form N-1A, Investment Company Act Release No. 18612 (Mar. 12, 1992) [57 FR 9828 (Mar. 20, 1992)]. A fund’s portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the ETF. See Acquisition and Valuation of Certain Portfolio Instruments by Registered Investment Companies, Investment Company Act Release (footnote continued)
We request comment regarding the effect of portfolio liquidity on the potential for deviation between ETF share market price and NAV and the amount of any deviation. In addition to the liquidity guidelines applicable to all open-end funds, should the Commission include additional liquidity requirements as a condition of the exemptions? If so, what additional requirements and why? Should the chance (or likelihood) that substantial discounts or premiums may occur if an ETF portfolio contains less liquid securities or assets be a regulatory concern for the Commission, or should it be treated as a material risk to be disclosed to prospective investors, permitting them to evaluate whether the risk makes the ETF an appropriate investment in light of the investor’s investment objectives?\textsuperscript{35} We note that currently there is substantially more market interest in ETFs that track broad-based indexes that are comprised of highly liquid securities than ETFs that track more specialized indexes.\textsuperscript{36} How would liquidity or illiquidity of securities or other assets in an ETF’s portfolio affect the ability of financial institutions to assemble securities for a purchase basket and thus the arbitrage mechanism and operation of the ETF? Would liquidity requirements preclude the development of specialty ETFs that serve narrow investment purposes but which may satisfy particular investment needs of certain investors?

2. \textit{Actively Managed ETFs}

We recently issued exemptive orders to several actively managed ETFs and their

\textsuperscript{35} The Commission is proposing an amendment to Form N-1A that would codify the condition in our orders that ETFs disclose the extent and frequency with which market prices have tracked their NAV. \textit{See infra} notes 169-170 and accompanying text.

\textsuperscript{36} \textit{See} ICI ETF Statistics 2007, \textit{supra} note 5.
Like our orders, proposed rule 6c-11 would provide an exemption for an actively managed ETF that discloses on its Internet Web site each business day the identities and weightings of the component securities and other assets held by the ETF. Unlike index-based ETFs, an actively managed ETF does not seek to track the return of a particular index. Instead, an actively managed ETF’s investment adviser, like an adviser to any traditional actively managed mutual fund, generally selects securities consistent with the ETF’s investment objectives and policies without regard to a corresponding index.

In 2001, we sought comment on the concept of an actively managed ETF (“2001 Concept Release”). We requested comment on a broad number of questions that we felt were important to consider before expanding the scope of the exemptive orders we had issued. We wanted to know how investors would use an actively managed ETF because it seemed that, unlike an investment in an index-based ETF, an investment in an actively managed ETF could not be used, for example, to implement a hedging strategy. We questioned whether an actively managed ETF would provide investors with the same or similar benefits as index-based ETFs, including potential tax efficiencies and low expense ratios.

Our 2001 Concept Release also asked more focused questions about the structural and operational differences between the two types of ETFs and how those differences might affect the market value of ETF shares. We inquired whether as a matter of public policy an ETF must be designed to enable efficient arbitrage and thereby minimize the probability that ETF shares

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37 See Actively Managed ETF Orders, supra note 20.
38 Proposed rule 6c-11(e)(4)(v)(A); see infra Section III.B.1 for a discussion of this requirement.
would trade at a material premium or discount.\textsuperscript{40} We asked, for example, whether actively managed ETFs must have the same degree of portfolio transparency as index-based ETFs, a factor that appeared to contribute significantly to arbitrage efficiency.\textsuperscript{41} It was unclear to us at that time whether an adviser to actively managed ETFs would be willing to provide the same degree of transparency as an adviser to index-based ETFs because, for example, disclosure could allow market participants to access the fund’s investment strategy.\textsuperscript{42} We were concerned that reduced transparency could expose arbitrageurs to greater investment risk and result in a less efficient arbitrage mechanism, which in turn could lead to more significant premiums and discounts than experienced by index-based ETFs.

We received 20 comments from market participants, many of which supported the introduction of actively managed ETFs.\textsuperscript{43} Many commenters stated that actively managed ETFs would have the potential to provide investors with uses and benefits similar to index-based ETFs. For example, commenters maintained that, like index-based ETFs, actively managed ETFs could potentially serve as short-term or long-term investment vehicles, allow investors to gain

\begin{itemize}
\item \textsuperscript{40} \textit{Id.} at text following n.35.
\item \textsuperscript{41} \textit{See supra} note 27 and accompanying text.
\item \textsuperscript{42} We also noted concerns that full disclosure could permit market participants to “front-run” portfolio trades. \textit{See infra} text accompanying and preceding note 84. In addition, because actively managed portfolios likely would change more frequently and in less foreseeable ways than a portfolio of index-based ETFs, we were unclear how or whether an actively managed ETF would communicate intra-day portfolio changes to investors. \textit{See generally}, Russ Wermers, \textit{The Potential Effects of More Frequent Portfolio Disclosure on Mutual Fund Performance}, Investment Company Institute Perspective, June 2001, Vol. 7, No. 3, at http://www.ici.org/perspective/per07-03.pdf. (examining the potential effects of more frequent portfolio disclosure on the performance of mutual funds and concluding that, with more frequent disclosure, shareholders would likely receive lower total returns on their investments due to, among other things, front-running and free-riding).
\item \textsuperscript{43} The comment letters to the 2001 Concept Release are available for public inspection and copying in the Commission’s Public Reference Room, 100 F Street, NE., Washington, DC 20549 (File No. S7-20-01), and are available on the Commission’s Internet Web site (http://www.sec.gov/rules/concept/s72001.shtml).
\end{itemize}
exposure to an asset category such as value, growth or income, and play a significant role in an investor’s hedging strategies. Commenters also asserted that actively managed ETFs have the potential for providing investors benefits similar to index-based ETFs, including low expense ratios and intra-day exchange trading. Other commenters, however, questioned whether some of the investor benefits traditionally associated with index-based ETFs would be present with actively managed ETFs.

Commenters agreed that actively managed ETFs should be designed, like index-based ETFs, with an arbitrage mechanism intended to minimize the potential deviation between market price and NAV of ETF shares. Not all commenters agreed, however, on whether we should be concerned with the extent of premiums or discounts and, therefore, whether we should require full portfolio transparency. Some asserted that the amount of any discount or premium that might develop ought not to be a consideration for us in determining whether to grant exemptive

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44 See, e.g., Comment Letter of the American Stock Exchange LLC, File No. S7-20-01 (Mar. 5, 2002) (“For example, an investor may find that a particular actively managed ETF more closely tracks his securities holdings, and therefore may be a more effective hedge.”); Comment Letter of State Street Bank and Trust Company, File No. S7-20-01 (Jan. 14, 2002). One commenter asserted, however, that actively managed ETFs would be of greater interest to retail investors; institutional investors would not use active fund products for hedging, cash equitization or other strategies. Comment Letter of Barclays Global Investors, File No. S7-20-01 (Jan. 11, 2002).


46 One commenter, for example, asserted that an actively managed ETF would likely not experience similar tax efficiency because that is predominantly a function of the low portfolio turnover of index-based ETFs. The commenter also noted that actively managed ETFs are unlikely to have the low expenses associated with index-based ETFs, which result primarily from lower advisory fees associated with the passive management of those funds. Comment Letter of the Vanguard Group, File No. S7-20-01 (Feb. 14, 2002).

relief. One commenter argued that ETFs with share prices that significantly deviate from NAV would likely not attract the interest of investors and would ultimately fail if they did not provide information necessary for market participants to make knowledgeable investment decisions. Other commenters asserted that it is important to require that ETFs provide all investors with the same information about portfolio holdings and to require clear fund disclosures regarding the risks associated with the level of transparency provided. These commenters stressed the need,

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48 See, e.g., Comment Letter of the American Bar Association, Committee on Federal Regulation of Securities, File No. S7-20-01 (Feb. 1, 2002) (“We believe that the Commission should not mandate the level of transparency in ETFs’ portfolios, but rather should allow fully informed demand in the financial markets to determine the proper levels. Different segments of the market with different needs might demand investment vehicles with different variation. To prevent market demand from determining the structure of investment vehicles would retard efficiency, competition, and capital formation.”); Comment Letter of State Street Bank and Trust Company, File No. S7-20-01 (Jan. 14, 2002) (“…[A] non-transparent actively managed ETF will be no worse off than closed-end funds trading today. In fact, the premium/discount of a non-transparent ETF should be narrower due to the ETF’s open-ended qualities.”); Comment Letter of the Vanguard Group, File No. S7-20-01 (Feb. 14, 2002) (“While [spreads] may be higher for actively managed ETFs than for index ETFs, we do not believe that the discounts between market price and NAV will approach those seen in closed-end funds.”).

49 See Comment Letter of State Street Bank and Trust Company, File No. S7-20-01 (Jan. 14, 2002); see also Comment Letter of the American Bar Association, Committee on Federal Regulation of Securities, File No. S7-20-01 (Feb. 1, 2002) (“Ultimately it is in the interest of the sponsor and investment adviser to provide for effective arbitrage opportunities. It is unlikely that an actively managed ETF sponsor would be able to convince the critical market participants such as specialists, market makers, arbitragers and other Authorized Participants to support a product that contained illiquid securities to a degree that would affect the liquidity of the ETF, making it difficult to price, trade and hedge, ultimately leading to its failure in the marketplace.”).

50 See, e.g., Comment Letter of the Vanguard Group, File No. S7-20-01 (Feb. 14, 2002) (“Sponsors of actively managed ETFs should not be permitted to provide more information about portfolio holdings to the exchange specialist and market makers than they provide to other investors. Vanguard believes, as a matter of fundamental fairness, that all investors in a fund must be treated equally. Providing information only to a favored few is inconsistent with the foundation of our capital markets—full and fair disclosure to all investors.”).

51 See, e.g., Comment Letter of Morgan Stanley & Co., File No. S7-20-01 (May 3, 2002) (“Even if the Commission were to determine that new forms of ETFs do pose a significant risk of trading at a discount or premium to NAV, we do not believe that the Commission should delay approval of the product for this reason. Instead, we would urge the Commission to address any perceived investor risks by requiring additional risk disclosure.”); Comment Letter of the Vanguard Group, File No. S7-20-01 (Feb. 14, 2002) (“Investors in an actively managed ETF must receive adequate disclosure about the risks associated with the level of the ETF’s transparency (and other risks (footnote continued)
however, for sufficient market information to value the fund’s portfolio.\textsuperscript{52} Others argued that portfolio transparency is essential to support effective arbitrage.\textsuperscript{53} One commenter asserted that any lack of transparency would negatively impact an ETF’s arbitrage mechanism and would likely result in ETF shares trading at secondary market prices that do not reflect the value of the ETF’s underlying portfolio.\textsuperscript{54} The commenter noted that to the extent an ETF operates with less than full transparency during periods of market volatility, this would likely result in some individual investors buying or selling ETF shares at secondary market prices moving in the opposite direction of the ETF’s NAV. The commenter urged us to consider carefully the consequence of granting an exemption that might yield such a result.\textsuperscript{55} The Investment Company Institute asserted that to the extent that all or part of an ETF’s portfolio is not transparent, it could raise significant investor protection concerns including the potential for disparate treatment

\textsuperscript{52} See, e.g., Comment Letter of the American Stock Exchange LLC, File No. S7-20-01 (Mar. 5, 2002) (asserting that non-transparent actively managed ETFs need not disclose the full contents of their portfolios “so long as there is sufficient market information available to value the portfolio or a creation unit (or if different, the Redemption Basket) on an intra-day basis so as to facilitate secondary market trading and hedging.”); Comment Letter of State Street Bank and Trust Co., File No. S7-20-01 (“While the importance of an effective arbitrage mechanism is clear, there are potential ways to achieve an effective arbitrage mechanism with less than full transparency, and, potentially, with no portfolio transparency. This may be accomplished with proper disclosure of an actively managed ETF’s investment strategy and portfolio characteristics.”).

\textsuperscript{53} See, e.g., Comment Letter of Barclays Global Investors, File No. S7-20-01 (Jan. 11, 2002) (“It is generally accepted that portfolio transparency is the key to effective arbitrage. Therefore, the most significant issue for the Commission … is whether [actively managed ETFs] would provide the necessary level and frequency of portfolio disclosure to support efficient arbitrage.”).

\textsuperscript{54} Id.

\textsuperscript{55} Id.
of investors and the potential for the ETF to trade at significant premiums and discounts.56

Today we propose exemptions applicable to both index-based and actively managed ETFs that provide portfolio transparency to market participants. The comments we received, together with subsequent developments, address the principal concerns we raised in the 2001 Concept Release with respect to actively managed ETFs. We have received a number of applications from actively managed ETFs whose sponsors are interested in offering fully transparent, actively managed ETFs, and recently we have issued orders approving several of these ETFs.57 As described in these applications, an actively managed ETF would operate in the same manner as an index-based ETF.58 Each would be registered under the Act as an open-end fund and would redeem shares in creation units in exchange for basket assets. Each would be listed on a national securities exchange, and investors would trade the ETF shares throughout the day at market prices in the secondary market.59 The national securities exchange typically would disseminate the Intraday Value of ETF shares at 15-second intervals throughout the trading day,60 thereby providing institutional investors and other arbitrageurs the information necessary to engage in ETF share purchases and sales on the secondary market, and purchases and redemptions with the fund, which should help keep ETF share prices from trading at a significant discount or premium.61 Finally, the actively managed ETFs represent that they would provide

57 See Actively Managed ETF Orders, supra note 20.
58 See id.
59 See infra notes 88-94 and accompanying text for a discussion of the proposed rule’s condition that ETF shares be approved for listing and trading on a national securities exchange.
60 See infra notes 92-94 and accompanying text for a discussion of the proposed rule’s condition that ETFs be listed on an exchange that disseminates the Intraday Value of ETF shares on a regular basis.
61 See supra notes 27-29 and accompanying and following text. See also Actively Managed ETF (footnote continued)
ETF investors with uses and benefits similar to index-based ETFs.\footnote{Orders supra note 20.}

We believe that permitting fully transparent, actively managed ETFs would provide additional investment choices for investors and that exemptions necessary to permit the operation of these ETFs would be in the public interest and consistent with the policies and purposes of the Act. By proposing this rule we are not, however, suggesting that we will not consider applications for exemptive orders for actively managed ETFs that do not satisfy the proposed rule’s transparency requirements. Rather, we are at this time proposing to permit fully transparent, actively managed ETFs to be offered without first seeking individual exemptive orders from the Commission.

We request comment on allowing actively managed ETFs with fully transparent portfolios to rely on the exemptions provided by the proposed rule. We only recently approved orders to allow certain actively managed ETFs and have not had the opportunity to observe how they operate in the markets over a significant period of time. Should we wait until we have gained greater experience with the operation of actively managed ETFs before adopting a final rule applicable to them? Is there any concern that a fully transparent actively managed ETF would not facilitate an efficient arbitrage mechanism? Would actively managed ETFs provide investors with uses and benefits similar to or different than their index-based counterparts? Do these or any other concerns regarding the operation of a fully transparent actively managed ETF warrant limiting the rule to index-based ETFs and considering exemptions for actively managed ETFs on a case by case basis through the exemptive applications process? Should we consider

\footnote{See, e.g., In re PowerShares Capital Management LLC, et al., Fifth Amendment, File No. 812-13386, filed Jan. 7, 2008 (“PowerShares Actively Managed ETF Application”), at 12-13 (available for public inspection and copying in the Commission’s Public Reference Room, 100 F Street, NE., Washington, DC 20549).}
exemptions for other types of actively managed ETFs? If so, how would the arbitrage mechanism work in these ETFs? What kinds of conditions should we consider in order to facilitate an arbitrage mechanism?

3. **Organization as an Open-end Investment Company**

Our proposed rule would be available only to ETFs that are organized as open-end funds.\(^{63}\) We have provided similar exemptions to unit investment trusts (“UITs”) in the past.\(^{64}\) However, because we have not received an exemptive application for a new ETF to be organized as a UIT since 2002, there does not appear to be a need to include UIT relief in the proposed rule.\(^{65}\) We understand that ETF sponsors prefer the open-end fund structure because it allows more investment flexibility.\(^{66}\) In addition, unlike an ETF that is a UIT, an open-end fund ETF may participate in securities lending programs and has greater flexibility in reinvesting dividends received from portfolio securities. Of the 601 ETFs in existence as of December 2007, 593 were organized as open-end funds.\(^{67}\)

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\(^{63}\) Proposed rule 6c-11(e)(4).

\(^{64}\) See, e.g., SPDR Order, *supra* note 10. *See supra* note 8 for a definition of UITs.

\(^{65}\) Although two exemptive applications for ETFs organized as UITs were filed in 2007, the applications were occasioned by the transfer of the sponsorship from Nasdaq Financial Products Services, Inc. to PowerShares Capital Management, LLC and did not result in new ETFs. *See* BLDRs Index Funds Trust, Investment Company Act Release No. 27745 (Feb. 28, 2007) [72 FR 9787 (Mar. 5, 2007)] (“BLDRs Notice”); Nasdaq-100 Trust, Series 1, Investment Company Act Release No. 27740 (Feb. 27, 2007) [72 FR 9594 (Mar. 2, 2007)].

\(^{66}\) A UIT portfolio is fixed, and substitution of securities may take place only under certain circumstances. As a result, an ETF organized as a UIT typically replicates the holdings of the index it tracks. By contrast, existing ETFs organized as open-end funds may employ investment advisers and use a “sampling” strategy to track the index. Using a sampling strategy, an investment adviser can construct a portfolio that is a subset of the component securities in the corresponding index, rather than a replication of the index. The investment adviser also may invest a specific portion of the ETF’s portfolio in securities and other financial instruments that are not included in the corresponding index if the adviser believes the investment will help the ETF track its underlying index. *See, e.g.*, First Trust Notice, *supra* note 32, at. n.1.

\(^{67}\) The number of ETFs organized as UITs is based on information in the Commission’s database of Form N-SAR filings.
We request comment on whether we should include ETFs organized as UITs in the definition of ETF under the proposed rule. If so, should they be subject to the same conditions set forth in the proposed rule?

B. Conditions

ETF sponsors have sought exemptions from certain provisions of the Act and our rules so that they may register ETFs as open-end funds. The principal distinguishing feature of open-end funds is that they offer for sale redeemable securities.68 The Act defines “redeemable security” as any security that allows the holder to receive his or her proportionate share of the issuer’s current net assets upon presentation to the issuer.69

Section 22(d) of the Act prohibits any dealer in redeemable securities from selling open-end fund shares at a price other than a current offering price described in the fund’s prospectus.70 Rule 22c-1 under the Act requires funds, their principal underwriters, and dealers to sell and redeem fund shares at a price based on the current NAV next computed after receipt of an order to buy or redeem.71 Together, these provisions are designed to require that fund shareholders are treated equitably when buying and selling their fund shares.72

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68 15 U.S.C. 80a-5(a)(1); see infra notes 109-121 and accompanying text.
70 15 U.S.C. 80a-22(d).
71 17 CFR 270.22c-1(a). The rule requires that funds calculate their NAV at least once daily Monday through Friday (with certain exceptions, including days on which no securities are tendered for redemption and the fund receives no orders to purchase or sell securities). See 17 CFR 270.22c-1(b)(1). Today, most funds calculate NAV as of the time the major U.S. stock exchanges close (typically at 4:00 p.m. Eastern Time). Thus, a fund’s NAV generally reflects the closing prices of the securities it holds. Under rule 22c-1, an investor who submits an order before the 4:00 p.m. pricing time receives that day’s price, and an investor who submits an order after the pricing time receives the next day’s price.
ETFs seeking to register as open-end funds under the Act require exemptions from these provisions because certain investors may purchase and sell individual ETF shares on the secondary market at current market prices, i.e., at prices other than those described in the ETF’s prospectus or based on NAV. As discussed above, investors (typically financial institutions) can purchase and redeem shares from the ETF at NAV only in creation units.73 Because these financial institutions can take advantage of disparities between the market price of ETF shares and NAV, they may be in a different position than investors who buy and sell individual ETF shares only on the secondary market.74 The disparities in market price and NAV, however, provide those institutional investors with opportunities for arbitrage that would tend to drive the market price in the direction of the ETF’s NAV to the benefit of retail investors.75

Today, we propose a rule with certain conditions that may permit the ETF structure to operate within the scope of the Act without sacrificing appropriate investor protection, and is designed to be consistent with the purposes fairly intended by the policy and provisions of the Act.76 Our orders have provided exemptions from the definition of “redeemable security” and section 22(d) and rule 22c-1 for ETFs with an arbitrage mechanism that helps maintain the equilibrium between market price and NAV. Our proposed rule would codify these exemptions subject to three conditions that appear to have facilitated the arbitrage mechanism: transparency

73 See supra Section II for a discussion on the operation of ETFs.
74 See, e.g., Comment Letter of Barclays Global Investors, File No. S7-20-01 (Jan. 11, 2002) (“[D]uring periods of market volatility… it is not unreasonable to assume that some retail investors would buy or sell ETF shares at secondary market prices moving in the opposite direction of a fund's NAV.”).
75 See supra notes 25-26 and accompanying text.
76 Section 6(c) of the Act permits the Commission, conditionally or unconditionally, to exempt by rule any person, security, or transaction (or classes of persons, securities, or transactions) from any provision of the Act “if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions” of the Act. 15 U.S.C. 80a-6(c).
of the ETF’s portfolio, disclosure of the ETF’s Intraday Value, and listing on a national securities exchange.

1. **Transparency of Index and Portfolio Holdings**

To take advantage of the proposed exemption, an ETF must either (i) disclose on its Internet Web site each business day the identities and weightings of the component securities and other assets held by the fund, or (ii) have a stated investment objective of obtaining returns that correspond to the returns of a securities index, whose provider discloses on its Internet Web site the identities and weightings of the component securities and other assets of the index. The Web page of the ETF or the index provider, as the case may be, must be publicly accessible at no charge. Thus, the proposed rule would allow for an actively managed ETF provided that the actively managed ETF discloses its portfolio assets each business day.

We seek comment on these transparency conditions. In particular, we request comment on the proposed provision requiring that an ETF that tracks an index and does not disclose its portfolio each business day must track an index whose provider discloses on an Internet Web site the component securities and other assets of the index it tracks. Is it necessary for the rule to include this option instead of simply requiring daily portfolio disclosure by the ETF? What circumstances, if any, would prevent an index-based ETF from disclosing its portfolio

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77 Proposed rule 6c-11(e)(4)(v).
78 Id.
79 See supra discussion at Section III.A.2. An index-based ETF that has the investment objective of obtaining returns that correspond to the returns of multiple securities indexes may rely on the proposed rule provided that it discloses its portfolio in the same manner as a fully transparent actively managed ETF.
80 The proposed rule defines an “index provider” to mean the person that determines the securities and other assets that comprise a securities index. See proposed rule 6c-11(e)(7).
holdings? Would Internet Web site disclosure of portfolio holdings be sufficient? If not, what other means of disclosure should the ETF or the index provider use?

We also seek comment on whether we should require ETFs to disclose daily on their Internet Web sites liabilities (as well as portfolio holdings) to permit investors, particularly arbitrageurs, to evaluate the impact of leverage from borrowings on the fund’s portfolio.

Should we limit such a requirement to certain kinds of ETFs that may have significant liabilities? If so, how should we identify the ETFs that would be subject to the condition?

One of the issues we discussed in the 2001 Concept Release was that full portfolio transparency could give market participants an ability to access the fund’s market strategies (i.e., “free-riding”) and, in some cases, the ability to trade ahead of the ETF (i.e., “front-running”).

Those commenters who addressed the issue generally agreed that intra-day or advance portfolio disclosure may be detrimental to an actively managed ETF because it could enable third parties to front-run the fund. Therefore, the proposed rule does not require disclosure of intra-day changes in the portfolio of the ETF, because currently, intra-day changes do not affect the composition of the ETF’s basket assets until the next trading day. The proposed rule also does not require advance disclosure of portfolio trades.

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81 See supra note 27.

82 For example, if an ETF enters into a written call to hedge the fair value exposure of an equity security in its portfolio, it would sacrifice any unrealized gains caused by the price of the equity security increasing above the price at which the call may be exercised (i.e. the strike price). Unless the ETF discloses the presence of these and similar liabilities, investors may not be able to evaluate the impact of leverage on the NAV of the ETF.

83 Market participants could trade ahead of an ETF if it disclosed portfolio assets in advance of the trades, rather than after the assets were acquired.


85 Applicants seeking exemptions for actively managed ETFs noted that under accounting procedures followed by the funds, portfolio trades made on the prior business day (“T”) would be (footnote continued)
We request comment on these aspects of the proposal. Should the rule require disclosure of portfolio changes more often than once a day? How would more frequent disclosure affect the arbitrage mechanism? Would more frequent disclosure increase the likelihood of free-riding or front-running? The rule does not limit ETFs to tracking specialized indexes that change their assets at or below a specified frequency. How might this affect the transparency of the portfolios of ETFs that would rely on index rather than portfolio disclosure?87

Should the proposed rule prohibit advance portfolio disclosure? Would advance portfolio disclosure increase the likelihood of free-riding or front-running? If so, should the risk that participants may engage in these activities be treated as a material risk to be disclosed to prospective investors permitting them to evaluate whether the risk makes the ETF an appropriate investment in light of the particular investor’s investment objectives? How would advance disclosure affect the arbitrage mechanism? If the portfolio disclosed in advance differed from the actual portfolio acquired, would that affect the market’s ability to price the ETF’s shares?

2. Listing on a National Securities Exchange and Dissemination of Intraday Value

An ETF that relies on rule 6c-11 would need to satisfy two additional conditions set forth in the paragraph defining “exchange-traded fund.”88 First, shares issued by the ETF would have

booked and reflected in the fund’s NAV on the current business day (“T+1”). See, e.g., WisdomTree Actively Managed ETF Notice, supra note 20, at n.5. As a result, these funds will not have to announce trades before they are made. In addition, the funds will be able to disclose at the beginning of each trading day the portfolio that will form the basis of the NAV calculation at the end of the day. Id.

86 See proposed rule 6c-11(e)(4)(v)(A). Under the proposed rule, an ETF could disclose its portfolio at the end of the day on which relevant portfolio trades occurred (i.e., after the portfolio assets are acquired) or the beginning of the following day, which would eliminate the potential for front-running.

87 See supra note 77 and accompanying text.

88 Proposed rule 6c-11(e)(4) (defining “exchange-traded fund”).
to be approved for listing and trading on a national securities exchange.\textsuperscript{89} We have premised our previous exemptive orders on the ETF listing its shares for trading on a national securities exchange.\textsuperscript{90} Listing on an exchange would provide an organized and continuous trading market for the ETF shares at negotiated prices. Applicants for exemptive relief have noted that this intra-day trading, combined with the arbitrage mechanism inherent in the ETF structure, should prevent significant premiums and discounts between the market price of ETF shares and the Intraday Value.\textsuperscript{91}

Second, an ETF could rely on the rule only if a national securities exchange disseminates the Intraday Value at regular intervals during the trading day.\textsuperscript{92} Applications for exemptive relief have noted that exchanges typically disseminate the Intraday Value every 15 seconds during trading hours.\textsuperscript{93} They have also asserted that this regular dissemination of the Intraday Value enables market makers to engage in the arbitrage activities that determine the market price for ETF shares.\textsuperscript{94}

We request comment on these two conditions. Should the rule require that ETF shares be listed on a national securities exchange? Should the rule make allowance for shares that are delisted for a short time, or for suspensions in listing? If an ETF’s shares were not listed for

\textsuperscript{89} Proposed rule 6c-11(e)(4)(iii).

\textsuperscript{90} See, e.g., HealthShares, Inc., Investment Company Act Release No. 27553 (Nov. 16, 2006) [71 FR 67404, 67408 (Nov. 21, 2006)] (“HealthShares Notice”).

\textsuperscript{91} See, e.g., Amended and Restated Application of Ziegler Exchange Traded Trust, File No. 812-13224, filed Dec. 19, 2006 (“Ziegler Application”), at 10; PowerShares Actively Managed ETF Notice, supra note 20.

\textsuperscript{92} Proposed rule 6c-11(e)(4)(i).

\textsuperscript{93} See, e.g., Van Eck, Van Eck Associates Corp., Investment Company Act Release No. 27283 (Apr. 7, 2006) [71 FR 19214 (Apr. 13, 2006)], at n.3; PowerShares Actively Managed ETF Notice, supra note 20, at n.2.

\textsuperscript{94} See, e.g., Ziegler Application, supra note 91, at 26-27.
trading on a national securities exchange (even on a temporary basis), would the ETF structure permit the arbitrage mechanism to function appropriately? Should the rule require an ETF to liquidate or take other steps in the event of delisting? Should the proposed rule condition relief on listing exchanges disseminating the Intraday Value? If not, are there other means for market makers to receive the Intraday Value? Are there alternatives to using the basket as the basis for the Intraday Value calculation? For example, should the rule require the entity calculating the Intraday Value to use the ETF’s portfolio (as opposed to the basket)? Should the calculation method be prescribed?

The proposed rule does not require the dissemination of an ETF’s Intraday Value at specific intervals because the rules of national securities exchanges, as approved by the Commission, establish the frequency of disclosure.\(^{95}\) Should the rule specify a minimal frequency? For example, should the rule prohibit an ETF from relying on the exemption if it is listed on an exchange that permits dissemination at intervals longer than the current 15 or 60-second intervals?

3. Marketing

Our exemptive orders included a condition requiring each ETF to agree not to market or advertise the ETF as an open-end fund or mutual fund and to explain that ETF shares are not individually redeemable.\(^{96}\) This condition was designed to help prevent retail investors from confusing ETFs with traditional mutual funds. Similarly, the proposed rule would require each ETF relying on the rule to identify itself in any sales literature as an ETF that does not sell or redeem individual shares, and explain that investors may purchase or sell individual ETF shares

\(^{95}\) An ETF’s Intraday Value is disseminated every 15 seconds (or 60 seconds in the case of ETFs that track foreign indexes). See supra note 29 and accompanying text.

\(^{96}\) See, e.g., WisdomTree Order, supra note 12.
in secondary market transactions that do not involve the ETF.\textsuperscript{97} This condition, like the prior condition in our orders, is designed to help prevent retail investors from confusing ETFs with traditional mutual funds.

We request comment on whether the proposed condition is likely to provide a benefit for investors with respect to ETF marketing and advertising materials. Are investors confused about the distinction between ETFs and traditional mutual funds? Should any confusion be addressed through rule requirements? Should the rule require ETFs to identify themselves as either index-based or actively managed ETFs?

4. \textit{Conflicts of Interest}

Section 1(b)(2) of the Investment Company Act states that the public interest and the interest of investors are adversely affected when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, or other affiliated persons, and underwriters, brokers, or dealers rather than in the interest of shareholders.\textsuperscript{98} The operation of an ETF—specifically, the process in which a creation unit is purchased by delivering basket assets to the ETF, and redeemed in exchange for basket assets—may lend itself to certain conflicts for the ETF’s investment adviser, which has discretion to specify the securities included in the baskets. For example, the adviser could direct creation unit purchasers to purchase securities from affiliates of the adviser for subsequent presentation to the ETF. As we noted in the 2001 Concept Release, these conflicts would appear

\textsuperscript{97} Proposed rule 6c-11(e)(4)(ii). The term sales literature is defined in the proposed rule to mean any advertisement, pamphlet, circular, form letter, or other sales material addressed to or intended for distribution to prospective investors other than a registration statement filed with the Commission under section 8 of the Act. Proposed rule 6c-11(e)(8). An ETF would have to make similar disclosures in its prospectus under the proposed amendments to Form N-1A. \textit{See} proposed Item 6(h)(3) of Form N-1A, and \textit{infra} text accompanying note 159.

\textsuperscript{98} 15 U.S.C. 80a-1(b)(2).
to be minimized in the case of an index-based ETF because the universe of securities that may be included in the ETF’s portfolio generally is restricted by the composition of its corresponding index.\footnote{See 2001 Concept Release, \textit{supra} note 39, at Section IV.E.2.} We also noted that the same would not appear to be the case for an actively managed ETF. Because the adviser to an actively managed ETF would have greater discretion to designate securities to be included in the basket assets, a greater potential for conflicts appears to exist.

Commenters generally stated that actively managed ETFs would not be faced with conflicts that are different from those that currently exist for actively managed mutual funds.\footnote{See, \textit{e.g.}, Comment Letter of the American Stock Exchange LLC, File No. S7-20-01 (Mar. 5, 2002); Comment Letter of State Street Bank and Trust Company, File No. S7-20-01 (Jan. 14, 2002); Comment Letter of Nuveen Investments, File No. S7-20-01 (Jan. 14, 2002).} One commenter, however, recommended that the Commission impose any prohibitions or conditions under the Act that would apply to transactions directly effected by the adviser on any transactions effected at the adviser’s discretion.\footnote{Comment Letter of the Investment Company Institute, File No. S7-20-01 (Jan. 14, 2002).} The commenter noted that, for example, an ETF that is prohibited from acquiring a security in certain underwritings (under section 10(f) of the Act)\footnote{Section 10(f) of the Act prohibits a fund from purchasing any security during an underwriting or selling syndicate if a principal underwriter of the security is an officer, director, member of an advisory board, investment adviser, or employee of the fund or if any of these persons is an affiliate of the principal underwriter. 15 U.S.C. 80a-10(f). This section protects fund shareholders by preventing an affiliated underwriter from placing or “dumping” unmarketable securities in the fund.} should be prohibited from circumventing this prohibition by including the security in the ETF’s basket assets. Similarly, an adviser could attempt to circumvent section 17(a) restrictions on principal transactions between a registered fund and its affiliates by designating a security for the basket assets that a creation unit purchaser would have to purchase from an
affiliate of the adviser.\footnote{\annote{103}{Section 17(a) generally prohibits affiliated persons of a registered fund ("first-tier affiliates") or affiliated persons of the fund’s affiliated persons ("second-tier affiliates") from selling securities or other property to the fund (or any company the fund controls). 15 U.S.C. 80a-17(a).}}

We have not included a condition in the proposed rule prohibiting an actively managed ETF’s adviser, directly or indirectly, from causing a creation unit purchaser to acquire a security for the ETF through a transaction in which the ETF could not engage directly. An adviser to an actively managed ETF already is subject to section 48(a) of the Act, which prohibits a person from doing indirectly, through another person, what that person is prohibited by the Act from doing directly. An adviser, therefore, would be prohibited from causing an institution that transacts directly with the ETF (or any investor on whose behalf the institution may transact with the ETF) to acquire any security for the ETF through a transaction in which the ETF could not engage directly.\footnote{\annote{104}{See Lessler v. Little, 857 F.2d 866, 873-874 (1st Cir. 1988) (reversing dismissal of a claim that principals of a registered investment company and its adviser had violated sections 17(a)(2) and 48(a) of the Act by purchasing the fund’s assets indirectly by arranging for sale of the fund to a third party in conjunction with an arrangement whereby the adviser obtained excessive interest in the transferred assets); SEC v. Commonwealth Chemical Securities, 410 F. Supp 1002, 1018 (S.D.N.Y. 1976) (finding violations of sections 17(a) and 48(a) of the Act by directors of a registered investment company who caused a third party to purchase shares in an offering underwritten by an affiliated broker-dealer and sold the shares to the registered investment company).}}

We request comment on whether it would be useful to include a condition in the proposed rule reminding ETFs relying on the rule of the prohibitions contained in section 48(a) of the Act. We also request comment on potential conflicts of interest for an ETF’s investment adviser. Does an adviser to a fully transparent, actively managed ETF face different conflicts of interest from the conflicts of an adviser to a traditional mutual fund? If so, what are those conflicts and how could the rule address them?
5. **Affiliated Index Providers**

Federal securities laws and the rules of national securities exchanges require funds and their advisers to adopt measures reasonably designed to prevent misuse of non-public information. Funds are likely to be in a position to well understand the potential circumstances and relationships that could give rise to the misuse of non-public information, and can develop appropriate measures to address them. We believe these requirements should be sufficient to protect against the abuses addressed by the terms in the exemptive applications of ETF sponsors that represented they would use an affiliated index provider. The proposed rule, therefore, does not include terms from previous applications that are designed to prevent the communication of material non-public information between the ETF and the affiliated index provider.

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105 See rule 38a-1 (requiring funds to adopt policies and procedures reasonably designed to prevent violation of federal securities laws); rule 17j-1 (requiring funds to adopt a code of ethics containing provisions designed to prevent certain fund personnel (“access persons”) from misusing information regarding fund transactions); Section 204A of the Investment Advisers Act of 1940 (“Advisers Act”) (15 U.S.C. 80b-204A) (requiring an adviser to adopt policies and procedures that are reasonably designed, taking into account the nature of its business, to prevent the misuse of material, non-public information by the adviser or any associated person, in violation of the Advisers Act or the Exchange Act, or the rules or regulations thereunder); Section 15(f) of the Exchange Act (15 U.S.C. 78o(f)) (requiring a registered broker or dealer to adopt policies and procedures reasonably designed, taking into account the nature of the broker’s or dealer’s business, to prevent the misuse of material, nonpublic information by the broker or dealer or any person associated with the broker or dealer, in violation of the Exchange Act or the rules or regulations thereunder).

See, e.g. Rule Commentary .02(b)(i) of American Stock Exchange Rule 1000A (requiring “firewalls” between an ETF and an affiliated index provider).

106 The terms are intended to address the potential conflicts of interest between the ETF adviser and its affiliated index provider, and include: (i) all of the rules that govern inclusion and weighting of securities in each index are made publicly available; (ii) the ability to change the rules for index compilation is limited and public notice is given before any changes are made; (iii) “firewalls” exist between (A) the staff responsible for the creation, development and modification of the index compilation rules and (B) the portfolio management staff; (iv) the calculation agent, who is responsible for all index maintenance, calculation, dissemination, and reconstitution activities, is not affiliated with the index provider, the ETF or any of their affiliates; and (v) the component securities of the index may not be changed more frequently than on a specified periodic basis. See HealthShares Notice, supra note 90; WisdomTree Notice, supra note 12.
We request comment on our proposal to eliminate these terms. Should the rule include any of the terms included in previous exemptive applications for affiliated index providers? If so, which terms and why?

C. Exemptive Relief

The unique structure of ETFs has required ETF sponsors to seek relief from certain provisions of the Act and our rules in order to form and operate. Proposed rule 6c-11 would permit an ETF that meets the conditions of the rule to redeem shares in creation unit aggregations, to trade at current market prices, to engage in in-kind transactions with certain affiliates and, in certain circumstances, to pay the proceeds from the redemption of shares in more than seven days. The proposed exemptions would be subject to certain conditions that are designed to address the concerns underlying the statute and thereby satisfy the requirement that exemptions from statutory provisions are in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy of the Act.\(^\text{107}\)

1. Issuance of “Redeemable Securities”

Our exemptive orders have provided ETFs with relief from sections 2(a)(32) and 5(a)(1)\(^\text{108}\) of the Act so that they may register under the Act as open-end funds while issuing shares that are redeemable in creation units only.\(^\text{109}\) In support of the relief, ETF sponsors have noted that because the market price of ETF shares is disciplined by arbitrage opportunities, investors in ETF shares generally should be able to sell the shares in secondary market

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\(^{107}\) See 15 U.S.C. 80a-6(c).

\(^{108}\) 15 U.S.C. 80a-2(a)(32) (defining “redeemable security” as any security the terms of which permit the holder upon presentation to receive the holder’s proportionate share of the issuer’s current net assets, or the cash equivalent); 15 U.S.C. 80a-5(a)(1).

\(^{109}\) These exemptions are granted under section 6(c) of the Act. See supra note 76.
transactions at approximately their NAV.\textsuperscript{110}

Proposed rule 6c-11 would deem an equity security issued by an ETF to be a “redeemable security” for purposes of section 2(a)(32) of the Act.\textsuperscript{111} This provision would permit an ETF to register with the Commission as an open-end fund, which the Act defines as an investment company that issues redeemable securities,\textsuperscript{112} even though ETF shares are issued and redeemed in creation unit aggregations.\textsuperscript{113} This approach would provide ETFs with the same relief contained in our exemptive orders without exempting ETFs from other requirements imposed under the Act and our rules that apply to funds that issue redeemable securities.\textsuperscript{114}

We request comment on this aspect of the proposed rule. Are there differences in ETFs and other funds that would justify not applying any provision of the Act or our rules that applies to funds that issue redeemable securities?

As discussed above, ETFs today operate with an arbitrage mechanism designed to minimize the potential deviation between the market price and NAV of ETF shares. The proposed rule would require that an ETF establish creation unit sizes the number of shares of which are reasonably designed to facilitate arbitrage, which is described in the proposed


\textsuperscript{111} Proposed rule 6c-11(a). Our orders provided an exemption from sections 2(a)(32) and 5(a)(1) to allow ETFs to redeem securities in creation unit aggregations rather than individually.


\textsuperscript{113} ETF creation units have ranged from 25,000 to 200,000 ETF shares. See, e.g., PowerShares Actively Managed ETF Notice, supra note 20 (creation units are blocks of 50,000 to 100,000 ETF shares); ProShares Trust, Investment Company Act Release No. 27323 (May 18, 2006) [71 FR 29991 (May 24, 2006)] (notice) (“ProShares Notice”) (creation units are blocks of 25,000 to 50,000 ETF shares); WisdomTree Notice, supra note 12 (creation units are blocks of 25,000 to 200,000 ETF shares).

\textsuperscript{114} See, e.g., 15 U.S.C. 80a-22; 17 CFR 270.22c-1. In addition, the rules under the Exchange Act that apply to redeemable securities issued by a mutual fund would apply to ETFs. See, e.g., 17 CFR 240.15c3-1.
definition of creation unit as the purchase (or redemption) of shares from the ETF with an
offsetting sale (or purchase) of shares on a national securities exchange at as nearly the same
time as practicable for the purpose of taking advantage of a difference in the Intraday Value and
the current market price of the shares. The proposed rule also would require an ETF
to disclose in its prospectus and any sales literature the number of ETF shares for which it will
issue or redeem a creation unit to alert investors that they cannot purchase or redeem individual
ETF shares directly from or with the ETF.

The proposed condition regarding creation unit size is intended to require ETFs that rely
on the proposed rule to choose creation unit sizes that promote an arbitrage mechanism and to
preclude ETFs from setting very low or high thresholds, such as one ETF share per creation unit
or one million ETF shares per creation unit. A low creation unit size could, as a practical matter,
make the use of creation unit redemption irrelevant. The ETF would, in effect, be issuing and
redeeming ETF shares like a traditional mutual fund, but the shares would trade on an exchange.
Conversely, a high creation unit size could reduce the willingness or ability of institutional
arbitrageurs to engage in creation unit purchases or redemptions. Impeding the ability of
arbitrageurs to purchase and redeem ETF shares could disrupt the arbitrage pricing discipline,
which could lead to more frequent occurrences of pricing premiums or discounts.

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115 Proposed rule 6c-11(e)(3). We note that the Board of Governors of the Federal Reserve defines
“arbitrage” in a similar manner in section 220.6(b) of Regulation T (“Arbitrage. A creditor may
effect and finance for any customer bona fide arbitrage transactions. For the purpose of this
section, the term “bona fide arbitrage” means: (1) A purchase or sale of a security in one market
together with an offsetting sale or purchase of the same security in a different market at as nearly
the same time as practicable for the purpose of taking advantage of a difference in prices in the
two markets; or (2) A purchase of a security which is, without restriction other than the payment
of money, exchangeable or convertible within 90 calendar days of the purchase into a second
security together with an offsetting sale of the second security at or about the same time, for the
purpose of taking advantage of a concurrent disparity in the prices of the two securities.”). 12
CFR 220.6.

116 Proposed rule 6c-11(e)(4)(ii); Proposed Item 6(h)(3) to Form N-1A.
We request comment on the proposed requirement for creation unit size, which is included in the proposed rule’s definition of “creation unit.” Does the requirement that an ETF establish creation unit sizes the number of which is reasonably designed to facilitate arbitrage provide the sponsor or adviser of the ETF with sufficient guidance in setting appropriate thresholds? Should we include other elements in our description of arbitrage, which is included in the definition of creation unit? If so, what elements? Should the proposed rule instead require the board of directors of the ETF to make a finding that the ETF is structured in a manner reasonably intended to facilitate arbitrage? This finding could require the board, for example, to look at the number of shares in each creation unit and the liquidity of the portfolio securities and other assets. What other elements, if any, should the board be required to review in making this finding?

The proposed rule does not include numerical thresholds for the number of ETF shares in each creation unit. Should the proposed rule include minimum or maximum numerical thresholds? If so, what would be appropriate thresholds and why? For example, should the rule set a minimum of 100 ETF shares, and/or a maximum of 500,000 ETF shares, per creation unit? Are our concerns with respect to smaller- or larger-sized creation units addressed by requiring ETFs to establish creation unit sizes that facilitate arbitrage? If the rule does not include any thresholds, would any of the exemptions provided by the proposed rule be inappropriate for an ETF with smaller- or larger-sized creation units? If so, which exemptions?

ETF applicants represent that ETF share prices are disciplined by arbitrage opportunities created by the ability to purchase and redeem creation units at NAV on a daily basis.117 Would

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117 See, e.g., Zeigler Application, supra note 91, at 52-53; see also supra notes 25-26 and accompanying and preceding text.
this pricing mechanism function differently for smaller-or larger-sized creation units? Because ETFs charge transaction fees for direct purchases and redemptions from the fund, ETF applicants have asserted that the interests of long-term shareholders should not be diluted by frequent traders, if those transaction fees accurately reflect the costs to the fund. Are smaller-sized creation units likely to cause the transaction fees charged by ETFs to be insufficient to protect the long-term shareholders in the event of more frequent purchases and redemptions? If so, should an ETF relying on the proposed exemption be required to take additional measures designed to protect long-term shareholder interests from being diluted by frequent traders? If so, what measures?

As discussed above, ETFs issue and redeem shares in creation unit aggregations in exchange for the deposit or delivery of a basket of securities and other assets. The proposed rule defines “basket assets” to mean the securities or other assets specified each business day in name and number by the ETF as the securities or assets in exchange for which it will issue, or in return for which it will redeem, ETF shares. The rule does not require that the basket mirror the portfolio of the ETF because in some circumstances it may not be practicable, convenient or operationally possible for the ETF to operate on an in-kind basis. The rule, like our orders,

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118 See Zeigler Application, supra note 91, at 23; PowerShares Actively Managed ETF Application, supra note 62, at 17-18.

119 Proposed rule 6c-11(c)(1). Under the proposed rule, the term “business day” with respect to an ETF would mean any day that the fund is open for business, including any day on which it is required to make payment under section 22(e) of the Act. Section 22(e) of the Act prohibits registered funds from suspending the right of redemption or postponing the date of payment upon redemption of any redeemable security for more than seven days except for certain periods specified in the provision. See 15 U.S.C. 80a-22(e). Proposed rule 6c-11(c)(2).

120 The ETF and its adviser may decide to permit cash-only purchases of creation units to minimize transaction costs or enhance the ETF’s operational efficiency. For example, on a day when a substantial rebalancing of an index-based ETF’s portfolio is required, the adviser might prefer to receive cash rather than in-kind securities so that it has the liquid resources at hand to make the necessary purchases. If the ETF received in-kind securities on that day, it might have to sell (footnote continued)
allows an ETF to require or permit a purchasing or redeeming shareholder to substitute cash for some or all of the securities in the basket assets.\footnote{Proposed rule 6c-11(e)(1). Though the standard operations of most existing ETFs involve in-kind purchases and redemptions, the Commission has consistently permitted the substitution of cash for certain securities in the basket assets. \textit{See, e.g.}, WisdomTree Notice, \textit{supra} note 12 at text preceding n.9. In addition, the Commission has permitted ETFs that primarily hold financial instruments, cash and cash equivalents in their portfolios to operate on a cash-only basis because of the limited transferability of financial instruments. \textit{See, e.g.}, ProShares Notice, \textit{supra} note 113, at n.2 and accompanying text. \textit{See also} SPDR Lehman Municipal Bond ETF, Prospectus 19-22 (Sept. 10, 2007) (ETF generally sells creation units for cash only and redeems creation units in-kind only).}

We request comment on the proposed definition of basket assets. Are there any reasons why an ETF should not be permitted to substitute cash for some or all of the assets in the basket? Should the proposed rule include any conditions for when an ETF may require or permit cash substitutions? If so, what conditions should be included? Should the rule specify how the ETF would announce the composition of the basket? For example, should the rule mandate that the ETF post the information on its Internet Web site? Should the rule specify the frequency with which the ETF must announce the composition of the basket? If so, how often?

2. \textit{Trading of ETF Shares at Negotiated Prices}

As noted above, section 22(d), among other things, prohibits a dealer from selling a redeemable security that is being offered currently to the public by or through an underwriter, except at a current public offering price described in the prospectus.\footnote{15 U.S.C. 80a-22(d).} Rule 22c-1 generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a
price based on its NAV.123 Because secondary market trading in ETF shares takes place at current market prices, and not at the current offering price described in the prospectus or based on NAV, ETFs have obtained exemptions from section 22(d) and rule 22c-1.

The provisions of section 22(d), as well as rule 22c-1, are designed to prevent dilution caused by certain riskless trading schemes by principal underwriters and dealers, and to prevent unjust discrimination or preferential treatment among investors purchasing and redeeming fund shares.124 The proposed rule would exempt a dealer in ETF shares from section 22(d) of the Act and rule 22c-1(a) with regard to purchases, sales and repurchases of ETF shares in secondary market transactions at current market prices.125 As discussed above, we have provided exemptions from section 22(d) and rule 22c-1 in our orders because the arbitrage function appears to address the potential concerns regarding shareholder dilution and unjust discrimination that these provisions were designed to address.126 In addition, secondary market trading should not cause dilution for ETF shareholders because those transactions do not directly involve ETF portfolio assets (the transactions are with other investors, not the ETF), and thus have no direct impact on the NAV of ETF shares held by other investors. Moreover, to the extent that different prices for ETF shares exist during a given trading day, or from day to day, these variations occur as a result of third-party market forces, such as supply and demand, and

123 17 CFR 270.22c-1.
124 For a complete legislative history of section 22(d), see Exemption from Section 22(d) to Permit the Sale of Redeemable Securities at Prices that Reflect Different Sales Loads, Investment Company Act Release No. 13183 (Apr. 22, 1983) [44 FR 19887 (May 10, 1983)]. See also Adoption of Rule 22c-1 under the Investment Company Act of 1940 Prescribing the Time of Pricing Redeemable Securities for Distribution, Redemption, and Repurchase and Amendment of Rule 17a-3(a)(7) under the Securities Exchange Act of 1934 Requiring Dealers to Time Stamp Orders, Investment Company Act Release No. 5519 (Oct. 16, 1968) [33 FR 16331 (Nov. 7, 1968)].
125 Proposed rule 6c-11(b).
126 See supra notes 71-7573 and accompanying text.
not as a result of discrimination or preferential treatment among purchasers.

We request comment on this proposed relief. Should the relief also apply to parties other than dealers in ETF shares? If so, which other parties require similar relief, and why? Do dealers (or others) need relief from other provisions to facilitate transactions in ETF shares on the secondary market?

3. In-Kind Transactions between ETFs and Certain Affiliates

Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such person, from selling any security to or purchasing any security from the company.127 Purchases and redemptions of ETF creation units are typically in-kind rather than cash transactions,128 and section 17(a) prohibits these in-kind purchases and redemptions by persons who are affiliated with the ETF, including those affiliated because they own 5 percent or more, and in some cases more than 25 percent, of the ETF’s outstanding securities (“first-tier affiliates”), and by persons who are affiliated with the first-tier affiliates or who own 5 percent or more, and in some cases more than 25 percent, of the outstanding securities of one or more funds advised by the ETF’s investment adviser (“second-tier affiliates”).129

128 ETFs must comply with the federal securities laws in accepting and satisfying redemptions with basket assets, including the registration provisions of the Securities Act. See, e.g., Ameristock Notice, supra note 13, at n.3.
129 An affiliated person of a fund includes, among others: (i) any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting securities of the fund; (ii) any person five percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the fund; and (iii) any person directly or indirectly controlling, controlled by, or under common control with such other person. 15 U.S.C. 80a-2(a)(3)(A), (B) and (C). A control relationship will be presumed where one person owns more than 25 percent of another person’s outstanding voting securities. 15 U.S.C. 80a-2(a)(9).
We have granted exemptions from sections 17(a)(1) and (a)(2)\textsuperscript{130} of the Act to allow these first- and second-tier affiliates of the ETF to purchase and redeem creation units through in-kind transactions.\textsuperscript{131} In seeking this relief, applicants have submitted that because the first- and second-tier affiliates are not treated differently from non-affiliates when engaging in purchases and redemptions of creation units, there is no opportunity for these affiliated persons to effect a transaction detrimental to the other ETF shareholders. The securities to be deposited for purchases of creation units and to be delivered for redemptions of creation units are announced at the beginning of each day. All purchases and redemptions of creation units are at an ETF’s next-calculated NAV (pursuant to rule 22c-1), and the securities deposited or delivered upon redemption are valued in the same manner, using the same standards, as those securities are valued for purposes of calculating the ETF’s NAV.

The proposed rule would permit first- and second-tier affiliates of the ETF to purchase and redeem creation units through in-kind transactions.\textsuperscript{132} The proposed exemption would not, however, apply to a specific category of redemptions that would be addressed in new rule 12d1-4, which we also are proposing today. Section 12(d)(1) of the Act imposes substantial limitations on the ability of investment companies to invest in other investment companies.\textsuperscript{133} As discussed in Section IV of this release, proposed rule 12d1-4 would permit investment companies to acquire shares of ETFs in excess of the limitations on those investments under section 12(d)(1) of the Act subject to certain conditions intended to address the concerns underlying those limitations. One of the proposed conditions would prohibit investment

\textsuperscript{130} 15 U.S.C. 80a-17(a)(1), 80a-17(a)(2).

\textsuperscript{131} See, e.g., HealthShares Notice, supra note 90, at text following n.10.

\textsuperscript{132} Proposed rule 6c-11(d).

\textsuperscript{133} See infra note 194 and accompanying text.
companies from redeeming certain ETF shares acquired in reliance on proposed rule 12d1-4.\textsuperscript{134} In order to make proposed rule 6c-11 consistent with the conditions in proposed rule 12d1-4, we propose to exclude investment companies that acquire ETF shares in reliance on proposed rule 12d1-4 from relying on proposed rule 6c-11(d) to redeem those ETF shares in kind.\textsuperscript{135}

We request comment on this proposed exemption. Does the proposed exemption raise any risks with regard to affiliated transactions with the ETF? If so, should the exemption include any conditions to minimize those risks? Should the relief extend to parties that are affiliated persons of an ETF for other reasons? For example, should a broker-dealer that is affiliated with the ETF’s adviser be allowed to transact in-kind with the ETF?

4. Additional Time for Delivering Redemption Proceeds

Section 22(e) of the Act generally prohibits a registered open-end investment company from suspending the right of redemption, or postponing the date of satisfaction of redemption requests more than seven days after the tender of a security for redemption.\textsuperscript{136} Some ETFs that track foreign indexes have stated that local market delivery cycles for transferring foreign securities to redeeming investors, together with local market holiday schedules, require a delivery process in excess of seven days. These ETFs have requested, and we have granted, relief from section 22(e) so that they may satisfy redemptions up to a specified maximum number of calendar days depending upon specific circumstances in the local markets, as

\textsuperscript{134} As discussed in Section IV.B.2, \textit{infra}, this condition is designed to prevent a fund that relies on the proposed rule to acquire ETF shares in excess of the limits of section 12(d)(1)(A)(i) from unduly influencing the ETF by the threat of a large-scale redemption.

\textsuperscript{135} The proposed rule would not permit an investment company that has acquired ETF shares in excess of the limits in section 12(d)(1)(A)(i) of the Act in reliance on proposed rule 12d1-4(a) to rely on proposed rule 6c-11(d) with regard to the purchase of basket assets (\textit{i.e.}, the purchase of securities identified in the basket when redeeming ETF shares). Proposed rule 6c-11(d).

\textsuperscript{136} 15 U.S.C. 80a-22(e).
disclosed in the ETF's prospectus or statement of additional information (“SAI”). Other than in the disclosed situations, these ETFs satisfy redemptions within seven days.\textsuperscript{137}

Section 22(e) of the Act is designed to prevent unreasonable delays in the satisfaction of redemptions, and ETF sponsors have asserted that the requested relief will not lead to the problems that section 22(e) was designed to prevent.\textsuperscript{138} They have represented that the ETF’s SAI would disclose those local holidays (over the period of at least one year following the date of the SAI) that are expected to prevent the satisfaction of redemptions in seven days and the maximum number of days needed to satisfy redemption requests with respect to the foreign securities at issue.\textsuperscript{139}

The delay in satisfying redemption requests seems reasonable under the circumstances described by the ETF sponsors because it is for a limited period of time and disclosed to investors. The proposed rule, therefore, would codify the relief from section 22(e) of the Act previously provided to ETFs. If an ETF has a foreign security in its basket assets and a foreign holiday prevents timely delivery of the foreign security, the ETF would be exempt from the prohibition in section 22(e) against postponing the date of satisfaction upon redemption for more than seven days. To rely on this exemption, the ETF would be required to disclose in its SAI the foreign holidays it expects to prevent timely delivery of the foreign securities and the maximum

\textsuperscript{137} In their applications, ETFs acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations that they may otherwise have under rule 15c6-1 under the Exchange Act. See, e.g., In re Barclays Global Fund Advisors, Second Amended and Restated Application, File No. 812-11598, filed May 11, 2000 (“Barclays Foreign Application”), at 76. (available for public inspection and copying in the Commission’s Public Reference Room, 100 F Street, NE, Washington, DC 20549). Rule 15c6-1 requires that most securities transactions be settled within three business days of the trade date. 17 CFR 240.15c6-1.

\textsuperscript{138} See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency, 76\textsuperscript{th} Cong., 3d Sess. 291-293 (statements of David Schenker).

\textsuperscript{139} See, e.g., Barclays Foreign Application, supra note 137, at 76-84.
number of days it anticipates it would need to deliver the foreign securities. Finally, the delivery
would have to take place no more than 12 calendar days after the tender of ETF shares (in a
creation unit).140

We request comment on this relief in the proposed exemption. Is the relief necessary? We specifically request comment from ETFs regarding the frequency with which they have relied on this exemption. Could an ETF pay cash (as part of the basket assets) in lieu of foreign securities in the case of delays in settlement? Should the relief be limited to ETFs that satisfy redemptions entirely through in-kind transactions? Is the number of days in the proposed rule sufficient or is it too long? Should the rule refer to the applicable local market’s settlement cycle without specifying a number of days? Should the disclosure be included in the prospectus of the ETF instead of the SAI, which is only delivered upon request? Should the disclosure be included in any sales literature of the ETF?

The rule would provide relief if the ETF’s basket assets include a foreign security. Should the rule also provide relief if an ETF has foreign securities included in its portfolio and, if so, why? Would actively managed ETFs present any issues with respect to this exemption that do not exist with respect to index-based ETFs? Could the investment adviser to an actively managed ETF manage the ETF so as to comply with section 22(e)?

The proposed rule defines “foreign security” to mean any security issued by a government or any political subdivision of a foreign country, a national of any foreign country, or a corporation or other organization incorporated or organized under the laws of any foreign

140 Proposed rule 6c-11(c). Applicants requesting this exemptive relief generally have represented that they would be able to deliver redemption proceeds within 12 calendar days. See, e.g., WisdomTree Notice, supra note 12. An ETF relying on this exemption would disclose the information in the SAI. See Item 18 of Form N-1A (requiring disclosures regarding purchase, redemption, and pricing of shares).
country, and for which there is no established United States public trading market as that term is used in Item 201 of Regulation S-K under the Exchange Act. Use of the phrase “established United States public trading market” is designed to limit this relief to ETFs that invest in securities that do not have an active trading market in the United States. The rule does not rely on registration status because an unregistered large foreign private issuer may have an active U.S. market for its securities, in which case the ETF should be able to meet redemption requests in a timely manner.  

We request comment on the definition of “foreign security.” Should the definition provide any additional exceptions?  

D. Disclosure Amendments  

Congress enacted the federal securities laws to promote fair and honest securities markets, and an important purpose of these laws is to promote full and fair disclosure of important information by issuers of securities to the investing public. The Securities Act and the Exchange Act, as implemented by Commission rules and regulations, provide for systems of mandatory disclosure of certain material information in securities offerings and in periodic reports. Accordingly, the Securities Act requires delivery of a prospectus meeting the requirements of section 10(a) to each investor in a registered offering.  

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141 See Termination of a Foreign Private Issuer’s Registration of a Class of Securities Under Section 12(g) and Duty To File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 55540 (Mar. 27, 2007) [72 FR 16934 (Apr. 5, 2007)] (adopting rule 12h-6 under the Exchange Act, which permits a foreign issuer to terminate its Exchange Act registration and reporting obligations regarding a class of equity securities if the average daily trading volume (“ADTV”) of the securities in the United States has been 5 percent or less of the ADTV of that class of securities in the issuer’s principal trading market during a recent 12-month period, regardless of the size of its U.S. public float).  

142 15 U.S.C. 77j(a). This is known as a “final prospectus.” In 2005, the Commission adopted rule 172 under the Securities Act which generally deems final prospectus delivery satisfied when the prospectus is filed with the Commission (“access equals delivery”). 17 CFR 230.172. The (footnote continued)
requires dealers in a security, for a specified period of time after the registration statement for the security becomes effective, to deliver a final prospectus to purchasers, including to most persons purchasing shares in secondary market transactions. The Investment Company Act, however, requires dealers to continue prospectus delivery to investors in open-end funds, including ETFs, which continuously offer their securities to the public.

1. Delivery of Prospectuses to Investors

Our orders generally have exempted broker-dealers selling ETF shares from the obligation to deliver prospectuses in most secondary market transactions. Applicants have represented that broker-dealers would instead deliver a “product description” containing basic

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143 Under section 4(3) of the Securities Act, dealers must deliver a prospectus in connection with original sales by the dealer of securities obtained from or through an underwriter, and resales by the dealer occurring during the 40 days (90 days for first-time issuers) after the effective date of the registration statement (or, under certain circumstances, a different date). This aftermarket delivery obligation applies to all dealers, whether or not they participated in the offering itself. 15 U.S.C. 77d(3). See also rule 174 under the Securities Act, which provides an exception from the requirement in section 4(3) that a prospectus be delivered prior to the expiration of the applicable 40-day or 90-day period. 17 CFR 230.174.

144 Section 24(d) of the Act eliminates the dealer’s exception with respect to securities issued by funds and UITs on the theory that, because those issuers continuously offer their securities to the public, all dealers should be compelled to use the statutory prospectus. See H.R. REP. NO. 1542, 83d Cong., 2d Sess. 29-30 (1954).

145 Most of the orders have granted exemptions from section 24(d) of the Act, which makes inapplicable the dealer exception in section 4(3) of the Securities Act to transactions in redeemable securities issued by an open-end fund. 15 U.S.C. 80a-24(d); 15 U.S.C. 77(d)(3); see, e.g., WisdomTree Notice, supra note 12, at n.14. ETFs that have this relief continue to be subject to prospectus delivery requirements in connection with sales of creation units and other non-secondary market transactions. Our most recent orders permitting certain actively managed ETFs do not, however, provide this exemption. See Actively Managed ETF Orders, supra note 20.
information about the ETF and its shares. Proposed rule 6c-11 would not include a similar exemption, and thus broker-dealers would be required to deliver a prospectus meeting the requirements of section 10(a) of the Securities Act to investors purchasing ETF shares.

We understand that many, if not most, broker-dealers selling ETF shares in secondary market transactions do, in fact, transmit a prospectus to purchasers, and thus they have not relied on the exemptions we have provided in our orders. More important, we believe an exemption allowing dealers to deliver product descriptions would be unnecessary given our proposal regarding summary prospectus disclosure. As discussed below, we recently proposed amendments to Form N-1A and to rule 498 under the Securities Act, in order to enhance the disclosures that are provided to mutual fund investors (“Enhanced Disclosure Proposing Release”). The proposed amendments, if adopted, would require key information to appear in plain English in a standardized order at the front of the mutual fund prospectus (“summary section”). A person could satisfy its mutual fund prospectus delivery obligations under section 5(b)(2) of the Securities Act by sending or giving this key information directly to investors in the form of a summary prospectus and providing a prospectus that meets the requirements of section

146 See, e.g., Ziegler Notice, supra note 110. The product description provides a summary of the salient features of the ETF and its shares, including the investment objectives of the fund, the manner in which ETF shares trade on the secondary market, and the manner in which creation units are purchased and redeemed. National securities exchanges on which ETFs are listed have adopted rules requiring the delivery of product descriptions. See, e.g., American Stock Exchange Rules 1000 and 1000A.

147 15 U.S.C. 77j(a). This prospectus delivery requirement would apply to all ETFs, including ETFs operating under current exemptive orders. Therefore, we propose to amend orders we issued to open-end ETFs to exclude the section 24(d) exemption we have issued to existing ETFs. See infra Section III.E for a discussion of this proposed amendment to existing orders.

148 See infra notes 176-185 and accompanying text.

149 17 CFR 230.498.

150 See Enhanced Disclosure Proposing Release, supra note 142.

151 See id., at Section II.A.
10(a) of the Securities Act (“statutory prospectus”) on an Internet Web site.\(^{152}\) If adopted, broker-dealers selling ETF shares could deliver a summary prospectus in secondary market transactions. We believe the summary prospectus would contain material information that may not be included in a product description, but, like the product description, would be in a form that would be easy to use and readily accessible.

We request comment on this approach. Are we correct in our understanding that many, if not most, broker-dealers deliver a prospectus instead of a product description in connection with sales of ETF shares in secondary market transactions? If so, why?

If we were to adopt rule 6c-11 before the amendments proposed in the Enhanced Disclosure Proposing Release, we would expect to permit delivery of a product description in lieu of a prospectus, pending final determination of that proposal by the Commission. We request comment on this approach. Should we permit all ETFs, including actively managed ETFs and index-based ETFs that rely on the rule instead of an exemptive order to deliver product descriptions? Should we prescribe the form of the product description? For example, should we propose specific requirements for product descriptions that would provide ETF investors with information similar to that received by traditional mutual fund investors, such as the fee table, name and length of service of the portfolio manager, and return information, as noted above? Alternatively, should the product description conform to the disclosures in the summary section as proposed in Section III.D.2 below?\(^{153}\) If so, are there any additional disclosures to those in the proposed summary section that ETFs should be required to include in a product description? Are there any disclosures in the proposed summary section that ETFs should not be required to

\(^{152}\) 15 U.S.C. 77j(a). The fund also would be required to provide additional information on its Web site. See Proposed rule 498(c).

\(^{153}\) See infra notes 175-189 and accompanying text.
include in the product description?

If we do not adopt the amendments proposed in the Enhanced Disclosure Proposing Release, we would anticipate that dealers in ETF shares will nevertheless continue their current practice of delivering prospectuses to investors. We request comment on whether the rule should require dealers to deliver prospectuses instead of product descriptions. ETFs are becoming more like traditional mutual funds in several respects. As discussed above, when we began issuing exemptive orders to ETFs, they had basic investment objectives (to track a widely-followed index) and simple investment techniques (investment in all, or a representative sample of, the securities of a widely followed index). Soon, however, some ETFs will be actively managed and have portfolio managers whose role is important to the success of the fund. ETF operations, investment objectives, expenses, and other characteristics may become more varied as well. Because prospectuses contain information in a standardized form prescribed by the Commission, the use of these disclosure forms could promote greater uniformity in the content and level of disclosure among ETFs. In addition, as discussed below, we are proposing to amend Form N-1A to include additional information relevant to a retail investor in an ETF, who does not typically buy or redeem individual shares directly from the fund.

If we were to retain the prospectus delivery exemption for broker-dealers, should the

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154 For a discussion of the additional burdens associated with the requirement that broker-dealers deliver prospectuses in secondary market transactions involving ETF shares, see infra discussion at Section VIII.

155 See supra note 10 and accompanying text.

156 The investment objectives and techniques of index-based ETFs also have become more complex. Some ETFs today follow specialized or custom-designed indexes; others are leveraged through use of futures contracts and other types of derivative instruments.

157 Certain disclosures required by Form N-1A that generally are not included in product descriptions may be important to some investors given the evolution of ETFs. Product descriptions do not, for example, include a fee table itemizing the ETF’s expenses, or the name and length of service of the portfolio manager.
exemption be limited to index-based ETFs or only to certain index-based ETFs, such as those that replicate the components of a broad-based stock market index? If we were to retain the exemption, should we require broker-dealers to deliver prospectuses instead of product descriptions to purchasers of actively managed ETF shares?

2. Amendments to Form N-1A

We are proposing several amendments to Form N-1A, the registration form used by open-end management investment companies to register under the Act and to offer their securities under the Securities Act, to accommodate the use of this form by ETFs. The proposed amendments for ETF prospectuses are designed to meet the needs of investors (including retail investors) who purchase shares in secondary market transactions rather than financial institutions purchasing creation units directly from the ETF.

We request comment on our proposal to amend Form N-1A to meet the needs of secondary market investors. Is this distinction we propose to draw between purchasers of shares in secondary market transactions and purchasers of creation units from the fund appropriate? Should we instead revise Form N-1A to include the additional disclosure (as discussed below) we are proposing today for secondary market investors without eliminating (as discussed below) certain disclosures relevant to creation unit purchasers? Would secondary market investors be confused if Form N-1A included disclosure relevant to both types of investors?

Purchasing and Redeeming Shares. We propose to amend Item 6 of Form N-1A to eliminate the requirement that ETF prospectuses disclose information on how to buy and redeem shares of the ETF because it is not relevant to secondary market purchasers of ETF shares.158 Instead ETF prospectuses would simply state the number of shares contained in a creation unit

158 Proposed Item 6(h)(1) of Form N-1A.
(i.e. the amount of shares necessary to redeem with the ETF) and that individual shares can only
be bought and sold on the secondary market through a broker-dealer.\textsuperscript{159} Similarly, we also would
amend Item 3 to exclude from the fee table fees and expenses for purchases or sales of creation
units.\textsuperscript{160} Instead, the proposed amendment would require an ETF to modify the narrative
explanation preceding the example in the fee table to state that individual ETF shares are sold on
the secondary market rather than redeemed at the end of the periods indicated, and that investors
in ETF shares may be required to pay brokerage commissions that are not reflected in the fee
table.\textsuperscript{161}

We request comment on our assumption that investors (including most individual
investors) purchasing their shares in secondary market transactions do not need to know
information on how creation units are purchased and redeemed, or the payment of transaction
fees by investors purchasing or redeeming creation units. If they do need this information, why?

ETFs would still be required to include disclosure on how creation units are offered to the
public in the SAI.\textsuperscript{162} We are not proposing to amend this disclosure to include information on
creation unit redemption, which Item 6 currently requires and which we propose to eliminate.
Should we amend the SAI to include the disclosure requirements we are proposing to eliminate
from Item 6? Should we require that the information in the SAI regarding the purchase of
creation units also specify associated fees and expenses? As an alternative, should we require
purchase and redemption information and associated fees and expenses to remain in Item 3 and

\textsuperscript{159} Proposed Item 6(h)(3) of Form N-1A.
\textsuperscript{160} Proposed Instruction 1(e)(i) to Item 3 of Form N-1A.
\textsuperscript{161} Proposed Instruction 1(e)(ii) to Item 3 of Form N-1A. We also are proposing a conforming
amendment to the fee table in ETF annual and semi-annual reports. Proposed Instruction 1(e) to
Item 22(d) of Form N-1A.
\textsuperscript{162} Item 18(a) of Form N-1A.
Item 6 only for prospectuses provided to investors purchasing creation units, such as in the form of a supplementary prospectus?

The proposed alternative disclosures in Items 3 and 6 would not be available, however, to ETFs with creation units of less than 25,000 shares because more retail investors would be able to transact directly with an ETF that has smaller-sized creation units.

We request comment on whether the exemptions we are providing from Items 3 and 6 of Form N-1A should be based on the size of the creation unit, and whether 25,000 shares per creation unit is an appropriate threshold. Should it be higher or lower? Should we instead adopt a threshold based on the value of shares rather than the number of shares?

Total Return. We propose to modify instructions to several items that require the use of the ETF’s NAV to determine its return. In addition to returns based on NAV, ETFs also would be required to include returns based on the market price of fund shares. As discussed above, returns based on market price may be different than returns based on the fund’s NAV and better relate to an ETF investor’s experience in the fund.

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163 We propose to amend the average annual return table to include a separate line item for returns based on the market price of ETF shares. Proposed Instruction 5(a) to Item 2(c)(2) of Form N-1A. This would codify, with modifications, a condition in ETF exemptive orders. See, e.g., Ziegler Notice, supra note 110. The condition in our exemptive orders did not specify the location of the disclosure in the prospectus. As a result, ETFs include an additional table in the prospectus, rather than including market price returns in the average annual returns table required by Item 2. In addition, ETFs use different time periods for the disclosure, with some using calendar years and others fiscal years. The proposed amendment would eliminate use of a second table, which may confuse investors. It also would standardize the reporting period by requiring all ETFs to present the information using calendar years.

We also propose to amend the financial highlights table to require ETFs to calculate total return at market prices in addition to returns at NAV. This proposed amendment would provide secondary market investors with more pertinent information as to the effect of market price movements on their investments. Proposed Instruction 3(f) to Item 8(a) of Form N-1A. Under the proposed amendment, ETFs would be required to include two bar charts under Item 2 of the form; one using market price returns and one using NAV returns. See Instruction 1(a) to Item 2(c)(2) of Form N-1A.
We request comment on whether use of market prices, in addition to NAV, would provide secondary market purchasers of ETF shares with meaningful information on their investments. Alternatively, should we require returns to be computed solely using market prices? Would investors find it confusing to have fund returns presented using both market price and NAV? Should we limit this amendment to ETFs with creation units of 25,000 shares or more because more retail investors may be able to transact directly with the ETF in the event of smaller creation units?

For purposes of determining ETF returns, we would define “market price” as the last price at which ETF shares trade on their principal U.S. trading market during a regular trading session (i.e. closing price). Is this an appropriate definition for market price, or should we instead (or in addition) define the market price as the mid-point price between the highest bid and the lowest offer on the principal U.S. market on which the ETF shares are traded, at the time the fund’s NAV is calculated?

Premium/Discount Information. We propose to require that each ETF disclose to investors information about the extent and frequency with which market prices of fund shares have tracked the fund’s NAV. This disclosure, which would be required on the fund’s Internet

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164 Proposed definition of “Market Price” in General Instruction A of Form N-1A. We consider the closing price to be the strongest indicator of market value. See Codification of Financial Reporting Policies, Section 404.03.b.ii, “Valuation of Securities—Securities Listed for Trading on a National Securities Exchange,” reprinted in SEC Accounting Rules (CCH) ¶ 38,221 (“ASR 118”), at 38, 424-38, 425. See also Fair Value Measurements, Statement of Financial Accounting Standards No. 157, § 24 (Fin. Accounting Standards Bd. 2006) (“FASB 157”) (“[A] quoted price in an active market provides the most reliable evidence of fair value and shall be used to measure fair value whenever available.”).

165 In circumstances where closing price may be less accurate because the last trade occurred at a much earlier point in the day than NAV calculation, some ETFs have used the mid-point price, rather than the closing price. See, e.g., Claymore Exchange-Traded Fund Trust, Investment Company Act Release No. 27469 (Aug. 28, 2006) [71 FR 51869 (Aug. 31, 2006)].

166 Proposed Item 6(h)(4) to Form N-1A.
Web site and included in its prospectus, is a condition to relief in ETF exemptive orders. Proposed rule 6c-11 also would require each ETF to disclose on its Internet Web site the prior business day’s last determined NAV, the market closing price of its shares and the premium/discount of the closing price to NAV. This disclosure is designed to alert investors to the current relationship between NAV and the market price of the ETF’s shares, and that they may sell or purchase ETF shares at prices that do not correspond to the NAV of the fund.

Proposed Item 6(h)(4) of Form N-1A would require disclosure in the ETF prospectus of the number of trading days, during the most recently completed calendar year and quarters since that year, on which the market price of the ETF shares was greater than the fund’s NAV and the number of days it was less than the fund’s NAV (premium/discount information). In addition to alerting investors that the ETF’s NAV and share price may differ, this disclosure also would provide historical information regarding the frequency of these deviations. In light of the historical premium/discount disclosure in the ETF prospectus and in order to avoid duplicative disclosures that may result in additional regulatory burdens, proposed rule 6c-11, unlike the exemptive orders, would not require ETFs to include historical premium/discount information on their Internet Web sites.

We request comment on whether daily and historical premium/discount information, which ETFs currently provide, is useful to investors. One commenter to the 2001 Concept

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167 See, e.g., WisdomTree Notice supra note 12; Zeigler Notice supra note 110.
168 Proposed rule 6c-11(c)(4)(iv).
169 Consistent with current orders, ETFs would be required to present premiums or discounts as a percentage of NAV. They also would be required to explain that shareholders may pay more than NAV when purchasing shares and receive less than NAV when selling, because shares are bought and sold at market prices. Proposed Instructions 2, 3 to Item 6(h)(4) of Form N-1A. In addition, the amendments also would require each ETF to identify the trading symbol(s) and principal U.S. market(s) on which the shares are traded. Proposed Item 6(h)(2) of Form N-1A.
Release suggested that investors need not receive premiums/discounts against NAV disclosure because the more useful information is the Intraday Value of the fund’s basket as disseminated by national securities exchanges at regular intervals.\(^{170}\) This information, according to the commenter, provides investors with contemporaneous pricing of the fund’s portfolio and enables the investor to see, at the time his order is entered, whether the Intraday Value is close to (or between) the bid-asked price.

We request comment on whether investors need premium/discount disclosure in light of the dissemination of the ETF’s Intraday Value at regular intervals during trading hours. We request ETF sponsors commenting on this condition of the rule to provide us with data regarding the frequency with which visitors to their Internet Web sites access this information. In addition to current premium/discount information, should we also require ETF Web sites to provide historical premium/discount information as is currently required by exemptive orders? If the Web site includes historical premium/discount information, should the rule also require historical information in Form N-1A? If so, over what periods?

**Periodic Report Information.** We are proposing conforming amendments to ETF return information in ETF annual reports. The proposed amendments would require each ETF to use the market price of fund shares in addition to NAV to determine its return,\(^{171}\) and include a table

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\(^{171}\) Proposed Instruction 12(b) to Item 22(b)(7) of Form N-1A. This proposed disclosure would be identical to proposed Instruction 5(a) to Item 2(c)(2) of Form N-1A. See supra note 163. We also are proposing to require ETFs to include a new line graph comparing the initial and subsequent account values using market price, following the line graph using NAV required by Item 22(b)(7)(ii)(A) of Form N-1A. Proposed Instruction 12(a) to Item 22(b)(7) of Form N-1A. Consistent with the amendments proposed above, this proposed amendment also is designed to provide individual investors with the effect of market price fluctuations on their investment.
with premium/discount information for the five recently completed fiscal years.\textsuperscript{172}

We request comment on whether it is necessary to include similar disclosure in both the prospectus and annual report of an ETF. Should ETFs that provide this information on their Internet Web sites be exempt from this annual report requirement? Is it necessary for the ETF to provide premium/discount data for the most recently completed five fiscal years? Should the reporting period conform to that proposed under Item 6 of the form (\textit{i.e.}, one calendar year and most recent quarters since that year)?

We also are proposing to amend the prospectus and annual report requirements of Form N-1A to require an index-based ETF to compare its performance to its underlying index rather than a benchmark index.\textsuperscript{173} This amendment would permit use of a narrow-based or affiliated index and eliminate the opportunity for an index-based ETF to select an index different from its underlying index which should better reflect whether the ETF’s performance corresponds to the index the performance of which it seeks to track.\textsuperscript{174}

We request comment on whether it is appropriate to require an index-based ETF to compare its performance to its underlying index. Should an index-based ETF that tracks an

\textsuperscript{172} Proposed Item 22(b)(7)(iv) of Form N-1A. Although similar to the proposed disclosure amendment to the shareholder information in Item 6 of the form, this proposed disclosure would span a longer, and different, reporting period: five fiscal years instead of the most recent calendar year and quarter(s). \textit{See} Proposed Item 6(h)(4) of Form N-1A. The proposed amendment would require fiscal year disclosure to conform to currently required disclosure in Item 22(b)(7). We are also proposing to include instructions similar to those proposed in Item 6 to assist funds in meeting this proposed disclosure obligation. Proposed Instructions to Item 22(b)(7)(iv) of Form N-1A.

\textsuperscript{173} Proposed Instruction 5(b) to Item 2(c)(2) of Form N-1A; Proposed Instruction 12(c) to Item 22(b)(7) of Form N-1A.

\textsuperscript{174} Item 2(c)(2)(iii) of Form N-1A; Instruction 12(c) to Item 22(b)(7) of Form N-1A. The form requires use of a broad-based index and prohibits use of affiliated indexes unless widely used and recognized. Our amendment would require ETFs that track narrow, custom indexes or affiliated indexes, to use the underlying index when presenting this return information.
index compiled by an affiliated index provider use a benchmark index instead of, or in addition to, its underlying index? Should an index-based ETF that tracks a fundamental or other custom-designed index use a benchmark index instead of, or in addition to, its underlying index?

Summary Prospectus. As noted above, we recently issued the Enhanced Disclosure Proposing Release, which would require key information to appear in plain English in a summary section of the prospectus. In addition, a person could satisfy its mutual fund delivery obligations under section 5(b)(2) of the Securities Act by delivering the summary prospectus to investors and providing a statutory prospectus on an Internet Web site. Upon request, a fund also would be required to send the statutory prospectus to the investor.

As proposed, the summary section would include certain key information, which also would comprise the information in the summary prospectus. This key information would include: (i) investment objectives; (ii) costs; (iii) principal investment strategies, risks, and

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175 See supra notes 148-152 and accompanying text. References to Form N-1A amendments in the Enhanced Disclosure Proposing Release, supra note 142, are to the “proposed summary prospectus.”

176 See Enhanced Disclosure Proposing Release, supra note 142, at Section II.B (proposed rule 498 under the Securities Act).

177 See id., at n.43 and accompanying text (proposed summary prospectus Item 2 of Form N-1A). This is the same information required by current Item 2(a) of Form N-1A.

178 See id., at nn.44-55 and accompanying text (proposed summary prospectus Item 3 of Form N-1A). This information would be substantially the same as that required by current Item 3 of Form N-1A (the risk/return summary fee table and example), except for proposed amendments that would: (i) require funds that offer discounts on front-end sales charges for volume purchases (i.e. breakpoints) to include a brief narrative disclosure alerting investors to the availability of those discounts; (ii) revise the parenthetical following the heading “Annual Fund Operating Expenses” to read “ongoing expenses that you pay each year as a percentage of the value of your investment” in place of “expenses that are deducted from Fund assets”; (iii) require funds to add brief disclosure regarding portfolio turnover immediately following the fee table example; and (iv) permit funds to include additional captions directly below the “Total Annual Fund Operating Expenses” caption in cases where there were expense reimbursement or fee waiver arrangements that reduced fund operating expenses and that will continue to reduce them for no less than one year from the effective date of the fund’s registration statement.
performance, \(^{179}\) (iv) the fund’s top ten portfolio holdings as of the end of its most recent calendar quarter; \(^{180}\) (v) identity of investment advisers and portfolio managers; \(^{181}\) (vi) brief purchase and sale and tax information; \(^{182}\) and (vii) financial intermediary compensation. \(^{183}\) This information is drawn largely from the current risk/return summary and rule 498 fund profile. \(^{184}\) In addition, the summary prospectus would be required to include on the cover page or at the beginning: (i) the

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\(^{179}\) See id., at nn.56-57 and accompanying text (proposed summary prospectus Item 4 of Form N-1A). This would include the same information required by current Items 2(b) and (c) of Form N-1A.

\(^{180}\) See id., at nn.58-66 and accompanying text (proposed summary prospectus Item 5 of Form N-1A). This information currently is not required in a fund’s prospectus. The proposal would allow funds to list an amount not exceeding five percent of the total value of the portfolio holdings in one amount as “Miscellaneous securities” provided certain specified conditions are met. Id. at n.66 and accompanying text (proposed Instruction 3 to proposed summary prospectus Item 5 of Form N-1A).

\(^{181}\) See id., at nn.67-72 and accompanying text (proposed summary prospectus Item 6 of Form N-1A) (proposing that a fund disclose the name of each investment adviser and sub-adviser of the fund, followed by the name, title, and length of service of the fund’s portfolio managers). This information is similar to disclosures required by current Item 5 of Form N-1A. Certain additional disclosures regarding investment advisers and portfolio managers that are currently required in the statutory prospectus would continue to be required in the statutory prospectus, but not in the summary section. See id., at n.68.

\(^{182}\) See id., at nn.73-74 and accompanying text (proposed summary prospectus Item 7 of Form N-1A) (proposing that a fund disclose minimum initial or subsequent investment requirements, the fact that the shares are redeemable, and identify the procedures for redeeming shares (e.g., on any business day by written request, telephone, or wire transfer), and nn.75-76 and accompanying text (proposed summary prospectus Item 8 of Form N-1A) (proposing that a fund state, as applicable, that it intends to make distributions that may be taxed as ordinary income or capital gains or that the fund intends to distribute tax-exempt income, and proposing that a fund that holds itself out as investing in securities generating tax-exempt income provide, as applicable, a general statement to the effect that a portion of the fund’s distributions may be subject to federal income tax).

\(^{183}\) See id., at nn.77-78 and accompanying text (proposed summary prospectus Item 9 of Form N-1A) (proposing that a fund provide disclosure that, if an investor purchases the fund through a broker-dealer or other financial intermediary (such as a bank), the fund and its related companies may pay the intermediary for the sale of fund shares and related services, and state that these payments may influence the broker-dealer or other intermediary and the salesperson to recommend the fund over another investment).

\(^{184}\) Registrants would not be permitted to include any additional information in the summary section. See id., at n.37 and accompanying text (proposed summary prospectus General Instruction C.3.(b) of Form N-1A).
fund’s name and the share classes to which the summary prospectus relates; (ii) a statement identifying the document as a “summary prospectus”; (iii) the approximate date of the summary prospectus’s first use; and (iv) the following legend:

Before you invest, you may want to review the Fund’s prospectus, which contains more information about the Fund and its risks. You can find the Fund’s prospectus and other information about the Fund online at [______]. You can also get this information at no cost by calling [______] or by sending an e-mail request to [________].

If adopted, the amendments to Form N-1A and rule 498 proposed in the Enhanced Disclosure Proposing Release would require open-end ETFs to include the summary section in their prospectuses and permit persons to satisfy their prospectus delivery obligations by sending or giving the summary prospectus and providing the statutory prospectus on an Internet Web site in the manner set forth in the proposed rules. Today, we also propose that, if the Enhanced Disclosure Proposing Release is adopted, ETFs include in the summary section of their prospectuses, and in their summary prospectuses, the additional proposed disclosures discussed above. Specifically, we would modify the amendments proposed in the Enhanced Disclosure Proposing Release to include our proposed amendments to ETF disclosures as follows: (i) our proposed amendments regarding disclosures about creation units and the purchase and sale of individual ETF shares would be included in proposed summary prospectus Item 7, which would require brief purchase and sale information; (ii) the additional information on market price returns would be included in proposed summary prospectus Item 4, which includes the

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185 See id., at n.98 and accompanying text (proposed rule 498(b)(1) under the Securities Act).

186 The disclosures in our proposed Items 6(a)(1), 6(h)(2) and 6(h)(3) to Form N-1A would be included in proposed summary prospectus Item 7 of Form N-1A. As noted, our proposed amendments also would require the ETF to modify the narrative explanation preceding the example in the fee table, see supra note 160, which would remain in current Item 3 of Form N-1A.
risk/return summary, bar chart and table, and (iii) premium/discount information would be included in proposed summary prospectus Item 7 (purchase and sale information). We also would permit ETFs to exclude proposed information regarding the purchase and sale of creation units consistent with our proposal today.

We request comment on whether ETFs should send or give the proposed additional items in the summary prospectus. If so, should any information from the statutory prospectus, in addition to the items that we are proposing today, be included in the summary section of an ETF’s prospectus and, therefore, in its summary prospectus? Should ETFs not be required to include certain items in the summary section? For example, in light of the transparency of portfolio holdings of an ETF, should ETFs not have to include the top ten portfolio holdings? Should ETFs be permitted or required to locate any of the specific disclosures proposed in this release or in the Enhanced Disclosure Proposing Release elsewhere in the prospectus outside the summary section?

**E. Amendment of Previously Issued Exemptive Orders**

As discussed above, our orders have exempted ETFs from compliance with section 24(d) of the Act to relieve dealers from delivering prospectuses to investors in secondary market

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187 Our proposed instructions 5(a) and (b) to the risk return bar chart and table (current Item 2(c)(2) of Form N-1A), see note 163 and accompanying and following text, would be added to the end of the proposed instructions to proposed summary prospectus Item 4.

188 The disclosure in our proposed Item 6(h)(4) to Form N-1A, see notes 167-169 and accompanying and following text, would be included at the end of proposed summary prospectus Item 7 of Form N-1A. Our proposed amendments to the financial highlights (current Item 8 of Form N-1A) and the financial statements (current Item 22 of Form N-1A) would be included in the proposed summary prospectus Items 14 and 28 of Form N-1A, respectively.

189 ETFs would be permitted to exclude from the fee table (current Item 3 and proposed summary prospectus Item 3 of Form N-1A) the fees and expenses associated with creation unit purchases and redemptions and would be permitted to exclude the disclosure required by proposed summary prospectus Items 7(a) and 7(b) of Form N-1A. See supra notes 158-160 and accompanying text.
transactions. We are proposing today not to include such an exemption in rule 6c-11 to ensure that broker-dealers are subject to the same delivery requirements with respect to all ETFs. In addition, we are proposing amendments to Form N-1A that would revise the prospectus requirements in that form in order to provide more useful information to investors in ETF shares. Therefore, pursuant to our authority under section 38(a) of the Act, we propose to amend the exemptive orders we have issued to ETFs that are open-end funds to eliminate the section 24(d) exemptions and require ETFs to satisfy their statutory prospectus delivery requirements.

The consequence of the amendment to these orders, if adopted, would be to put ETFs that have received exemptive orders on the same footing as ETFs that may in the future rely solely on rule 6c-11, and thus eliminate any competitive advantage they might otherwise obtain by having obtained orders before adoption of the rule. The amendment would be limited to orders issued to ETFs seeking to operate as open-end management companies.

We are not proposing to rescind the orders we have issued because we do not believe rescission would be necessary to eliminate competitive advantages for ETFs that have already received exemptive orders. With the exception of the section 24(d) exemption (and the related prospectus disclosure requirements), the proposed rule contains broader exemptive relief than that provided in our orders and therefore we expect most, if not all, ETFs would rely on the rule

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190 See supra Section III.D.1.

191 Section 38(a) of the Act provides the Commission with the authority to amend orders when necessary or appropriate to the exercise of its powers conferred elsewhere in the Act. We are not proposing to amend the orders of UITs that have sought and obtained an exemption from section 24(d) of the Act because those ETFs do not prepare their prospectuses in accordance with Form N-1A.

192 For the same purpose, we expect all funds seeking exemptive orders to operate an ETF after today to agree as a condition of the order that the requested order would expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of index-based or actively managed ETFs.
if and when it is adopted.

We request comment on whether we should rescind our previous orders. Is our assumption correct that most ETFs that have orders would rely on the rule?

IV. EXEMPTION FOR INVESTMENT COMPANIES INVESTING IN ETFs

A. Background

As we discussed above, institutional investors, including funds, have invested in ETFs to achieve asset allocation, diversification, or other investment objectives. Some funds invest primarily in ETFs. A fund’s ability to invest in ETFs, however, is limited because section 12(d)(1) of the Act prohibits a fund (and companies or funds it controls) (“acquiring fund”) from:

(i) acquiring more than three percent of any other investment company’s outstanding voting securities (“acquired fund”);

(ii) investing more than five percent of its total assets in any one acquired fund; or

(iii) investing more than ten percent of its total assets in all acquired funds.194

Section 12(d)(1) was enacted to limit so-called “fund of funds” arrangements. Congress was concerned about “pyramiding,” a practice under which investors could use a limited

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193 See supra note 15 and accompanying text (funds also use ETFs for hedging purposes). See also, e.g., iShares Trust, Investment Company Act Release No. 25969 (Mar. 21, 2003) [68 FR 15010 (Mar. 27, 2003)].

194 See 15 U.S.C. 80a-12(d)(1)(A). Both registered and unregistered funds are subject to these limits with respect to their investments in a registered fund. Registered funds are also subject to these same limits with respect to their investments in an unregistered fund. Unregistered funds are not subject to limits on their investments in another unregistered fund. Id. ETFs are registered funds and therefore both registered and unregistered funds are subject to section 12(d)(1)(A)’s limits with respect to investments in ETFs. Section 12(d)(1)(B) prohibits a registered open-end fund from selling any security issued by the fund to any other fund (including unregistered funds) if, after the sale, the acquiring fund would: (i) together with companies and funds it controls, own more than three percent of the acquired fund’s voting securities; or (ii) together with other funds (and companies they control) own more than ten percent of the acquired fund’s voting securities. 15 U.S.C. 80a-12(d)(1)(B).
investment in an acquiring fund to gain control of another (and potentially much larger) fund and use the assets of the acquired fund to enrich themselves at the expense of acquired fund shareholders. Control could be exercised either directly (such as through holding a controlling interest) or indirectly (such as by coercion through the threat of large-scale redemptions). Congress also was concerned about the potential for excessive fees when one fund invested in another, and the formation of overly complex structures that could be confusing to investors.

The legislative history of these provisions cites examples of controlling investors in an acquiring fund using “pyramiding schemes” to force acquired funds to purchase securities of companies in which the investors had an interest and to direct underwriting and brokerage business to broker-dealers they controlled. In an open-end fund, controlling investors were able to exert control and influence over acquired funds through the threat of large-scale redemptions. In the 1960s, Fund of Funds, Ltd., an unregistered foreign investment company, acquired controlling interests in several registered U.S. funds and was able to exert undue influence over the management of those acquired funds by threatening advisers to those funds with large redemptions. See SEC, PUBLIC POLICY IMPLICATIONS OF INVESTMENT COMPANY GROWTH, H.R. REP. NO. 2337, 89th Cong., 2d Sess. at 315-16 (1966) (“1966 Study”). Congress enacted section 12(d)(1) to prevent these abuses and amended the section in 1970 to prevent similar abuses by investors in unregistered acquiring funds. Congress later amended section 12(d)(1) to give the Commission specific authority to provide exemptions from these limitations. See infra notes 200 and 214 and accompanying text.

Large-scale redemptions may disrupt portfolio management or increase transaction fees if fund managers must hold cash or sell portfolio securities at an inopportune time to meet redemptions. Large-scale redemptions also may be threatening to a fund manager because they decrease the fund’s assets under management, on which the manager’s fee is based.

Pyramiding schemes resulted in fund shareholders paying excessive charges due to duplicative fees at the acquiring and acquired fund levels. See SEC, INVESTMENT TRUSTS AND INVESTMENT COMPANIES, H.R. DOC. NO. 279, 76th Cong., 1st Sess., pt.3, at 2721-95 (1939) (“INVESTMENT TRUST STUDY”). See also Fund of Funds Investments, Investment Company Act Release No. 26198 (Oct. 1, 2003) [68 FR 58226 (Oct. 8, 2003)] (“Fund of Funds Proposing Release”) at nn.2-6 and accompanying text. For example, from 1927 to 1936, it was estimated that the duplication of expenses incurred by funds investing in other funds exceeded five percent of the total operating expenses for all management funds. See INVESTMENT TRUST STUDY, at 2727-2728. Fund of Funds, Ltd. also charged duplicative advisory fees at the acquiring and acquired fund levels, provided sales loads to an affiliated broker for each investment the acquiring fund made in an acquired fund, and directed brokerage to an affiliate of the fund of funds. See 1966 Study, supra note 195, at 318-320; Arthur Lipper Corp., et al. v. SEC, Securities Exchange Act Release No. 11773, 46 S.E.C. 78 (Oct. 24, 1975), sanction modified, 547 F.2d 171 (2d Cir. 1976) (a Fund of Funds, Ltd. affiliated broker-dealer received commissions under step-out arrangements with Arthur Lipper Corp, a registered broker-dealer, and other broker-dealers).

Pyramiding of funds resulted in complicated corporate structures that were confusing to...
Congress imposed these limits, in part, based on our conclusion in 1966 that fund of funds structures served little or no economic purpose. \footnote{199}

Our views and those of Congress regarding the economic value of fund of funds arrangements have changed over the years as fund of funds arrangements have been created that serve new, legitimate purposes. Recognizing this, in 1996, Congress granted us specific authority to provide exemptions allowing fund of funds arrangements, and directed that we use it “in a progressive way.” \footnote{200} Pursuant to this authority, we have provided exemptions to permit certain fund of funds arrangements that would otherwise be prohibited under section 12(d)(1).

For example, in 2006 we adopted rule 12d1-1, which allows funds to invest in money market funds in excess of section 12(d)(1) limits. \footnote{201} We also have issued exemptive orders that allow many funds to invest in unaffiliated traditional funds (“multigroup fund orders”) and that allow the sale of shares issued by several ETFs to unaffiliated funds in excess of the statutory limits. \footnote{202}

\footnote{199}
See id., at 2725-41.

\footnote{200}

\footnote{201}

\footnote{202}
The exemptions provided under the rule and these orders facilitate the acquiring funds’ ability to achieve their investment objectives by expanding their investment options to include investments in unaffiliated funds in a manner consistent with the protection of investors. These exemptions also increase the potential pool of investors and assets available for investment in ETFs and traditional funds.

ETF applicants have sought exemptive orders similar to those we have issued to funds investing in unaffiliated traditional funds.\textsuperscript{203} The conditions included in those orders were designed to prevent the abuses that historically were associated with fund of funds arrangements and that led Congress to enact section 12(d)(1).\textsuperscript{204} The conditions include: (i) limits on the control and influence an acquiring fund can exert on the acquired fund;\textsuperscript{205} (ii) limits on certain

\textsuperscript{203} Fifteen orders have been issued to ETFs allowing other funds to invest in ETFs beyond the limits of section 12(d)(1). \textit{See, e.g.,} iShares Trust, \textit{et al.}, Investment Company Act Release No. 25969 (Mar. 21, 2003) [68 FR 15010 (Mar. 27, 2003)].

\textsuperscript{204} \textit{See, e.g.,} Schwab Notice and Order, \textit{supra} note 202.

\textsuperscript{205} The exemptive orders permitting investments in ETFs contain the following conditions relating to influence and control: (i) the acquiring fund’s investment adviser or sponsor, any person in a control relationship with that investment adviser or sponsor, any investment company (including a company that would be an investment company but for the exceptions provided in sections 3(c)(1) and 3(c)(7) of the Act) that is advised or sponsored by the acquiring fund’s investment adviser or sponsor, or any person in a control relationship with that investment adviser or sponsor cannot control the ETF within the meaning of section 2(a)(9) of the Act; (ii) neither the acquiring fund nor certain of its affiliates cause any existing or potential investment by the acquiring fund in ETF shares to influence the terms of any services or transactions between the acquiring fund or its affiliate and the ETF or an ETF affiliate; (iii) the board of directors (or trustees) of the acquiring fund, including a majority of the independent directors, adopts procedures reasonably designed to assure that the acquiring fund’s investment adviser(s) is conducting the acquiring fund’s investment program without taking into account any consideration received by the acquiring fund or an acquiring fund affiliate from the ETF or an ETF affiliate in connection with any services or transactions; (iv) the board of directors of an open-end ETF, including a majority of its independent directors, determines that any consideration paid by the ETF to the acquiring fund or an acquiring fund affiliate in connection with any services or transactions: (a) is fair and reasonable in relation to the nature and quality of the services and benefits received by the ETF; (b) is within the range of consideration that the ETF would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned; (v) neither the acquiring fund nor certain of its affiliates (except to the extent it is acting in its capacity as an investment adviser or sponsor to the (footnote continued)
fees charged to the acquiring fund and its shareholders;\textsuperscript{206} (iii) limits on the acquired fund’s ability to invest in other funds;\textsuperscript{207} (iv) the acquired fund and each acquiring fund must enter into an agreement stating that both funds understand the terms and conditions of the order and agree

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The exemptive orders permitting investments in ETFs contain the following conditions relating to fee limits: (i) before approving any advisory contract under section 15 of the Act, the board, including a majority of independent directors, finds that the advisory fees charged under the contract are based on services provided that are in addition to, rather than duplicative of, the services provided under the ETF advisory contract(s) and these findings and their basis are recorded in the minute books of the acquiring fund; (ii) the acquiring fund’s adviser(s) (or if the acquiring fund is a UIT, its trustee or sponsor) waives fees payable to it by the acquiring fund in an amount at least equal to any compensation (including fees received pursuant to any 12b-1 plan) received from the ETF by the acquiring fund’s adviser, trustee, or sponsor or an affiliated person of the acquiring fund’s adviser, trustee, or sponsor (other than any advisory fees paid by the ETF to the adviser, trustee, or sponsor or its affiliated person) in connection with the acquiring fund’s investment in the ETF; and (iii) any sales charge and/or service fees charged with respect to shares of the acquiring fund do not exceed the limits applicable to a fund of funds as set forth in Rule 2830 of the NASD Conduct Rules (or with respect to registered separate accounts that invest in a fund of funds, no sales load is charged at the acquiring fund level or ETF level and other sales charges and services fees, if any, are only charged at either the acquiring fund level or ETF level, not both). See, e.g., Healthshares™, Inc. and XShares Order, supra note 205.

Under the exemptive orders permitting investments in ETFs, the ETF may not invest in shares of other funds (including companies relying on sections 3(c)(1) and 3(c)(7) of the Act) in excess of the limits in section 12(d)(1)(A) of the Act (some orders allow a few exceptions to this condition, see infra note 225). See, e.g., Healthshares™, Inc. and XShares Order, supra note 205.
to fulfill their responsibilities under the order ("participation agreement");\(^{208}\) and (v) the acquiring fund provides a list of certain of its affiliates to the acquired fund.\(^{209}\)

More recently, sponsors of some ETFs as well as managers of funds investing in ETFs have expressed concern to our staff that some of the conditions in the exemptive orders are burdensome and unnecessary in the context of a fund investment in an ETF, which is less likely to be subject to at least some of the abuses these conditions were designed to prevent.\(^{210}\) For example, ETF sponsors have communicated to our staff that the participation agreement condition is cumbersome and costly because the ETFs must enter into an agreement with each acquiring fund and each acquiring fund seeks to negotiate different terms in its agreement.\(^{211}\) They have suggested that we develop conditions that address the concerns underlying section 12(d)(1) in a manner that is more suited to fund investments in ETFs.\(^{212}\)

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\(^{208}\) The exemptive orders require an agreement between the acquiring fund and the ETF stating that their boards and investment advisers, or their sponsors and trustees, as applicable, understand the terms and conditions of the order and agree to fulfill their responsibilities under the order (and the acquiring fund transmits to the ETF a list of certain of its affiliates and underwriting affiliates) and the acquiring fund and ETF maintain and preserve a copy of the exemptive order, participation agreement, and the list of affiliates with any updated information for the duration of the investment and for at least six years thereafter, the first two years in an easily accessible place. See, e.g., Healthshares™, Inc. and XShares Order, supra note 205.

\(^{209}\) See supra note 208.

\(^{210}\) See infra Section IV.B.

\(^{211}\) Acquiring funds also have indicated to the staff that it is burdensome for them to enter into participation agreements with each ETF in which the funds want to invest.

\(^{212}\) Many funds also appear to consider investments in ETFs to be different than investments in other investment companies. In 2004, our staff conducted examinations of a number of mutual fund complexes, which focused on the funds’ investments in ETFs and whether those investments were made in accordance with section 12(d)(1) of the Act. Most of the examined mutual fund complexes treated ETF investments like investments in traditional equity securities and did not identify ETFs as registered funds subject to the requirements of section 12(d)(1) of the Act. Thus, those that acquired more than three percent of the voting securities of an ETF or invested more than five percent of the acquiring fund’s assets in the voting securities of an ETF were inconsistent with section 12(d)(1). Most of the mutual funds examined invested in ETFs in order to: (i) hedge the portfolio; (ii) “equitize” cash balances in order to earn returns in excess of money market rates; and (iii) gain exposure to a specific market and/or industry sector in an (footnote continued)
B. Proposed Rule 12d1-4 Conditions

Today, we are proposing a new rule 12d1-4, which would provide an exemption to permit acquiring funds to invest in ETFs in excess of the limits of section 12(d)(1), subject to four conditions that are designed to address the historical abuses that result from pyramiding and the threat of large-scale redemptions and may arise in connection with investments in ETFs. The relief we propose is subject to fewer conditions than our exemptive orders but, unlike our orders, would limit an acquiring fund’s ability to redeem ETF shares.

1. Control

In order to address the concern that a fund could exert control over another fund, the proposed rule would limit the exemption to an acquiring fund (and any entity in a control relationship with the acquiring fund) that does not “control” an ETF. The Act defines

We are also proposing related amendments to rule 12d1-2 under the Act to include within its exemptive relief investments in ETFs made in reliance on proposed rule 12d1-4 and investments in non-security assets. See infra Section V.

In 1996, Congress added section 12(d)(1)(J) to the Act, which gave us specific authority to exempt any person, security or transaction, or any class or classes of transactions, from section 12(d)(1) of the Act if the exemption is consistent with the public interest and the protection of investors. NSMIA, § 202(4) (codified at 15 U.S.C. 80a-12(d)(1)(J)). The House Report accompanying the legislation urged the Commission to use the additional exemptive authority under section 12(d)(1)(J) “in a progressive way as the fund of funds concept continues to evolve over time.” H.R. REP. NO. 622, supra note 200, at 43-44 (1996). The House Report explained that, in exercising its exemptive authority, the Commission should consider factors that relate to the protection of investors, including the extent to which a proposed arrangement is subject to conditions that are designed to address conflicts of interest and overreaching by a participant in the arrangement, so as to avoid the abuses that gave rise to the initial adoption of the Act’s restrictions against funds investing in other funds. Id. at 44.

The condition would provide that: (i) an acquiring fund and any of its investment advisers or depositors, and any company in a control relationship with the acquiring fund or any of its investment advisers or depositors, each individually or in the aggregate, do not control an ETF; and (ii) if, as a result of a decrease in the outstanding voting securities of an ETF, the acquiring fund, any of its investment advisers, and any company in a control relationship with the acquiring fund or its investment adviser, either individually or together in the aggregate, become holders of more than 25 percent of the outstanding voting securities of an ETF (i.e., are presumed to control the ETF, see infra notes 217-218 and (footnote continued)
“control” to mean “the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.”216 The Act also creates rebuttable presumptions that any person who directly or indirectly beneficially owns more than 25 percent of the voting securities of a company controls the company and that one who does not own that amount does not control it.217 The effect of the proposed rule, if adopted, would be that an acquiring fund’s beneficial ownership of up to 25 percent of the voting securities of an ETF, by itself, would not constitute control over the ETF. As a result, a fund relying on the rule could make a substantial investment in an ETF (i.e., up to 25 percent of the ETF’s shares) without seeking further exemption from us.

If, however, an acquiring fund uses its ownership interest in the ETF (even if that interest is 25 percent or less) to exercise a controlling influence over the ETF’s management or policies, the fund would not be able to rely on the proposed rule.218 For example, an acquiring fund that used its share position to persuade an ETF manager to enter into a transaction with an affiliate of the acquiring fund or its adviser would almost certainly exercise a controlling influence on the ETF’s management and thus lose its exemption under the proposed rule.219

accompanying text), each of those shareholders must vote its shares of the ETF in the same proportion as the vote of all the other ETF shareholders. The same condition is in our exemptive orders.


217 Id. These presumptions continue until the Commission makes a final determination to the contrary by order either on its own motion or on application by an interested person. Id.

218 A determination of control depends on the facts and circumstances of the particular situation. “[N]o person may rely on the presumption that less than 25 percent ownership is not control when, in fact, a control relationship exists under all the facts and circumstances.” Exemption of Transactions by Investment Companies with Certain Affiliated Persons, Investment Company Act Release No. 10698 (May 16, 1979) [44 FR 29908 (May 23, 1979)] at n.2. (citing Fundamental Investors, Inc., 41 SEC 285 (1962)) (“Fundamental Investors”) (Commission order noting that rebutting presumption of control can have retrospective as well as prospective effect).

219 We have long held that “controlling influence” includes, in addition to voting power, a
We request comment on the proposed condition. Do ETF sponsors believe that it would sufficiently protect the ETF from the type of coercive behavior on the part of acquiring funds that section 12(d)(1) was intended to prevent?

2. **Redemptions**

The proposed rule includes two provisions that would prevent an acquiring fund from redeeming shares it acquired in reliance on the proposed rule. First, the rule would prohibit an acquiring fund that relies on the proposed rule to acquire shares in excess of section 12(d)(1)(A)(i) limits (*i.e.*, to acquire more than three percent of an ETF’s shares) from redeeming those shares. As a result, acquiring funds would not be able to threaten large-scale redemptions as a means of coercing an ETF. It is our understanding that most acquiring funds purchase and sell ETF shares in secondary market transactions. Accordingly, this condition, while precluding one of the historical abuses associated with fund of funds arrangements, would not prevent acquiring funds from taking passive shareholder positions in ETF shares (in excess of section 12(d)(1) limits) in order to, for example, gain exposure to a particular market segment.

We request comment on whether the condition achieves this purpose. If not, are there

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220 Proposed rule 12d1-4(a)(2). Under the proposed rule, an acquiring fund would be deemed to have redeemed or sold the most recently acquired ETF shares first. *Id.* As a result, an acquiring fund could redeem shares from an ETF only when the fund (and companies or funds it controls) holds ETF shares in an amount consistent with section 12(d)(1)(A)(i) limits. An acquiring fund that relies on the proposed rule to invest more than five percent of its assets in the acquired ETF (prohibited by section 12(d)(1)(A)(ii)) and/or to invest more than 10 percent of its assets in all funds (including the acquired ETF) (prohibited by section 12(d)(1)(A)(iii)) but that does not acquire more than three percent of the acquired ETF’s outstanding securities would not be prohibited from redeeming shares of the ETF under the proposed rule.
other conditions that would better address the concern?

Second, the proposed rule would prohibit an ETF, its principal underwriter, and a broker or a dealer that relies on the rule to sell ETF shares in excess of section 12(d)(1)(B) limits from redeeming (or submitting an order to redeem) those shares acquired by another fund that exceed the three percent limit in section 12(d)(1)(A)(i).\textsuperscript{221} We recognize that it may be difficult in all circumstances for an ETF, its principal underwriter, a broker or a dealer to know whether a redemption order is submitted by an acquiring fund that acquired more than three percent of the ETF’s shares in reliance on the proposed rule. Accordingly, we are proposing to include a safe harbor for each of those entities if it has: (i) received a representation from the acquiring fund that none of the ETF’s shares the acquiring fund is redeeming includes any shares that it acquired in excess of three percent of the ETF’s shares in reliance on proposed rule 12d1-4(a); and (ii) no reason to believe that the acquiring fund is redeeming ETF shares that the acquiring fund acquired in excess of three percent of the ETF’s shares in reliance on the proposed rule.\textsuperscript{222} If an acquiring fund attempts to redeem ETF shares in connection with a threat to coerce the ETF, the ETF would know of the attempt. In those circumstances, or if the principal underwriter, broker or dealer knows or has reason to know of the threat, the entity could not redeem (or submit for

\textsuperscript{221} Proposed rule 12d1-4(b)(1). Under the proposed rule, an exchange-traded fund, any principal underwriter thereof, and a broker or a dealer may sell or otherwise dispose of exchange-traded fund shares if the exchange-traded fund does not redeem, or the principal underwriter, broker or dealer does not submit for redemption any of the exchange-traded fund’s shares that were acquired by an acquiring fund in excess of the limits of section 12(d)(1)(A)(i) in reliance on proposed rule 12d1-4(a). \textit{Id.} An acquiring fund would be deemed to have redeemed or sold the most recently acquired exchange-traded fund shares first. \textit{Id. See also supra} note 220.

We note that our adoption of proposed rule 12d1-4 would not preclude an acquiring fund from continuing to rely on exemptive orders we have previously issued that permit funds to invest in ETFs in excess of the limits of section 12(d)(1) but which do not restrict their ability to redeem ETF shares, subject to the conditions set forth in the orders and described above. Moreover, we intend to continue to issue such orders and may consider their codification in a rule in the future.

\textsuperscript{222} Proposed rule 12d1-4(b)(2).
redemption) the ETF shares held by the acquiring fund. We believe that the proposed condition prohibiting acquiring funds from redeeming ETF shares acquired in reliance on the proposed rule should sufficiently prevent an acquiring fund from threatening redemptions as a means of coercing an ETF adviser.

We request comment on these conditions. Do most funds that invest in ETFs redeem their shares or sell them in secondary market transactions? Would the prohibition on redemption impede the ability of acquiring funds to dispose of ETF shares? Do acquiring funds realize significant benefits from the ability to redeem ETF shares?

The proposed conditions limiting redemptions of ETF shares are designed to eliminate the threat of redemption that an acquiring fund could otherwise use to coerce an ETF. Accordingly, the proposed rule does not include the conditions in our exemptive orders that require the ETF and the acquiring fund to take measures to prevent the acquiring fund from

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223 The orders require that: (i) the board of directors of an ETF, including a majority of its independent directors, determines that any consideration paid by the ETF to the acquiring fund or any investment adviser, depositor, or principal underwriter of the acquiring fund and any person controlling, controlled by, or under common control with an investment adviser, depositor, or principal underwriter of the acquiring fund, (but not including any investment adviser of the ETF or any person controlling, controlled by, or under common control with the investment adviser of the ETF) (“acquiring fund affiliate”) in connection with any services or transactions: (a) is fair and reasonable in relation to the nature and quality of the services and benefits received by the ETF; (b) is within the range of consideration that the ETF would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned; (ii) the ETF board of directors, including a majority of the independent directors, adopts procedures reasonably designed to monitor any purchases of securities by the ETF in an underwriting in which a principal underwriter is an officer, director, member of an advisory board, acquiring fund investment adviser, acquiring fund depositor, or an acquiring fund employee or an affiliated person of any such person (“affiliated underwriting”), and the board reviews these purchases at least annually to determine whether the purchases were influenced by the acquiring fund’s investment in the ETF; and (iii) the ETF maintains and preserves a copy of the procedures designed to monitor purchases made in an affiliated underwriting and maintains a written record of each purchase of securities in an affiliated underwriting and the information or materials upon which the board’s determinations were made. See supra note 205.
unduly influencing the ETF.\textsuperscript{224}

We request comment on the exclusion of these conditions from the proposed rule. Is there a concern that if the acquiring fund and ETF do not take particular measures to prevent the acquiring fund from unduly influencing the ETF, acquiring funds may be able more easily to coerce the ETF? Notwithstanding the prohibition on control and redemption, should we be concerned about particular transactions between an acquiring fund (or an acquiring fund affiliate) and an ETF, or an ETF’s purchase of securities during an underwriting in which a principal underwriter is an affiliate of the acquiring fund or its adviser? If there is reason for concern about ETF purchases of securities in an affiliated underwriting, is that concern limited to purchases from an affiliate of the acquiring fund or its adviser? Should any specific conditions in the exemptive orders be included in the proposed rule in addition to or in place of the proposed conditions to prevent an acquiring fund or an acquiring fund affiliate from unduly influencing an ETF?

3. \textit{Complex Structures}

To prevent the formation of overly complex multi-tiered fund structures, the proposed rule would prohibit an acquired ETF from itself being a fund of funds \textit{(i.e.,} the rule would

\begin{itemize}
\item[(i)] neither the acquiring fund nor any acquiring fund affiliate cause any existing or potential investment by the acquiring fund in an ETF to influence the terms of any services or transactions between the acquiring fund or an acquiring fund affiliate and the ETF (or certain affiliates of the ETF);
\item[(ii)] neither the acquiring fund nor an acquiring fund affiliate causes the ETF to purchase a security in any affiliated underwriting; and
\item[(iii)] the acquiring fund board of directors, including a majority of its independent directors, adopts procedures reasonably designed to assure that the acquiring fund’s investment adviser(s) is conducting the acquiring fund’s investment program without taking into account any consideration received by the acquiring fund or an acquiring fund affiliate from the ETF (or certain affiliates of the ETF).
\end{itemize}

\textit{See supra} note 205.

As discussed above, the proposed rule would however include the condition from our exemptive orders that an acquiring fund (and any entity in a control relationship with the acquiring fund) could not “control” the ETF. \textit{See supra} note 215 and accompanying text.

\textsuperscript{224} The orders require that: (i) neither the acquiring fund nor any acquiring fund affiliate cause any existing or potential investment by the acquiring fund in an ETF to influence the terms of any services or transactions between the acquiring fund or an acquiring fund affiliate and the ETF (or certain affiliates of the ETF); (ii) neither the acquiring fund nor an acquiring fund affiliate causes the ETF to purchase a security in any affiliated underwriting; and (iii) the acquiring fund board of directors, including a majority of its independent directors, adopts procedures reasonably designed to assure that the acquiring fund’s investment adviser(s) is conducting the acquiring fund’s investment program without taking into account any consideration received by the acquiring fund or an acquiring fund affiliate from the ETF (or certain affiliates of the ETF). \textit{See supra} note 205.
prohibit a fund of funds of funds, or three-tier fund, structure). A fund of ETFs has the potential to become a complicated corporate structure of the kind that concerned Congress when section 12(d)(1) was enacted. If an acquiring fund invests in an ETF that in turn invests in other funds (including other ETFs), an acquiring fund shareholder could find it difficult to determine the nature and value of the holdings ultimately underlying his or her investment. The proposed rule is designed to allow an ETF the flexibility to invest in other funds in order to meet its investment objectives while preventing shareholder confusion as to the nature of their investment in an acquiring fund by limiting the extent of those ETF investments.

We request comment on the proposed limits on an ETF itself being a fund of funds. Are

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225 Proposed rule 12d1-4(a)(4) (“The exchange-traded fund has a disclosed policy that prohibits it from investing more than 10 percent of its assets in: (i) Other investment companies in reliance on section 12(d)(1)(F) or section 12(d)(1)(G) of the Act or [rule 12d1-4]; and (ii) Any other company that would be an investment company under section 3(a) of the Act but for the exceptions to that definition provided in sections 3(c)(1) and 3(c)(7) of the Act (15 U.S.C. 80a-3(c)(1) and 80a-3(c)(7)).”). Section 12(d)(1)(A)(iii) of the Act limits an acquiring fund’s total investment in other funds to no more than 10 percent of the acquiring fund’s assets. An ETF would still be able to make limited investments in other funds, including other ETFs. This is similar to a condition in section 12(d)(1)(G) of the Act that provides an exemption from section 12(d)(1) limits for funds to invest in other funds in the same group provided, among other things, the acquired fund has a policy that it will not rely on exemptions allowing it to be a fund of funds. See 15 U.S.C. 80a-12(d)(1)(G)(i)(IV). The exemptive orders generally prohibit an acquired ETF from investing in other funds beyond section 12(d)(1)(A) limits. Many of the orders have provided exceptions to this general prohibition, which permit the ETF to invest in money market funds beyond the limits of section 12(d)(1)(A) either in reliance on another exemptive order allowing the ETF to do so or in reliance on rule 12d1-1. In addition, some of the orders permit the ETF to invest in another fund beyond the limits of section 12(d)(1)(A) to the extent permitted by section 12(d)(1)(E) of the Act. An acquiring fund relying on any of these exceptions may have difficulty determining whether an acquired ETF would itself be considered a fund of funds because the acquiring fund might not be able to ascertain easily if the ETF is relying on an order, section 12(d)(1)(E) of the Act, or rule 12d1-1 to invest in other funds beyond the limits of section 12(d)(1)(A) of the Act. The orders also do not anticipate any future exemptive relief the Commission might provide to allow acquired ETFs to invest in other non-money market funds in excess of section 12(d)(1)(A) limits. Limiting exemptive relief to investments in ETFs with disclosed policies would allow an acquiring fund to determine easily if it could invest in a particular ETF.

226 See supra note 198 and accompanying text.

227 Under the proposed rule, an acquiring fund could invest in an ETF that invests up to 10 percent of its assets in other ETFs.
the proposed limits on an underlying ETF’s investments in other funds sufficient to prevent investor confusion? If not, what limits should the proposed rule include to prevent shareholder confusion? Should the proposed rule include the same limit (and exceptions to the limit) as in our exemptive orders? Are there reasons not to restrict the ability of an acquired ETF itself to invest in other funds, including ETFs, beyond the limits of section 12(d)(1)(A)? Does the fact that ETF shares trade more like a typical equity security make it less likely that investors would be confused if we were to allow an acquiring fund to invest in an ETF that itself invests more than ten percent of its assets in other ETFs in reliance on proposed rule 12d1-4?

4. Layering of Fees

As discussed above, one of Congress’ concerns regarding fund of funds arrangements was that acquiring fund shareholders might pay excessive charges due to duplicative fees at the acquiring and acquired fund levels. To prevent duplicative fees at the acquiring and acquired fund levels, the proposed rule would limit sales charges and service fees charged by the acquiring fund to those set forth in the Financial Industry Regulatory Authority’s (“FINRA”) sales charge rule, which takes into consideration fees charged at both levels of a fund of funds arrangement. In addition, like all acquiring funds, funds that invest in ETFs would be subject

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228 As discussed above, the orders generally prohibit an acquired ETF from investing in other funds beyond the limits of section 12(d)(1)(A). Some of the orders include a few exceptions to this general prohibition. See supra note 225.

229 The proposed rule would allow an acquired ETF to invest in other funds, including ETFs, beyond the limits of section 12(d)(1)(A) in reliance on sections 12(d)(1)(F) and 12(d)(1)(G) and to invest in other ETFs beyond the limits of section 12(d)(1)(A) in reliance on the proposed rule. However, the proposed rule would limit an acquired ETF’s aggregate investment in these funds to no more than 10 percent of the acquired ETF’s assets. Proposed rule 12d1-4(a)(4).

230 See supra note 197 and accompanying text.

231 Proposed rule 12d1-4(a)(3). The proposed rule would limit the sales charge (including any 12b-1 fee) or service fee charged in connection with the purchase, sale, or redemption of securities issued by the acquiring fund to the FINRA fee limits for fund of funds set forth in NASD (footnote continued)
to our disclosure rules for fund investments in other funds. These rules require all registered
funds to disclose in their prospectus fee tables expenses paid by both the acquiring and acquired
funds so that shareholders can evaluate the costs of investing in a fund that invests in other funds,
including ETFs. These rules and the proposed fee limit may fully address congressional
concerns with the duplication and layering of fees that hide the real cost of investing in an
investment company.

We request comment on the proposed condition limiting the fees charged by an acquiring
fund. Would the proposed fee limits adequately prevent acquiring fund shareholders from
paying excessive distribution or service fees? Are there any special concerns as to how to

Conduct Rule 2830(d)(3). Some ETFs charge a 12b-1 fee. See, e.g., Select Sector SPDRs®,
Prospectus 20,28 (Jan. 31, 2008). FINRA does not, however, apply Conduct Rule 2830 to
variable annuity contracts. See NASD Conduct Rule 2820(a) (rule 2820 applies exclusively and
in lieu of rule 2830 to the activities of members in connection with variable contracts to the extent
the activities are subject to federal securities law regulation). To address the potential for
excessive layering of fees in a separate account that invests in an acquiring fund, proposed rule
12d1-4(a)(3)(ii) would: (i) prohibit an acquiring fund in which a separate account invests and any
ETF in which the acquiring fund invests from charging a sales load and would allow only the
acquiring fund or ETF, but not both, to impose asset-based sales charges or service fees; and (ii)
require the aggregate fees associated with the variable insurance contract and the sales charges
and service fees charged by the acquiring fund and the ETF to be reasonable in relation to the
services rendered, the expenses expected to be incurred and, with respect to the variable insurance
contract, the risks assumed by the insurance company.

See Item 3(f) to Form N-1A; Fund of Funds Adopting Release, supra note 201, at Section II.D.
See supra note 197.

The proposed rule would not include the condition from our orders requiring the acquiring fund
adviser (or sponsor or trustee) to waive its fee in an amount at least equal to any compensation
(including fees received pursuant to any 12b-1 plan but excluding advisory fees) received from
the ETF by the acquiring fund’s adviser, trustee, or sponsor or an affiliated person of the
acquiring fund’s adviser, trustee, or sponsor in connection with the acquiring fund’s investment in
the ETF. The proposed rule also does not include the condition from our orders that requires the
board of the acquiring fund to find that the advisory fees charged under an advisory contract are
based on services provided that will be in addition to, rather than duplicative of, the services
provided by an adviser to an acquired ETF. As we noted in the proposing and adopting releases
for rule 12d1-1 explaining our exclusion of a similar condition from rule 12d1-1, an acquiring
fund board is already obligated to protect the fund from being overcharged for services provided
to the fund regardless of any special findings we might require. See Fund of Funds Adopting
Release, supra note 201, nn.51-52 and accompanying text; Fund of Funds Proposing Release,
(footnote continued)
apply the proposed fee limits to an acquiring fund when a separate account invests in an acquiring fund? Do our disclosure requirements provide sufficient information to investors to allow them to determine whether the total fees imposed on a fund of ETFs are consistent with their investment objectives?

C. Scope of Proposed Rule 12d1-4

1. Acquiring Funds and ETFs Eligible for Relief

Proposed rule 12d1-4 would permit open-end and closed-end management companies (including business development companies)\(^{235}\) and UITs\(^{236}\) that comply with the rule’s conditions to invest in ETFs beyond the limits of section 12(d)(1).\(^{237}\) Our orders to date have provided exemptions only for investments in ETFs by registered management funds and UITs.\(^{238}\)

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\(^{235}\) A business development company is any closed-end company that: (i) is organized under the laws of, and has its principal place in, any state or states; (ii) is operated for the purpose of investing in securities described in section 55(a)(1)-(3) of the Act and makes available “significant managerial assistance” to the issuers of those securities, subject to certain conditions; and (iii) has elected under section 54(a) of the Act to be subject to the sections addressing activities of business development companies under the Act. See 15 U.S.C. 80a-2(a)(48). Section 60 of the Act extends the limits of section 12(d) to a business development company to the same extent as if it were a registered closed-end fund. Section 6(f) of the Act exempts business development companies that have made the election under section 54 of the Act from registration and other provisions of the Act. We similarly included business development companies within the scope of rule 12d1-1 to allow them to invest in money market funds beyond the limits of section 12(d)(1). See Fund of Funds Adopting Release, supra note 201, at nn.44-46 and accompanying text.

\(^{236}\) Because an ETF can be organized either as an open-end management company or UIT, see supra note 8, it could rely on the proposed rule to invest in other ETFs beyond the limits contained in section 12(d)(1).

\(^{237}\) Section 12(d)(1)(B)’s limits on sales of an acquired fund’s securities apply only to shares of an ETF organized as an open-end investment company.

\(^{238}\) We have not had the opportunity to consider a request for an individual exemptive order for other types of investment companies. Our orders also have permitted funds to invest in ETFs organized as UITs (and as open-end funds). Proposed rule 12d1-4 would include relief for investments in ETFs that are organized as UITs as long as the UITs satisfy the criteria enumerated in proposed rule 6c-11(e)(4). Proposed rule 12d1-4(d)(2). As noted above, proposed rule 6c-11 would not include a UIT within its relief because we have not received an exemptive application for a new (footnote continued)
We do not anticipate that providing a similar exemption for business development companies would raise particular concerns that section 12(d)(1) was designed to address.

We request comment on the inclusion of business development companies within the scope of proposed rule 12d1-4. Would these entities benefit from this exemption? Are there reasons not to extend the exemption to these companies? Do any special concerns arise with respect to extending the exemption to these companies?

2. Investments in Affiliated ETFs Outside the Fund Complex

In addition to providing an exemption from section 12(d)(1) of the Act, the proposed rule would provide exemptions from sections 17(a)(1), 17(a)(2), 57(a)(1) and 57(a)(2) of the Act. These provisions restrict a fund’s ability to enter into transactions with affiliated persons.239 They are designed to prevent affiliated persons from managing the fund’s assets for their own benefit, rather than for the benefit of the fund’s shareholders.240 These provisions would

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239 Section 17 of the Act limits transactions between a fund and its affiliated persons. Section 17(a) of the Act generally prohibits affiliated persons of a registered fund (“first-tier affiliates”) or affiliated persons of the fund’s affiliated persons (“second-tier affiliates”) from selling securities or other property to or purchasing securities or other property from the fund (or any company the fund controls). Section 57 of the Act restricts certain transactions between business development companies and certain of their affiliates. An affiliated person of a fund includes: (i) any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting securities of the fund; and (ii) any person five percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the fund. See 15 U.S.C. 80a-2(a)(3)(A), (B). Thus, if an acquiring fund holds five percent or more of the outstanding voting shares of the ETF, the acquiring fund is an affiliated person of the ETF and the ETF is an affiliated person of the acquiring fund.

240 See Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. On Banking and Currency, 76th Cong., 3d Sess. 37 (1940) (Statement of Commissioner Healy). Section 17 also would restrict an acquiring fund from investing in an ETF that is affiliated with the acquiring fund because both funds have a common investment adviser or other person exercising a controlling influence over the management or policies of the funds. See 15 U.S.C. 80a-2(a)(3)(C). The determination of whether a fund is under the control of its adviser, officers, or directors depends on all the relevant facts and circumstances. See Investment Company Mergers, Investment Company Act Release No. 25259 (Nov. 8, 2001) [66 FR 57602 (Nov. 15, 2001)], at n.11. For purposes of this release, we presume that funds with a common
otherwise effectively preclude a fund that acquires five percent or more of the securities of an ETF in another fund complex from making any additional purchases of shares from the ETF.241 They also would prohibit an affiliated acquiring fund from depositing (i.e., “selling”) securities identified in the creation basket. Permitting an acquiring fund to purchase additional ETF shares from the ETF at NAV on the same basis as any other purchaser of a creation unit, by itself, seems to provide little opportunity for the acquiring fund to manage the ETF for its own benefit.242 Allowing the ETF to acquire securities identified in a creation basket from an affiliated acquiring fund on the same basis as any other investor also would not seem to implicate the concerns underlying section 17(a). Accordingly, we believe that exemptions from sections 17(a)(1), 17(a)(2), 57(a)(1), and 57(a)(2) of the Act for these transactions would be appropriate.

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241 An ETF would be prohibited under section 17(a)(1) from selling its shares to an affiliated acquiring fund and under section 17(a)(2) from purchasing securities (i.e., securities designated in the creation basket) from the affiliated acquiring fund in exchange for ETF shares. An acquiring fund would be prohibited under section 17(a)(1) from selling any securities (i.e., securities identified in the creation basket) to an affiliated ETF in exchange for the ETF’s shares. An acquiring fund also would be prohibited under section 17(a)(2) from purchasing (creation basket) securities from an affiliated ETF for the redemption of ETF shares. The ETF would be prohibited under section 17(a)(1) from selling the affiliated acquiring fund (creation basket) securities in exchange for ETF shares redeemed and under section 17(a)(2) from acquiring the ETF shares submitted for redemption by the affiliated acquiring fund.

242 The exemptive orders provide similar relief from sections 17(a)(1) and 17(a)(2) of the Act, including relief to allow the acquiring fund to redeem shares of an affiliated ETF. The proposed rule would not, however, provide an acquiring fund relief from sections 17(a)(2) and 57(a)(2) of the Act in order to redeem shares in excess of the three percent limit in section 12(d)(1)(A)(i) from an affiliated ETF. In addition, proposed rule 6c-11, which would permit persons affiliated with an ETF solely because they own five percent or more of the ETF’s shares, to purchase and sell ETF shares in-kind (i.e., in exchange for securities designated in the creation basket) would not extend relief to certain redemptions by acquiring funds consistent with proposed rule 12d1-4(a). See supra Section III.C.3 and proposed rule 6c-11(d). As noted above, no orders have been issued to business development companies therefore no order includes relief from sections 57(a)(1) and 57(a)(2) of the Act. See supra note 238 and accompanying text.
in the public interest, and consistent with the protection of investors and the purposes of the Act.\textsuperscript{243}

We seek comment on these exemptions. Are there risks other than the concerns we addressed with respect to section 12(d)(1) limitations, regarding the potential that the acquiring fund could manage the ETF, that would arise from the proposed exception allowing a fund to acquire more than five percent of the shares of an affiliated ETF in another complex?

3. \textit{Use of Affiliated Broker to Effect Sales}

In order to allow acquiring funds to take full advantage of the exemptive relief, proposed rule 12d1-4 also would provide limited relief from section 17(e)(2) of the Act. If an investment company in one complex acquired more than five percent of the assets of an ETF in another complex, any broker-dealer affiliated with that ETF would become a (second-tier) affiliated person of the acquiring fund.\textsuperscript{244} As a result of the affiliation, the broker-dealer’s fee for effecting the sale of securities to (or by) the acquiring fund would be subject to the conditions set forth in rule 17e-1, including the quarterly board review and recordkeeping requirements with respect to certain securities transactions involving the affiliated broker-dealer.\textsuperscript{245} We believe that it is

\textsuperscript{243} Our proposal would not provide an exemption for any transactions other than the sale of securities by an acquiring fund to an affiliated ETF for a creation unit of ETF shares. The proposed rule also would not provide an exemption for any other transactions between a business development company and an affiliated ETF that would be subject to section 57 limitations.

\textsuperscript{244} \textit{See supra} notes 239-240.

\textsuperscript{245} Section 17(e)(2) of the Act prohibits an affiliated person (or second-tier affiliate) of a fund from receiving compensation for acting as a broker, in connection with the sale of securities to or by the fund if the compensation exceeds limits prescribed by the section. Rule 17e-1 sets forth a conditional exemption under which a commission, fee or other remuneration shall be deemed as not exceeding the “usual and customary broker’s commission” for purposes of section 17(e)(2)(A) of the Act. Rule 17e-1(b)(3) requires the fund’s board of directors, including a majority of the directors who are not interested persons under section 2(a)(19) of the Act, to determine at least quarterly that all transactions effected in reliance on the rule have complied with procedures which are reasonably designed to provide that the brokerage compensation is consistent with the rule’s standards. Rule 17e-1(d)(2) specifies the records that must be (footnote continued)
unlikely that a broker-dealer would be in a position to take advantage of the acquiring fund merely because that fund owned a position in an ETF affiliated with the broker-dealer.\textsuperscript{246} Accordingly, the proposed rule would permit an acquiring fund to pay commissions, fees, or other remuneration to a (second-tier) affiliated broker-dealer without complying with the quarterly board review and recordkeeping requirements set forth in rules 17e-1(b)(3) and 17e-1(d)(2).\textsuperscript{247} This relief would be available only if the broker-dealer and the acquiring fund are affiliated solely because of the acquiring fund’s investment in the ETF.

We request comment on the proposed exemptions. Is the scope of the proposed exemptions from section 17 limitations sufficiently broad to allow funds to take full advantage of the proposed relief? Are the proposed exemptions from board review and recordkeeping requirements with respect to transactions with an affiliated broker-dealer necessary? Do funds engage in these transactions with broker-dealer affiliates of acquired ETFs? Is there additional section 17 relief that would be helpful in order for acquiring funds to take full advantage of the proposed exemption for investments in ETFs? If so, please be specific regarding the transactions that would prevent funds from relying on the proposed rule.

\textsuperscript{246} We expect that the ETF’s adviser would have no influence over the decisions made by the acquiring fund’s adviser. In addition, because the interests of the adviser to the ETF and the adviser to the acquiring fund are directly aligned with their respective funds, transactions between the acquiring fund and a broker-dealer affiliate of the ETF are likely to be at arm’s length.

\textsuperscript{247} Proposed rule 12d1-4(c). The proposed relief is similar to relief we have provided in rule 12d1-1, which permits funds to invest in money market funds in excess of section 12(d)(1) limits. See Fund of Funds Adopting Release, supra note 201, at nn.32-36 and accompanying text. An acquiring fund relying on this exemption would be required to comply with all of the provisions of rule 17e-1, except for those in paragraphs (b)(3) and (d)(2). It does not appear that having to comply with the other provisions contained in rule 17e-1 would deter acquiring funds from taking full advantage of the exemption provided by proposed rule 12d1-4.
V. EXEMPTION FOR AFFILIATED FUND OF FUNDS INVESTMENTS

A. Affiliated Fund of Funds Investments in ETFs

As noted above, Congress recognized that the investment limits in section 12(d)(1) might restrict certain legitimate fund of funds arrangements, and included three exceptions to those limits.\(^\text{248}\) One of these exceptions—section 12(d)(1)(G)—permits a registered open-end investment company or UIT to invest in other registered open-end investment companies or UITs (including ETFs) that are in the “same group of investment companies” (“affiliated funds”) beyond the section 12(d)(1) limits.\(^\text{249}\) A fund that invests in unaffiliated ETFs (i.e., ETFs in other fund groups) in many cases, however, is still subject to the section 12(d)(1) limits.\(^\text{250}\) Section

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\(^{248}\) For a full discussion of section 12(d)(1) limitations and the exceptions under sections 12(d)(1)(E), 12(d)(1)(F), and 12(d)(1)(G) of the Act, see Fund of Funds Proposing Release, supra note 197, at Section I.

\(^{249}\) See 15 U.S.C. 80a-12(d)(1)(G). Section 12(d)(1)(G)(ii) of the Act defines “same group of investment companies” to mean “any 2 or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.” Section 12(d)(1)(G) imposes the following conditions on funds relying on this exception: (i) other investments are limited to short-term paper and government securities; (ii) acquired funds must have a policy against investing in shares of other funds in reliance on sections 12(d)(1)(F) or 12(d)(1)(G) (to prevent multi-tiered structures); and (iii) overall distribution expenses are limited.

\(^{250}\) A fund could invest in unaffiliated funds in reliance on two other statutory exemptions. Under section 12(d)(1)(E) an investment company may acquire securities issued by another investment company provided that (i) the acquiring fund’s depositor or principal underwriter is a broker or dealer registered under the Securities Exchange Act of 1934, (or a person the broker-dealer controls), (ii) the security is the only investment security the acquiring fund holds (or the securities are the only investment securities the acquiring investment company holds if it is a registered UIT that issues two or more classes or series of securities, each of which provides for the accumulation of shares of a different investment company), and (iii) the acquiring investment company is obligated (a) to seek instructions from its shareholders with regard to voting the acquired investment company’s securities or to vote the acquired investment company’s shares in the same proportion as the vote of all other acquired investment company shareholders, and (b) if unregistered, to obtain Commission approval before substituting the investment security. A fund relying on section 12(d)(1)(F) of the Act (and its affiliated persons) may acquire no more than three percent of another investment company’s outstanding stock, cannot charge a sales load greater than 1 1/2 percent; is restricted in its ability to redeem shares of the acquired investment company; and must vote shares of an acquired investment company either by seeking instructions from the acquiring fund’s shareholders, or voting the shares in the same proportion as the vote of (footnote continued)
12(d)(1)(G) restricts the other investments an acquiring fund investing in affiliated funds can make to government securities and short-term paper.\(^{251}\)

When it added section 12(d)(1)(G) to the Act, Congress also gave us specific authority to provide certain exemptions from the limitations of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.\(^ {252}\) In conjunction with the adoption of rule 12d1-1 in 2006 (allowing funds to invest in money market funds beyond the limits of section 12(d)(1)), we adopted rule 12d1-2, which allows funds relying on section 12(d)(1)(G) also to invest in: (i) unaffiliated money market funds when the acquisition is in reliance on rule 12d1-1; (ii) securities issued by unaffiliated funds (including ETFs), subject to the investment limits in sections 12(d)(1)(A) and 12(d)(1)(F) of the Act;\(^ {253}\) and (iii) securities not issued by an investment company. Under rule 12d1-2, therefore, a fund that invests in affiliated funds in reliance on section 12(d)(1)(G) and desires to invest in unaffiliated ETFs is subject to these statutory limitations (e.g., to acquiring no more than three percent of the acquired ETF’s shares). There seems no reason, however, to maintain the statutory limitations on investments in ETFs in these circumstances when we are proposing to permit other types of funds to invest in ETFs in excess of section 12(d)(1) limits. No special issues appear to arise in connection with an acquiring fund’s investments in an unaffiliated ETF simply because the acquiring fund also invests in all other shareholders of the acquired investment company.

\(^{251}\) Congress imposed this limitation to restrict the use of the exemption provided by section 12(d)(1)(G) to a “bona fide” fund of funds. Congress permitted other investments to include only government securities and short-term paper, which provide the fund with a source of liquidity to redeem shares. See H.R. Rep. No. 622, supra note 200, at 42.

\(^{252}\) Section 12(d)(1)(J) of the Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of transactions, from section 12(d)(1) of the Act if the exemption is consistent with the public interest and the protection of investors. See supra note 214.

\(^{253}\) See supra note 250.
affiliated funds. Accordingly, we propose to amend rule 12d1-2 to allow acquiring funds that invest in affiliated funds in reliance on section 12(d)(1)(G) to invest in unaffiliated ETFs beyond the statutory limitations as long as the funds comply with the conditions of proposed rule 12d1-4.\textsuperscript{254} This is similar to the relief we provided to affiliated funds of funds to allow them to acquire shares in money market funds, if the acquisition is in reliance on rule 12d1-1.\textsuperscript{255}

We request comment on the proposed amendment. Are there reasons not to extend the proposed relief to affiliated funds of funds? Do investments by an acquiring fund that invests in affiliated funds raise any special concerns if the acquiring fund also invests in unaffiliated ETFs? Are these concerns different than any other fund’s investment in unaffiliated ETFs?

\section*{B. Affiliated Fund of Funds Investments in Other Assets}

We also are proposing an amendment to rule 12d1-2 that would allow funds relying on section 12(d)(1)(G) to invest in assets other than securities. As discussed above, in 2006 we adopted rule 12d1-2 to permit affiliated funds of funds to acquire securities issued by other unaffiliated investment companies, as well as “securities (other than securities issued by an investment company).”\textsuperscript{256} The rule was intended to allow an acquiring fund greater flexibility to meet investment objectives that may not be met as well by investments in affiliated funds. We noted that these investments would not seem to present any additional concerns that section 12(d)(1)(G) was intended to address.\textsuperscript{257}

Since we adopted the rule, it has been brought to our attention that funds relying on section 12(d)(1)(G) wish to invest in other types of financial assets, including futures and other

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{254} Proposed rule 12d1-2(a)(4).
\item \textsuperscript{255} See 17 CFR 270.12d1-2(a)(3).
\item \textsuperscript{256} See 17 CFR 270.12d1-2(a)(1), 17 CFR 270.12d1-2(a)(2).
\item \textsuperscript{257} See Fund of Funds Proposing Release, supra note 197, at n.80 and accompanying text.
\end{itemize}
\end{footnotesize}
financial instruments that might not be securities under the Act and thus may not be within the scope of rule 12d1-2. Investments in these types of assets may allow an acquiring fund greater flexibility to meet investment objectives that may not be met as well by investments in securities. In addition, like investments in securities, investments in these assets do not appear to raise concerns that the investment limits on fund of funds arrangements contained in section 12(d)(1) were intended to address. Accordingly, we propose to amend rule 12d1-2 to allow funds relying on section 12(d)(1)(G) to invest in assets or instruments other than securities. Under the proposed rule, funds relying on the exemptive relief in section 12(d)(1)(G) would be able to invest in, among other things, real estate, futures contracts, and other financial instruments that do not qualify as a security under the Act. Those investments would, of course, have to be consistent with the fund’s investment policies.

We seek comment on this proposal. Would any concerns arise if a fund relying on section 12(d)(1)(G) could invest directly in non-securities? Do these concerns differ from a traditional fund that can invest in such assets and invests in other funds subject to the limits of

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258 See 15 U.S.C. 80a-2(a)(36) (defining “security”). If a future or other financial instrument in which a fund relying on section 12(d)(1)(G) proposes to invest is included within the Act’s definition of “security,” investments in such an instrument would be permitted under current rule 12d1-2(a)(2).

259 Proposed rule 12d1-2(a)(5).


261 See Item 4 of Form N-1A (requiring disclosure of funds’ investment objectives and principal investment strategies).
section 12(d)(1)?

VI. **REQUEST FOR COMMENT**

The Commission requests comment on the rules, rule amendments, and Form N-1A amendments proposed in this release. The Commission also requests suggestions for additional changes to existing rules or forms, and comments on other matters that might have an effect on the proposals contained in this release. Commenters are requested to provide empirical data to support their views.

VII. **PAPERWORK REDUCTION ACT**

Certain provisions of proposed rule 6c-11 would result in new “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA"). The Commission is therefore submitting this proposal to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for the collection of information requirements is “Rule 6c-11 under the Investment Company Act of 1940, ‘Exchange-traded funds.’” If adopted, this collection would not be mandatory, but would be necessary for ETFs that seek to form and operate as open-end management companies without seeking individual exemptive orders. Responses to the collection of information requirements of proposed rule 6c-11 would not be kept confidential.

In addition, the Commission is proposing amendments to an existing collection of information requirement titled “Form N-1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement for Open-End Management Companies.” Compliance with the disclosure requirements of Form N–1A is mandatory. Responses to the disclosure requirements are not kept confidential.

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Finally, proposed rule 12d1-4 would result in a new “collection of information” requirement within the meaning of the PRA. The Commission is therefore submitting the proposal for rule 12d1-4 to OMB for review. The title for the collection of information requirements is “Rule 12d1-4 under the Investment Company Act of 1940, ‘Exemption for investments in exchange-traded funds.’” If adopted, this collection would not be mandatory, but would be a condition that an acquiring fund would have to satisfy in order for an ETF, its principal underwriter, a broker, or a dealer to rely on the safe harbor if an acquiring fund redeems ETF shares. Responses to the collection of information requirements of proposed rule 12d1-4 would not be kept confidential.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. OMB has not yet assigned control numbers to the new collections for proposed rules 6c-11 and 12d1-4. The approved collection of information associated with Form N-1A, which would be revised by the proposed amendments, displays control number 3235-0307.

A. Proposed Rule 6c-11

Proposed rule 6c-11 would exempt ETFs from certain provisions of the Act, permitting them to begin operating without obtaining an exemptive order from the Commission. The proposed rule also would expand the relief we have issued in the past to index-based ETFs, and to transparent, actively managed ETFs. Each ETF seeking to rely on the proposed rule would have to disclose on a daily basis specific information to market participants: (i) the contents of its basket assets; (ii) the identities and weightings of the component securities and other assets in its portfolio if it does not track an index whose provider discloses its composition daily; and (iii) the prior business day’s NAV, market closing price for its ETF shares and premium/discount
information.\textsuperscript{263} In addition, each ETF would have to disclose in its registration statement: (i) the number of shares that comprise a creation unit; and (ii) the foreign holidays that would prevent timely satisfaction of redemption with respect to foreign securities in its basket assets.\textsuperscript{264} An ETF that chooses not to disclose its portfolio would have to track an index whose provider discloses the identities and weightings of the securities and other assets that constitute the index in order to rely on the proposed rule. In addition, each ETF seeking to rely on the proposed rule also would have to, in any sales literature (as defined in the rule), identify itself as an ETF, which does not sell or redeem individual shares, and explain that investors may purchase or sell individual shares on national securities exchanges.

Two of the disclosure conditions in proposed rule 6c-11 would not result in a burden for purposes of the PRA. Disclosure of the contents of the basket assets that comprise a creation unit and the number of shares in each creation unit does not result in a burden because ETFs must disclose this information in the normal course of business.\textsuperscript{265} Similarly, disclosure by an index provider of the identities and weightings of the component securities and other assets that comprise the index would not result in a burden because index providers disclose this information in the normal course of business.

\textsuperscript{263} Proposed rule 6c-11.

\textsuperscript{264} Id.

\textsuperscript{265} See Section II of this release for a discussion on the operation of ETFs. Disclosure of the contents of the basket assets and the number of shares that comprise a creation unit are critical to investors who seek to purchase or redeem creation units from the ETF and, therefore, to the operation of an ETF. To purchase a creation unit, an investor would need to know the securities and other assets that must be deposited with the ETF in exchange for a creation unit. To redeem a creation unit, an investor would need to know the number of ETF shares that comprise a creation unit in order to compile enough shares to redeem from the ETF. Disclosure of the contents of the basket assets also is important to the arbitrage mechanism of the ETF. Arbitrageurs compare the NAV of the basket to the NAV of ETF shares to determine whether to purchase or redeem creation units based on the relative values of ETF shares in the secondary market and the securities contained in the basket.
The remaining four disclosure requirements are collections of information. First, the proposed rule would require an ETF that does not track an index whose provider discloses its composition daily to provide daily disclosure of the identities and weightings of the component securities and other assets in the ETF’s portfolio. Currently, two ETF registrants are required to disclose their portfolios daily under the terms of their exemptive orders. The Commission staff estimates that an ETF each year would spend approximately 200 hours of professional time to update the relevant Internet Web page daily with this information, at a cost of $42,000. The staff also estimates that each new ETF initially would spend 100 hours to develop the Web page for this disclosure. Staff estimates the initial cost would be $22,520 for internal ETF staff time to develop the Web page and $12,600 for an external Web site developer, for a total of $35,120.

We seek comments on these estimates. If commenters believe these estimates are not reasonable, we request they provide data that would allow us to make more accurate estimates.

Second, the proposed rule also would require each ETF to disclose its prior business

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266 ProShares Notice, supra note 113; Rydex ETF Trust, Investment Company Act Release No. 27703 (Feb. 20, 2007) [72 FR 8810 (Feb. 27, 2007)]. Together, these registrants offer 64 ETFs that are required to disclose their portfolios daily.

267 Estimates on the number of burden hours and external costs associated with the collections of information are based on informal conversations between Commission staff and representatives of ETFs. The staff estimates the cost would be 200 hours for an internal Web site developer (at $211 per hour) (200 x $211 = $42,200). Hourly wages used for purposes of this PRA analysis are from the Securities Industry Association (now named Securities Industry and Financial Markets Association), SIA Report on Management & Professional Earnings in the Securities Industry 2006, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

268 Commission staff estimates the cost would equal 80 hours for Web site developers at the ETF (at $211 per hour) to develop the Web page and 20 hours for internal Web site managers (at $282 per hour) to review the Web page ((80 hours x $211) + (20 hours time x $282) = $22,520). In addition, based on discussions with industry representatives, the staff estimates that each ETF initially would spend an additional $12,600 to external Web site developers ($22,520 + 12,600 = $35,120).
day’s NAV, market price for its shares, and premium/discount information, which would provide investors with information on the deviation, if any, between the price of ETF shares and the NAV of the underlying portfolio. Commission staff estimates that an ETF each year spends approximately 206 hours of professional time to update the relevant Internet Web page daily with this information. Based on staff estimates, we estimate the annual cost would be $43,466 for internal ETF staff time to update the Web page and $6,000 to acquire the data from external data providers. The staff also estimates that each new ETF initially would spend 75 hours to develop the Web page for these disclosures. Based on staff estimates, we estimate the initial cost would be $16,890 for internal ETF staff time to develop the Web page and $9540 for an external Web site developer, for a total of $26,430.

We seek comments on these estimates. If commenters believe these estimates are not reasonable, we request they provide data that would allow us to make more accurate estimates.

Third, in any sales literature each ETF must identify itself as an ETF that does not sell or redeem individual shares, and explain that investors may purchase or sell individual shares only on national securities exchanges. This condition is similar to the condition in our exemptive orders, which requires each ETF to agree not to market or advertise the ETF as an open-end fund or mutual fund and to explain that the ETF shares are not individually redeemable. Based on conversations with ETF representatives, Commission staff estimates that an ETF each year spends approximately 30 hours at a cost of $1704 to comply with the condition in our exemptive orders.

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269 Commission staff estimates the cost would equal 206 hours for internal Web site developers at ($211 per hour) (206 x $211 = $43,466).

270 Commission staff estimates the cost would equal 60 hours for internal Web site developers (at $211 per hour) to develop the Web page and 15 hours for Web site managers (at $282 per hour) to review the Web page ((60 hours x $211) + (15 hours x $282) = $16,890). In addition, based on discussions with industry representatives, the staff estimates that each fund would spend an additional $9540 to external Web site developers ($16,890 + $9540 = $26,430).
orders. Because the condition in the proposed rule is similar, the staff estimates that each new ETF also would spend 30 hours at a cost of $1704 to comply with the condition in the proposed rule.

We seek comment on this estimate. If commenters believe this estimate is not reasonable, we request they provide data that would allow us to make a more accurate estimate.

Finally, some ETFs that track foreign indexes have stated that local market delivery cycles for transferring foreign securities to redeeming investors, together with local market holiday schedules, require a delivery process in excess of the statutory seven days required by section 22(e) of the Act. The proposed rule would codify the disclosure requirement in existing exemptive orders that requires ETFs to disclose in their registration statements the foreign holidays that would prevent timely satisfaction of redemption. The collection of information burden for this disclosure is discussed in the PRA analysis of proposed Form N-1A amendments in Section VI.B below.

As of December 2007, there were 601 ETFs. The Commission staff estimates that each year 150 new ETFs will form and operate. The staff estimates that each ETF each year would spend approximately 236 hours to comply with the conditions of proposed rule 6c-11. Each new ETF would spend an additional 75 hours to develop the Web sites for daily disclosure of its prior

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271 Commission staff estimates the cost would equal 2 hours for the ETF’s internal counsel (at $292 per hour) to draft the disclosure and 28 hours for clerical staff (at $40 per hour) to input and copy check the marketing materials ((2 x $292) + (28 x $40) = $1704).

272 See supra notes 136-141 and accompanying text for a discussion of the proposed exemption from section 22(e) of the Act.

273 ICI ETF Statistics 2007, supra note 5.

274 To estimate the number of new ETFs each year for purposes of this PRA, the staff has used the approximate average of the number of new ETFs for the past three years ((50 + 153 + 244)/3 = 149). ICI, Exchange-Traded Fund Assets December 2006, Jan. 31, 2007; ICI ETF Statistics 2007, supra note 5.
business day’s NAV, market closing price for its shares, and premium/discount information. In addition, ETFs that provide the identities and weightings of the securities and other assets in their portfolios if they do not track an index whose provider discloses its composition daily would spend an additional 100 hours to develop the Web sites for this disclosure. Each of those ETFs also would spend an estimated 200 hours each year to update the disclosures of portfolio assets on its Web site. For purposes of this PRA, the staff estimates that one-half of all new ETFs (75 ETFs) would provide this disclosure. Based on staff estimates, we estimate that ETFs would, in the aggregate, spend 205,036 hours each year to comply with the requirements of proposed rule 6c-11.\(^{275}\) We estimate further that ETFs would spend 18,750 hours initially to develop the Web page for these disclosures, amortized over three years for an annual burden of 6250 hours.\(^{276}\) Thus, the estimated total annual burden is 211,286 hours.\(^{277}\) We estimate the annual internal costs of ongoing compliance with these disclosure requirements would be $40 million and external costs would be $4.5 million.\(^{278}\) We further estimate that initial internal costs to develop the Web page for these disclosures would be $4.2 million and external costs would be $2.3 million, or $1.4 million and $0.8 million, respectively, amortized over three years.\(^{279}\)

**B. Form N-1A**

We are proposing amendments to Form N-1A to provide more useful information to

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\(^{275}\) Assuming all existing ETFs would rely on the proposed rule, these estimates are based on the following calculations: \((206 \text{ hours} + 30) \times 612 \text{ (existing plus estimated new index-based ETFs)} + (436 \text{ hours} \times 139 \text{ (existing plus estimated new actively managed ETFs)}) = 205,036.\)

\(^{276}\) This estimate is based on the following calculation: \((75 \text{ hours} \times 75 \text{ (estimated new index-based ETFs)}) + (175 \text{ hours} \times 75 \text{ (estimated new actively managed ETFs)}) = 18,750.\)

\(^{277}\) This estimate is based on the following calculation: \(205,036 + 6250 = 211,286.\)

\(^{278}\) These estimates are based on the following calculations: \((($43,466 + $1704) \times 612) + ($42,000 \times 139) = $39,760,670; ($6000 \times 612) + ($6000 \times 139) = $4,506,000.\)

\(^{279}\) These estimates are based on the following calculations: \((16,890 \times 75) + ((16,890 + 22,520) \times 75) = $4,222,500; (9540 \times 75) + ((9540 + 12,600) \times 75) = $2,376,000.\)
investors who purchase and sell ETF shares on national securities exchanges.

Creation Units. The proposed amendments would permit an ETF to exclude certain information from its prospectus that is not pertinent to investors purchasing individual ETF shares. Specifically, an ETF that has creation units of 25,000 shares or more may exclude from its prospectus: (i) information on how to purchase and redeem shares of the ETF; and (ii) fee table fees and expenses for purchases and redemptions of creation units. Based on conversations with industry representatives, Commission staff estimates that this proposed amendment would decrease the information collection burdens of an ETF that has creation units of 25,000 shares or more by an average of 1.4 hours per fund per filing of an initial registration statement or post-effective amendment to a registration statement.

The proposed amendment also would require disclosures designed to include important information for purchasers of individual ETF shares, as described below. An ETF would have to modify the narrative explanation preceding the example in the fee table in its prospectus and periodic reports to state that fund shares are sold on the secondary market rather than redeemed at the end of the periods indicated, and that investors in ETF shares may be required to pay brokerage commissions that are not reflected in the fee table. We believe that the added information collection burdens associated with this statement, if any, would be negligible.

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide data that would allow us to make more accurate estimates.

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280 Proposed Item 6(h)(1) of Form N-1A.
281 Proposed Instruction 1(e)(i) to Item 3 of Form N-1A.
282 Proposed Instruction 1(e)(ii) to Item 3 of Form N-1A; Proposed Instruction 1(e)(ii) to Item 22(d) of Form N-1A. The proposal also would require each ETF to identify the principal U.S. market on which its shares are traded and include a statement to the effect that ETF shares are bought and sold on national securities exchanges. We believe that the added information collection burdens associated with these very brief and specific statements, if any, would be negligible.
**Total Returns.** The proposed amendments would require each ETF to include a separate line item for returns based on the market price of ETF shares in the average annual total returns table in Item 2 of the Form.\textsuperscript{283} This would codify, with modifications, a condition in ETF exemptive orders. The amendments also would require ETFs to calculate total return at market prices in addition to returns at NAV for their financial highlights tables.\textsuperscript{284} One consequence of this proposed amendment is that ETFs would be required to include two bar charts under Item 2 of Form N-1A; one using market price returns and one using NAV returns.\textsuperscript{285} We do not believe these added disclosures would increase the hourly burdens of ETFs. ETFs are currently required by our orders to calculate and present market price returns in the prospectus and, therefore, this disclosure would not present a new substantive requirement. The proposal would eliminate industry practice of including this disclosure in a supplemental section rather than the main body of the prospectus and, therefore, would integrate the disclosure within current Form N-1A requirements.\textsuperscript{286} Staff estimates that the time it takes to prepare the new line items and the additional bar chart would be the same as the amount of time ETFs currently spend preparing the market price return disclosure that is included in the supplemental section. Based on discussions with industry representatives, the staff estimates that each ETF currently spends approximately 0.6 hours of professional time to prepare the market price returns disclosure required by our exemptive orders.

We request comment on this estimate. If commenters believe the estimate is not reasonable, we request they provide specific data that would allow us to make a more accurate

\textsuperscript{283} Proposed Instruction 5(a) to Item 2(c)(2) of Form N 1A.

\textsuperscript{284} Proposed Instruction 3(f) to Item 8(a) of Form N-1A.

\textsuperscript{285} See Item 2(c)(2)(i) of Form N 1A.

\textsuperscript{286} See supra note 163.
estimate.

**Premium/Discount Information.** The amendments also would require ETFs to include premium/discount information in both the prospectus and annual report of each ETF. This proposed amendment codifies an existing exemptive order requirement. Based on discussions with industry representatives, the staff estimates that each ETF currently spends an average of 0.5 hours per filing of an initial registration statement or a post-effective amendment to a registration statement to include this disclosure. The staff further estimates that each ETF also would spend 0.5 hours per annual report to include this disclosure.

We request comment on this estimate. If commenters believe the estimate is not reasonable, we request they provide specific data that would allow us to make a more accurate estimate.

**Foreign Holidays.** As noted above, proposed rule 6c-11 would require certain ETFs to disclose in their registration statements the foreign holidays that would prevent timely satisfaction of redemption. As of July 2007, there were 125 ETFs that provide exposure to international equity markets. Based on discussions with ETF representatives, the staff estimates that approximately 10% of these ETFs may need to delay satisfaction of redemption requests, and that each of those ETFs would spend approximately 0.3 hours to include the required information in its registration statement.

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide specific data that would allow us to make more accurate estimates.

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287 This estimate is based on discussions with representatives of ETFs, which include premium/discout information as required by their exemptive orders.
The current burden for preparing an initial Form N-1A filing is 830.47 hours per portfolio. The current burden for preparing a post-effective amendment on Form N-1A is 111 hours per portfolio. The total annual hour burden approved for Form N-1A is 1,575,184. Based on Commission filings, Commission staff estimates that on an annual basis, ETFs file initial registration statements covering 98 ETF portfolios, and post-effective amendments covering 1441 ETF portfolios on Form N-1A. Based on staff estimates, we estimate that the proposed amendments would not increase the hour burden per ETF per filing on an initial registration or post-effective amendment to a registration statement.288 Therefore, if the proposed amendments to Form N-1A were adopted, we estimate that the total annual hour burden for all ETFs for preparation and filing of initial registration statements would remain the same.

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide specific data that would allow us to make more accurate estimates.

C. Proposed Rule 12d1-4

Proposed rule 12d1-4 would permit an acquiring fund to acquire ETF shares in excess of the limits of section 12(d)(1) of the Act, subject to certain conditions.289 In order to rely on the proposed rule for an exemption from section 12(d)(1)(B) limits, an ETF may not redeem and its principal underwriter, a broker, or dealer may not submit for redemption any of the ETF’s shares that were acquired by an acquiring fund in excess of the limits of section 12(d)(1)(A)(i) of the

288 The proposed amendments would add approximately 1.4 hours (0.6 hours (total returns), 0.5 hours (premium/discount information), and 0.3 hours (foreign holidays)), which staff estimates would be offset by approximately 1.4 hours (elimination of description of creation units and associated fees).

289 See discussion in Section IV.A – B supra.
Act in reliance on proposed rule 12d1-4. The proposed rule provides a safe harbor for these entities if the entity has (i) received a representation from the acquiring fund that none of the ETF shares it is redeeming was acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the rule, and (ii) no reason to believe that the acquiring fund is redeeming any ETF shares that the acquiring fund acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the rule. The representation required for the safe harbor would be a collection of information for purposes of the PRA.

Our understanding is that acquiring funds that invest in ETFs generally do not redeem their shares from the ETF, but rather sell them in secondary market transactions. We also believe that an acquiring fund that would not rely on proposed rule 12d1-4 to acquire ETF shares (i.e., an acquiring fund that acquires 3 percent or less of an ETF’s outstanding voting securities) would be less likely to redeem shares because it would be less likely to have a sufficient number of shares to permit the acquiring fund to redeem its shares. We estimate that ETFs, their principal underwriters, and brokers and dealers in the aggregate would choose to rely on the safe harbor to redeem or submit a redemption order with respect to ETF shares that were not acquired in reliance on proposed rule 12d1-4 on average two times each year with respect to each ETF.

We request comment on this estimate. If commenters believe this estimate is not reasonable, we request they provide specific data that would allow us to make a more accurate

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290 See proposed rule 12d1-4(b)(1).
291 See proposed rule 12d1-4(b)(2).
292 ETF shares are redeemed only in creation unit aggregations. A creation unit typically consists of at least 25,000 shares. See supra note 113.
293 We recognize that some ETFs may receive more redemption requests from acquiring funds and may rely on the safe harbor more often, while other ETFs may receive no redemption requests or may not choose to rely on the safe harbor when they receive a redemption request from an acquiring fund.
estimate.

There were 601 ETFs as of the end of December 2007. Based on our estimate, two acquiring funds each year would provide a representation to an ETF, its principal underwriter, a broker, or a dealer with respect to each ETF, for a total of 1202 representations. We estimate that each representation would take, on average no more than 0.2 hours to prepare and submit to the ETF, principal underwriter, broker, or dealer. Accordingly, we believe that the total annual collection of information burden for proposed rule 12d1-4 would be 240 hours at a cost of $70,080.

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide specific data that would allow us to make more accurate estimates.

**D. Request for Comments**

We request comment on whether these estimates are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission’s estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the

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294 *ICI ETF Assets 2007, supra note 5.*

295 The proposed rule does not specify language that must appear in the representation. It simply requires the acquiring fund to represent that the shares submitted for redemption are not shares acquired in excess of the limits of section 12(d)(1)(A)(i) of the Act in reliance on proposed rule 12d1-4. Accordingly, we expect that while initial representations might take half an hour to draft, these representations would soon conform to an industry standard that would take no more than a few minutes to produce.

296 These estimates are based on the following calculations: 1202 representations x 0.2 hours = 240.4 hours; 240 hours x $292 (hourly rate for a fund attorney) = $70,080.
information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and should send a copy to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-07-08. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this Release; therefore a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this Release. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-07-08, and be submitted to the Securities and Exchange Commission, Public Reference Room, 100 F Street, NE, Washington, DC 20549-1520.

VIII. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. As discussed above, the proposed rules and rule amendments would permit funds to engage in activities and transactions that are otherwise prohibited under the Act without the expense and delay of obtaining an individual exemptive order. Specifically, proposed rule 6c-11 would permit ETFs to form and operate. Proposed rule 12d1-4 would permit a fund to invest in ETFs beyond the limits of section 12(d)(1) of the Act, and proposed amendments to rule 12d1-2 would expand the investment options available to funds that rely on the exemptive relief in section 12(d)(1)(G) of the Act. The proposed amendments to Form N-1A are designed to provide more useful
information to investors who purchase and sell ETF shares on national securities exchanges, while simplifying the form by permitting most, if not all, ETFs to exclude information related to the purchase and redemption of creation units.\footnote{297} This cost-benefit analysis examines the costs and benefits to ETFs, acquiring funds, and investors that would result from reliance on the proposed exemptive rules and rule and form amendments, in comparison to the costs and benefits associated with obtaining an exemptive order from the Commission.

A. Rule 6c-11

1. Benefits

Proposed rule 6c-11 would codify much of the relief and conditions of exemptive orders that we have issued to ETFs in the past.\footnote{298} Proposed rule 6c-11 would require an ETF that relies on the proposed rule either to (i) disclose on its Internet Web site each business day the identities and weightings of the component securities and other assets held by the fund, or (ii) have a stated objective of obtaining results that correspond to the returns of a securities index whose index provider discloses on its Internet Web site the identities and weightings of the component securities and other assets of the index.\footnote{299} An ETF that meets one of these requirements could redeem shares in creation unit aggregations, have its shares traded at current market prices, engage in in-kind transactions with certain affiliates, and in certain circumstances, redeem shares in more than seven days.\footnote{300}

\footnote{297} As noted above, information on how creation units are offered to the public is required to be disclosed in the SAI. Item 18(a) of Form N-1A.

\footnote{298} The proposed rule does not codify exemptions previously provided to ETFs organized as UITs because the Commission has not received an exemptive application for a new ETF to be organized as a UIT since 2002. See discussion in Section III.A.3 of this release.

\footnote{299} Proposed rule 6c-11(e)(4)(v); see also discussion in Section III.B.1 of this release for a discussion of these conditions.

\footnote{300} Proposed rule 6c-11(a)-(d); see also discussion in Section III.C. of this release.
Elimination of Exemptions Order Costs. We anticipate that ETFs, their sponsors, and ETF investors would benefit from the proposed rule. ETFs and their sponsors increasingly have sought exemptive orders (which the Commission has granted) to form and operate as open-end management companies under the Act. The application process involved in obtaining exemptive orders imposes direct costs on ETFs and their sponsors, including preparation and revision of an application, as well as consultations with Commission staff. The proposed rule would benefit ETFs and their sponsors by eliminating the direct costs of applying to the Commission for an exemptive order to form and operate as permitted under the rule. The rule would further benefit ETFs and their sponsors by eliminating the uncertainty that a particular applicant might not obtain relief to form and operate as permitted under the rule. We anticipate that the elimination of the direct costs of exemptive applications also may benefit ETF investors by enabling ETFs to lower their costs as a result of lower start-up costs.

We seek comment on whether the elimination of these direct costs would result in additional benefits to ETFs or their investors. Are there other costs of the proposed rule that would offset any cost savings resulting from not having to file an exemptive application?

The exemptive application process also involves other indirect costs. ETFs and their sponsors that apply for an order forgo potential market opportunities until they receive the order, while others forgo the market opportunity entirely rather than seek an exemptive order because they have concluded that the cost of seeking an exemptive order would exceed the anticipated benefit of the market opportunity. These direct and indirect costs currently may prevent

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301 The cost to an ETF for submitting an application ranges from approximately $75,000 to $350,000. These figures are based on conversations with attorneys and ETF employees who have been involved in submitting applications to the Commission.

302 The time involved in obtaining an order from the Commission ranges from several months to several years depending on the nature, complexity, and de novo consideration of the exemptions (footnote continued)
smaller ETFs and their sponsors from coming to market because they have determined that the
cost of an exemptive application may exceed the potential benefit. Eliminating these costs may
allow more ETFs, particularly smaller ETFs, to come to market.

We seek comment on this analysis. Would removing the regulatory burdens facilitate
greater innovation in the ETF market place, particularly with respect to smaller ETFs?

Increased Investment Options. We expect that the proposed rule also would benefit ETF
investors to the extent it would remove a possible disincentive for some ETFs and their sponsors
to form and operate as open-end funds and provide investors with additional investment choices.
As noted above, the direct and indirect costs of the exemptive application process may
discourage potential sponsors, particularly smaller sponsors interested in offering smaller, more
narrowly focused ETFs which may serve the particular investment needs of certain investors. By
eliminating the need for individual exemptive relief, we anticipate that the proposed rule would,
over time, lead to an increase in ETFs. In those circumstances, the proposed rule would provide
ETF investors with greater investment choices, while also providing them with the protections
afforded by the Investment Company Act.

We seek comment on this analysis. Would the proposed rule result in increased
investment options?

Elimination of Certain Exemptive Order Terms. Proposed rule 6c-11 also may benefit
ETFs and their sponsors by eliminating certain terms contained in exemptive orders that we
believe may be addressed by other provisions of the federal securities laws. We propose to
eliminate the terms designed to prevent the communication of material non-public information
between the ETF and its affiliated index provider because we believe that there are sufficient

sought.
requirements under federal securities laws and the rules of national securities exchanges to protect against the abuses the terms were intended to address.\textsuperscript{303} We anticipate that eliminating these regulatory burdens may reduce costs of operating an ETF and thereby facilitate greater competition and innovation among ETFs.

We request comment on this analysis. Are there any costs associated with eliminating these terms?

2. \textit{Costs}

We do not expect the proposed rule would impose mandatory costs on any ETF. As discussed above, the proposed rule is exemptive, and we expect that a fund would not operate as an ETF in reliance on the rule if the anticipated benefits did not justify the costs. We expect the costs of relying on the proposed rule are likely to be the same as or less than the costs to an ETF that relies on an existing exemptive order because the proposed rule includes the same or fewer conditions than existing orders that provide equivalent exemptive relief.

The proposed rule would affect different types of ETFs and their sponsors in different ways. A sponsor or adviser that has not sought and would not seek exemptive relief to form and operate an ETF registered under the Act would not be affected by the rule. For an ETF and its sponsor that currently rely on an exemptive order, there may be one-time “learning costs” in determining the differences between the order and rule. After making this determination, we expect that the costs for this ETF would be the same as or less than the costs of relying on its exemptive order because the rule contains the same or fewer conditions than existing orders. In addition, an ETF and its sponsor that currently rely on an exemptive order could generally satisfy all the conditions of the rule that provide similar exemptive relief without changing its operation.

\textsuperscript{303} See Section III.B.4 of this release for a discussion of this condition.
Finally, a sponsor that has not relied on an exemptive order and that intends to rely on the proposed rule would bear the same or lower continuing costs of complying with conditions that it would have borne had it obtained an exemptive order. In that case, its total costs are likely to have been the same as or greater than the costs associated with the proposed rule.

We request comment on this analysis. Would ETFs that currently rely on an order bear lower costs if they relied on the proposed rule? Would an ETF have to change its operation in any way to comply with the proposed rule?

Prospectus Delivery. The proposed rule does not provide an exemption from prospectus delivery that most ETFs and their sponsors have requested and we have provided in our orders. Most of our orders have exempted broker-dealers selling ETF shares from the obligation to deliver prospectuses in most secondary market transactions. Those applicants have represented that broker-dealers would instead deliver a “product description” containing basic information about the ETF and its shares. Because proposed rule 6c-11 would not contain a similar exemption, broker-dealers would be required to deliver a prospectus meeting the requirements of section 10 of the Securities Act to investors purchasing ETF shares. We

304 The orders have granted exemptions from section 24(d) of the Act, which makes inapplicable the dealer exception in section 4(3) of the Securities Act to transactions in redeemable securities issued by an open-end investment company. 15 U.S.C. 80a-24(d); 15 U.S.C. 77d(3); see, e.g., WisdomTree Order, supra note 12. ETFs that have this exemption, however continue to be subject to prospectus delivery requirements in connection with sales of creation units and other non-secondary market transactions. Our most recent orders, however, do not provide an exemption from prospectus delivery requirements. See Actively Managed ETF Orders, supra note 20.

305 See, e.g., Ziegler Notice, supra note 110. The product description provides a summary of the salient features of the ETF and its shares, including the investment objectives of the fund, the manner in which ETF shares trade on the secondary market, and the manner in which creation units are purchased and redeemed. National securities exchanges on which ETFs are listed have adopted rules requiring the delivery of product descriptions. See, e.g., American Stock Exchange Rules 1000 and 1000A.

306 15 U.S.C. 77j. We also are proposing to amend our orders to exclude the section 24(d) (footnote continued)
believe an exemption allowing broker dealers to deliver product descriptions would be unnecessary given our proposal regarding summary prospectus disclosure. If we adopt the Enhanced Disclosure Proposing Release, broker-dealers selling ETF shares could deliver a summary prospectus in secondary market transactions.\textsuperscript{307} Although there may be costs associated with printing and delivering prospectuses to secondary market purchasers, we expect these costs to be minimal. We understand that many, if not most, broker-dealers selling ETF shares in secondary market transactions, in fact, transmit a prospectus to purchasers, and thus they may not have relied on the exemptions provided in the orders. In addition, we anticipate these costs could be offset by the fact that the ETFs would not have to prepare product descriptions and by the simplified prospectus disclosure in this proposal.\textsuperscript{308}

We anticipate that any cost associated with this requirement may be justified by the benefits to ETF investors. Prospectuses provide ETF investors with standardized information about an investment in an ETF and the differences between an ETF and a traditional mutual fund. Because prospectuses are standardized forms the content of which has been prescribed by the Commission, their delivery could promote greater uniformity in the content and level of disclosure among existing and future ETFs. Finally, our proposed amendments to the prospectus should provide more useful information to investors who purchase and sell ETF shares on a national securities exchange, while simplifying prospectuses by permitting ETFs to exclude

\textsuperscript{307} See supra notes 145-152 and accompanying text. The summary prospectus would contain material information that may not appear in a product description, but like a product description, would be in a form that would be easy to use and readily accessible.

\textsuperscript{308} The preparation of a product description can cost approximately $360 to $11,000 per ETF. These figures are based on conversations with attorneys and ETF employees.
information related to the purchase and redemption of creation units.

We request comment on this analysis. Are we correct in assuming that prospectus delivery costs would be offset by the elimination of product descriptions?

Conditions. All ETFs seeking to rely on the rule would have to be listed on an exchange that disseminates the per share NAV of the ETFs’ baskets at regular intervals. This condition was included in our exemptive orders and, therefore, should not result in an increased cost to existing ETFs. Each ETF also must, in any sales literature (as defined in the rule), identify itself as an ETF, which does not sell or redeem individual shares, and explain that investors may purchase or sell individual shares on national securities exchanges. This condition is similar to one included in our exemptive orders and, therefore, should not result in an increased cost to existing ETFs. In addition, the ETF would be required either to (i) disclose on its Internet Web site each business day the identities and weightings of the component securities and other assets held by the fund, or (ii) have a stated objective of obtaining results that correspond to the returns of a securities index whose index provider discloses on its Internet Web site the identities and weightings of the component securities and other assets of the index.\textsuperscript{309} Index-based ETFs comply with the latter requirement and, therefore, this condition should not result in an increased cost to ETFs that would track a transparent index. ETFs that choose to rely on the former condition, including the actively managed ETFs subject to the recent exemptive orders we issued, would incur costs in connection with developing a Web page for this disclosure and updating the disclosure daily.\textsuperscript{310} We expect these costs to be of the same magnitude as the costs

\textsuperscript{309} Proposed rule 6c-11(e)(4)(iv).

\textsuperscript{310} For purposes of the Paperwork Reduction Act, the staff estimated that each ETF would spend approximately $22,520 to develop the Web site. The staff also estimates that each ETF would spend 200 hours annually to update the site daily. \textit{See supra} notes 267-268 and accompanying text.
borne by index providers in making their indexes transparent. Although this may be a reallocation of costs from index providers to those ETFs that choose to fully disclose their portfolios, we do not believe that this change would significantly affect the costs borne by ETF investors. The new disclosure costs for ETFs that choose to disclose their portfolios rather than track a transparent index would be offset by the lack of index licensing fees that are generally charged to index-based ETFs.

We request comment on whether investors in an actively managed ETF would incur any additional costs as a result of the portfolio disclosure. We also request comment on our analysis.

**B. Amendments to Form N-1A**

1. **Benefits**

As discussed above, most of our orders have exempted broker-dealers selling ETF shares from the obligation to deliver prospectuses in secondary market transactions. Applicants for those orders have represented that they would instead require that broker-dealers deliver a product description containing basic information about the ETF and its shares. We are not including a similar exemption in proposed rule 6c-11, and thus a broker-dealer would be required to deliver a prospectus meeting the requirements of section 10 of the Securities Act to investors purchasing ETF shares. In light of this requirement, we also are proposing amendments to Form N-1A, and the summary prospectus, designed to meet the needs of investors (including retail investors) who purchase shares in the secondary market rather than institutional investors purchasing creation units from the ETF.

**Material Information to ETF Investors.** We expect that the primary benefit of our proposed amendments would be to provide ETF investors purchasing shares in the secondary market with information on the investment that currently is not included in product descriptions,
such as the fund’s fee table and the name and length of service of the portfolio manager. This should provide ETF investors with information necessary to understand an investment in an ETF. This information also may be helpful to investors in making portfolio allocation decisions.

**Simplified Disclosure.** Our proposed amendments are designed to simplify prospectus and periodic report disclosure in two ways. First, the proposal would allow ETFs to exclude from the prospectus information on how to purchase and redeem creation units, including information on fees and expenses associated with creation unit sales or purchases. Current ETF prospectuses and periodic reports include detailed information on how to purchase and redeem creation units. The fee table and example include information on transaction fees payable only by creation unit purchasers. Our proposed amendments would permit ETFs with creation units of at least 25,000 shares to exclude this information because it is not relevant (and potentially confusing) to investors purchasing in secondary market transactions. This proposed provision should simplify ETF prospectuses without compromising the disclosure provided to investors who purchase ETF shares in secondary market transactions.

Second, the proposed amendment would incorporate current disclosure requirements mandated by our exemptive orders into the prospectus instead of in a supplemental section where ETFs currently locate it. Our exemptive orders require ETFs to include in their prospectuses and annual reports returns based on market price in addition to returns based on NAV, which as discussed above, may be different than the fund’s NAV and better relate to an ETF investor’s experience in the fund. The condition in our exemptive orders did not specify where this information must be located in the prospectus. As a result, ETFs have included an additional

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311 See supra notes 158-161 and accompanying text for a discussion of this proposed amendment.

312 See supra notes 163-165 and accompanying text for a discussion of this proposed amendment.
table in the prospectus, rather than including market price returns in the average annual returns table required by Item 2 of the Form. The lack of specificity also resulted in ETFs using different time periods for the disclosure, with some using calendar years and others fiscal years. The proposed amendment would eliminate use of a second table, which may confuse investors. It also would require all ETFs to present the information using calendar years, standardizing the reporting period used by ETFs. The proposed amendments would mandate uniform disclosure in the prospectus, which should benefit investors by allowing them to compare ETFs more easily.

Similarly, our exemptive orders required ETFs to include in their prospectuses and annual reports premium/discount information to alert investors of the extent and frequency with which market prices deviated from the fund’s NAV.313 ETFs have generally included this information in a supplemental section of the prospectus and annual report.314 The proposed amendments would incorporate this disclosure in the Shareholder Information section (Item 6 of Form N-1A) of the prospectus and the Management’s Discussion of Fund Performance (Item 22(b)(7) of the annual report). We anticipate that this would benefit ETF investors by simplifying the prospectuses and annual reports of ETFs while codifying important disclosures mandated by our exemptive orders.

2. Costs

The primary goal of our proposed amendments is to provide investors in ETF shares with more valuable information regarding an investment in an ETF. We do not expect that the proposed amendments would result in significant additional costs to ETFs.315 As noted above,

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313 See supra notes 166-170 and accompanying text for a discussion of this proposed amendment.


315 Existing ETFs would face a one-time “learning cost” to determine the difference between the
our proposed disclosure amendments generally would codify disclosure requirements in existing ETF exemptive orders. To the extent the proposed amendments contain new disclosure requirements, such as, for example, the requirement that ETFs include market price returns in addition to NAV returns in Item 8 of Form N-1A, any costs related to these additional disclosures should be offset by our proposal to exempt ETFs with creation units of 25,000 or more shares from including creation unit purchase and redemption information in their prospectuses and annual reports. Most, if not all ETFs, would be able to rely on this exemption.316 We anticipate that future ETFs would offer creation units of 25,000 shares or more.

We request comment on this assumption. If ETFs are likely to offer smaller creation units, what is the fewest number of shares likely to be offered in a creation unit?

In addition to codifying disclosure requirements of existing exemptive orders, we are proposing several new disclosure requirements in Form N-1A. First, we propose to require that ETFs include an additional total return calculation under Item 8 using market price returns, which would result in an additional bar chart under Item 2(c)(2)(i) of Form N-1A.317 Because most ETFs currently calculate and present market price returns in the prospectus pursuant to their exemptive orders, this additional bar chart should result in minimal additional costs because it only requires duplicating the presentation of information in another location. Second, we would require an index-based ETF to compare its performance to its underlying index rather than a

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316 Existing ETFs typically offer creation units of 50,000 or more shares, and the lowest number of shares permitted under current exemptive orders is 25,000.

317 See supra note 163.
benchmark index.\textsuperscript{318} This amendment would permit use of a narrow-based or affiliated index and eliminate the opportunity for an index-based ETF to select an index different from its underlying index, which would better reflect whether the ETF’s performance corresponds to the index which performance it seeks to track. This amendment replaces the type of index used to present performance data currently required under Form N-1A and, therefore, should not increase the compliance burden for ETFs. Finally, we would require each ETF to identify the principal U.S. market on which its shares are traded and include a statement to the effect that ETF shares are bought and sold on national securities exchanges and that ETF investors trading in these exchanges may be required to pay brokerage commissions.\textsuperscript{319} Including these additional statements should present minimal, if any, printing costs.

As noted above, any additional costs incurred by an ETF in complying with these additional disclosures should be offset by the cost-savings of our proposal, which would allow most, if not all, ETFs to exclude creation unit purchase and redemption information in their prospectuses.\textsuperscript{320}

C. Rule 12d1-4

1. Benefits

Proposed rule 12d1-4 would codify much of the relief in orders that we have issued permitting funds to invest in ETFs beyond the limits of section 12(d)(1), while eliminating most of the conditions included in the orders. Proposed rule 12d1-4 would permit fund investments in ETFs beyond the limits of section 12(d)(1) if: (i) the acquiring fund (and any entity in a control

\textsuperscript{318} See supra notes 173-174 and accompanying text.

\textsuperscript{319} See supra note 161 and note 282 and accompanying text.

\textsuperscript{320} For purposes of our Paperwork Reduction Act analysis, we have estimated that our proposed amendments would not change the current Form N-1A compliance costs. See supra discussion at Section VII of this release.
relationship with the acquiring fund) could not control the ETF;\(^{321}\) (ii) the acquiring fund does not redeem certain shares acquired in reliance on the rule;\(^{322}\) (iii) the fees charged by the acquiring fund do not exceed the FINRA sales charge limits;\(^{323}\) and (iv) the acquired ETF is not itself a fund of funds (\textit{i.e.}, the rule would prohibit a fund of funds of funds, or three-tier fund, structure).\(^{324}\) In addition, an ETF could not redeem and its principal underwriter, a broker or a dealer could not submit an order for redemption of certain shares acquired by an acquiring fund in reliance on proposed rule 12d1-4.\(^{325}\) The rule provides a safe harbor for any of those entities if it has: (i) a representation from an acquiring fund that none of the shares to be redeemed was acquired in excess of the limits of section 12(d)(1)(A)(i) of the Act in reliance on proposed rule 12d1-4; and (ii) no reason to believe that the shares to be redeemed were acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the proposed rule.\(^{326}\)

We anticipate that acquiring funds, acquired ETFs, investment advisers, and shareholders of both acquiring funds and acquired ETFs would benefit from the proposed rule. Acquiring funds would be able to purchase and ETFs would be able to sell ETF shares beyond the limits of section 12(d)(1) without obtaining an exemptive order, which can be costly to ETFs and their


\(^{322}\) Proposed rule 12d1-4(a)(2) See supra note 220 and accompanying and following text for a discussion of the proposed condition.

\(^{323}\) Proposed rule 12d1-4(a)(3). See supra notes 230-233 and accompanying text for a discussion of the proposed condition. Unlike the orders, however, the proposed rule would not require directors to make any special findings that investors are not paying multiple advisory fees for the same services.

\(^{324}\) Proposed rule 12d1-4(a)(4). See supra notes 225-229 and accompanying text for a discussion of the proposed condition.

\(^{325}\) Proposed rule 12d1-4(b)(1). See supra note 221 and accompanying text for a discussion of the proposed condition.

\(^{326}\) Proposed rule 12d1-4(b)(2). See supra note 222 and accompanying text for a discussion of the proposed safe harbor.
shareholders. The exemptive application process also involves other indirect costs. ETFs that apply for an order to permit other funds to make additional investments in the ETFs beyond the limits of section 12(d)(1) and funds that would rely on the order issued to the ETF forgo potentially beneficial investments until the ETFs receive the order, while other ETFs (and funds that would rely on the order if issued to the ETF) forgo the investment entirely rather than seek an exemptive order because they have concluded that the cost of seeking an exemptive order would exceed the anticipated benefit of the investment.

Unlike the orders, proposed rule 12d1-4 would not provide an exemption permitting acquiring funds to redeem ETF shares acquired in excess of the three percent limit in section 12(d)(1)(A)(i) of the Act in reliance on the proposed rule. This was designed to limit the potential for an acquiring fund to threaten large-scale redemptions as a means of coercing an ETF. Accordingly, the conditions in the proposed rule differ from those in the exemptive orders. The proposed rule would not include: (i) the participation agreement requirement; (ii) the transmission by an acquiring fund of a list of certain of its affiliates to the ETF; (iii) certain policies and procedures designed to limit the influence an acquiring fund can exert on the ETF; and (iv) limits on certain fees. Elimination of these conditions would reduce regulatory burdens and the cost of compliance for funds that seek to invest in ETFs, facilitating

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327 We estimate, based on discussions with fund representatives, that the cost of obtaining an exemptive order permitting an acquiring fund to invest in an ETF beyond the limits of section 12(d)(1) ranges from approximately $75,000 to $200,000.

328 Although these applications for relief are typically processed expeditiously, Commission staff estimates, based on orders issued in the past, that the exemptive application process (from initial filing to issuance of order) has taken on average about 15 months. During that time, Commission staff review and comment on applications, applicants submit responses to comments, and the completed application is summarized in a notice to the public. If an application contains a request for relief in addition to the relief from section 12(d)(1) of the Act, the application process has often taken longer than 15 months.

329 See supra note 220 and accompanying and following text.
greater participation by funds in the purchase and sale of ETF shares both directly with the ETF and in secondary market transactions.\textsuperscript{330} Although the proposed rule would not allow acquiring funds to redeem certain shares from the ETF, we understand that acquiring funds generally sell ETF shares in secondary market transactions, rather than redeem them. Accordingly, we believe that this prohibition would have minimal impact on acquiring funds. Moreover, the adoption of proposed rule 12d1-4 would not preclude an acquiring fund from continuing to rely on exemptive orders we have previously issued or seeking new orders to permit funds to invest in ETFs in excess of the limits of section 12(d)(1) but which do not restrict their ability to redeem ETF shares, subject to the conditions set forth in the orders and described above.

In order to allow acquiring funds to take full advantage of the exemptive relief, proposed rule 12d1-4 also would provide limited relief from rule 17e-1 under the Act. If an investment company in one complex acquired more than five percent of the assets of an ETF in another complex, any broker-dealer affiliated with that ETF would become a (second-tier) affiliated person of the acquiring fund.\textsuperscript{331} As a result of the affiliation, the broker-dealer’s fee for effecting the sale of securities to (or by) the acquiring fund would be subject to the conditions set forth in rule 17e-1, including the quarterly board review and recordkeeping requirements with respect to certain securities transactions involving the affiliated broker-dealer.\textsuperscript{332} The proposed rule would permit an acquiring fund to pay commissions, fees, or other remuneration to a (second-tier) affiliated broker-dealer without complying with the quarterly board review and recordkeeping

\textsuperscript{330} Based on discussions with fund representatives, we estimate that the cost of negotiating and entering into a participation agreement (and for an acquiring fund preparing the initial list of affiliates) required by our exemptive orders ranges from approximately $5,000 to $10,000. We estimate that the cost to an acquiring fund to review and update its list of affiliates each year as required by our exemptive orders ranges from approximately $4,000 to $15,000.

\textsuperscript{331} See supra note 239.

\textsuperscript{332} See supra note 245.
requirements set forth in rules 17e-1(b)(3) and 17e-1(d)(2). This relief would be available only if the broker-dealer and the acquiring fund became affiliated solely because of the acquiring fund’s investment in the ETF. We believe that this relief would enable more funds to take advantage of the exemption provided by the proposed rule.

2. Costs

We do not believe that the rule will impose mandatory costs on any fund. As discussed above, the rule is exemptive, and we believe that a fund would not rely on it if the anticipated benefits did not justify the costs. We believe the costs of relying on the rule would be less than the costs to an acquiring fund (and ETF) that relies on an existing exemptive order to invest in (or sell) ETF shares because the rule includes substantially fewer conditions than existing orders that provide similar exemptive relief with respect to purchases and sales of ETF shares.

In order to rely on the proposed rule for an exemption from section 12(d)(1)(B) limits, an ETF may not redeem and its principal underwriter, or a broker or dealer may not submit for redemption any of the ETF’s shares that were acquired by an acquiring fund in excess of the limits of section 12(d)(1)(A)(i) of the Act in reliance on proposed rule 12d1-4. The proposed rule provides a safe harbor for these entities if the entity has (i) received a representation from the acquiring fund that none of the ETF shares it is redeeming was acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the rule, and (ii) no reason to believe that the acquiring fund is redeeming any ETF shares that the acquiring fund acquired in excess of the limits of section 12(d)(1)(A)(i) in reliance on the rule.

See supra note 247 and accompanying text.

See proposed rule 12d1-4(b)(1).

See proposed rule 12d1-4(b)(2). We believe that the costs associated with this safe harbor would not be significant. Only acquiring funds that intend to redeem less than three percent of an ETF’s...
As noted above, we understand that acquiring funds that invest in ETFs generally do not redeem their shares from the ETF, but rather sell them in secondary market transactions. We also believe that an acquiring fund that would not rely on proposed rule 12d1-4 to acquire ETF shares (i.e., an acquiring fund that acquires 3 percent or less of an ETF’s outstanding voting securities) would be less likely to redeem shares because it would be less likely to have a sufficient number of shares to permit the acquiring fund to redeem its shares. We estimate that ETFs, their principal underwriters, and brokers and dealers in the aggregate would choose to rely on the safe harbor to redeem or submit a redemption order with respect to ETF shares that were not acquired in reliance on proposed rule 12d1-4 on average two times each year with respect to each ETF. We believe that the total annual cost for making this representation would be $70,080.

We request comment on these estimates. If commenters believe these estimates are not reasonable, we request they provide specific data that would allow us to make more accurate estimates.

The rule would affect different types of sponsors or advisers in different ways. A sponsor or adviser that has not sought and would not seek exemptive relief to permit another fund to invest in its shares beyond the limits of section 12(d)(1) of the Act would not be affected by the rule. The cost for a sponsor or adviser that currently relies on exemptive relief covered by the shares could provide the representations required under the safe harbor.

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336 ETF shares are generally redeemed only in creation unit aggregations. A creation unit typically consists of at least 25,000 shares. See supra note 113.

337 We recognize that some ETFs may receive more redemption requests from acquiring funds and may rely on the safe harbor more often, while other ETFs may receive no redemption requests or may not choose to rely on the safe harbor when they receive a redemption request from an acquiring fund.

338 See supra notes 294-296 and accompanying text.
rule would be less than the costs of relying on its exemptive order because the proposed rule contains substantially fewer conditions than existing orders. In addition, a sponsor or adviser that currently relies on an exemptive order could satisfy all the conditions of the proposed rule that provides similar exemptive relief with respect to purchases and sales of ETF shares without changing its operation. Finally, a sponsor or adviser that has not relied on an exemptive order and that intends to rely on the proposed rule would avoid the cost of obtaining an exemptive order and would incur lower continuing costs to comply with the conditions included in the proposed rule than it would have borne had it obtained an exemptive order.

D. Amendments to Rule 12d1-2

1. Benefits

The proposed amendments to rule 12d1-2 would expand the type of investments that funds relying on the exemptive relief in section 12(d)(1)(G) of the Act could make. The proposed amendments would allow acquiring funds that invest in affiliated funds in reliance on section 12(d)(1)(G) to invest in unaffiliated ETFs beyond the statutory limitations as long as the funds comply with the conditions of proposed rule 12d1-4. We also propose to amend rule 12d1-2 to allow funds relying on section 12(d)(1)(G) to invest in assets other than securities. Under the proposed rule, funds relying on the exemptive relief in section 12(d)(1)(G) would be able to invest in, among other things, futures contracts, options, swaps, other derivative investments, and other financial instruments that do not qualify as a security under the Act. Those investments would, of course, have to be consistent with the fund’s investment policies.

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340 Proposed rule 12d1-2(a)(5).
341 See Item 4 of Form N-1A (requiring disclosure of funds’ investment objectives and principal investment strategies).
We believe that including these types of investment opportunities would permit funds to allocate their investments more efficiently.

2. Costs

Rule 12d1-2 (and the proposed amendments to the rule) does not impose any conditions on its reliance and thus a fund would not incur any costs in relying on the rule.

E. Request for Comment

The Commission requests comment on the potential costs and benefits of the proposed rules and rule amendments. We also request comment on the potential costs and benefits of any alternatives suggested by commenters. We encourage commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs and benefits. For purposes of the Small Business Regulatory Enforcement Act of 1996, the Commission also requests information regarding the potential annual effect of the proposals on the U.S. economy. Commenters are requested to provide empirical data to support their views.

IX. Consideration of Promotion of Efficiency, Competition and Capital Formation

Section 2(c) of the Investment Company Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is consistent with the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

A. Proposed Rules 6c-11

Proposed rule 6c-11 would codify much of the relief and conditions of exemptive orders that we have issued to ETFs. The rule would provide relief to ETFs by permitting an ETF to

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operate without first obtaining an exemptive order from the Commission. As noted above, the direct and indirect costs of the exemptive application process may discourage potential ETF sponsors. The proposed rule also would not include conditions contained in exemptive orders designed to address particular concerns that we now believe are addressed by other provisions of the federal securities laws.\textsuperscript{344} Eliminating the need for individual exemptive relief and compliance with specific conditions may reduce costs of introducing and operating an ETF, and may permit additional opportunities for sponsors to introduce new ETFs, particularly smaller sponsors interested in offering smaller, more narrowly focused ETFs which may serve particular investment needs of certain investors. We therefore anticipate that the proposed rule would, over time, lead to an increase in ETFs.

We expect that the proposal is likely to increase competition and efficiency. By making it easier for sponsors, particularly smaller sponsors, to introduce ETFs, the proposal should allow more sponsors to enter the marketplace, thereby increasing competition among ETF sponsors. The resulting increase in ETFs that we expect also should increase competition and innovation among funds. The proposal also should promote efficiency because the increase in ETFs should provide investors with more investments that may be specifically tailored to their particular investment objectives. We do not expect the proposed rule would have an adverse impact on capital formation.

\textbf{B. Amendments to Form N-1A}

The proposed amendments to Form N-1A are designed to provide more useful information to investors (including retail investors) who purchase shares in the secondary market, rather than institutional investors purchasing creation units from the ETF. The proposed

\textsuperscript{344} See supra Section III.B.5. of this release for a discussion of these conditions.
amendments would require ETFs, in addition to providing returns based on NAV, to include
returns based on the market price of fund shares, and to disclose in the ETF prospectus the
number of trading days on which the market price of the ETF shares was greater than the ETF’s
NAV and the number of days it was less than the ETF’s NAV (premium/discount information).
This information should promote more efficient allocation of investments by investors and more
efficient allocation of assets among competing ETFs because investors may compare and choose
ETFs based on their market returns and deviations from NAV more easily. These amendments
also should improve competition because they may prompt sponsors to launch ETFs that provide
improved market price returns or lesser premiums/discounts. We do not believe the proposed
amendments would have an adverse impact on capital formation.

C. Proposed Rule 12d1-4 and Amendments to Rule 12d1-2

Proposed rule 12d1-4 and the proposed amendments to rule 12d1-2 would expand the
circumstances in which funds can invest in ETFs without the ETF first obtaining an exemptive
order from the Commission, which can be costly and time-consuming. We anticipate that the
proposed rule and amendments would promote efficiency and competition. Proposed rule
12d1-4 would permit funds to acquire shares of ETFs in excess of the limitations in section
12(d)(1) of the Act. This exemption should allow acquiring funds to allocate their investments
more efficiently by expanding their investment options to include holdings in ETFs beyond the
limits of section 12(d)(1) in order to meet the funds’ investment objectives. We also anticipate
that the proposed rule would promote efficiency because permitting funds to buy creation units
might benefit other ETF investors buying and selling ETF shares in secondary market
transactions by increasing the number of institutional investors participating in the arbitrage
process. The proposed rule might promote competition by increasing the pool of ETFs that
accept investments by other funds beyond section 12(d)(1) limits. Proposed rule 12d1-4 would eliminate the need for ETFs to obtain an exemptive order from the Commission, the cost of which might discourage ETFs, particularly smaller ETFs, from accepting or seeking fund investments beyond section 12(d)(1) limits.  

The proposed rule would provide relief from section 17(e) for funds that execute transactions with certain broker-dealers affiliated with ETFs in which the acquiring funds invest. This relief, which is not included in our exemptive orders, should allow more funds to take full advantage of the exemption provided by the rule, thereby increasing the potential that the proposed rule would promote efficiency and competition.

The proposed amendments to rule 12d1-2 expand the investment options for funds that rely on the exemption in section 12(d)(1)(G) of the Act to include investments in unaffiliated ETFs beyond the section 12(d)(1) limits and assets other than securities. This expansion of investment opportunities could permit funds to allocate their investments more efficiently. This may allow a fund to compete more effectively. We do not expect that proposed rule 12d1-4 or the proposed amendments to rule 12d1-2 would have an adverse impact on capital formation.

**X. INITIAL REGULATORY FLEXIBILITY ANALYSIS**

This Initial Regulatory Flexibility Analysis ("IRFA") has been prepared in accordance with 5 U.S.C. 603. It relates to proposed new rules 6c-11 and 12d1-4 and proposed amendments

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345 As noted above, the proposed rule also would not incorporate many of the conditions contained in our exemptive orders. The compliance costs of such conditions might otherwise discourage ETFs, particularly small ETFs, from accepting or seeking fund investments beyond section 12(d)(1) limits. *See supra* note 330 and accompanying and following text. By eliminating most of the conditions from our exemptive orders, more ETFs may accept and seek fund investments in their shares.

346 *See supra* Section IV.C.3 for a discussion of the proposed exemption.

347 While proposed rule 12d1-4 may result in additional investments in ETFs, we do not anticipate that the rule would have a significant impact on capital formation.
to rule 12d1-2 under the Investment Company Act, and to Form N-1A under the Investment Company Act and the Securities Act.

A. Reasons for the Proposed Actions

1. ETFs

As described more fully in Sections I and III of this release, we are proposing rule 6c-11 to allow new ETFs to enter the market without first obtaining an exemptive order from the Commission. The proposed rule would codify and expand upon the exemptive orders we have issued to ETFs allowing them to form and operate. In conjunction with proposed rule 6c-11, we also are proposing amendments to Form N-1A, as described more fully in Sections I and III.D of this release, to provide more useful information to investors who purchase and sell ETF shares on a securities exchange.

2. Investment Company Investments in ETFs

As described more fully in Sections I and IV of this release, we are proposing new rule 12d1-4 to permit funds to invest in shares of ETFs beyond the limits of section 12(d)(1)(A) without first obtaining an exemptive order from the Commission. The proposed rule would codify exemptions provided in orders we have issued permitting funds to invest in ETFs beyond the Act’s limits. We also are proposing amendments to rule 12d1-2, as described more fully in Section V of this release, to expand the investment options available to funds that rely on Section 12(d)(1)(G) of the Act.

Our exemptive orders have provided ETFs with relief from a number of sections in the Act in order to allow them to operate. See supra Section III.C.
B. Objectives of the Proposed Actions

1. ETFs

As described more fully in Sections I and III of this release, the objectives of the proposed rule 6c-11 are to allow new ETF competitors to enter the market more easily and eliminate certain conditions contained in the outstanding orders that we now believe may be unnecessary. As described more fully in Sections I and III.D of this release, the objective of the proposed amendments to Form N-1A is to provide more useful information to individual investors who purchase and sell ETF shares on national securities exchanges.

2. Investment Company Investments in ETFs

As more fully described in Sections I and IV of this release, proposed rule 12d1-4 is intended to allow funds to invest more easily in ETFs beyond the limits of section 12(d)(1) of the Act subject to certain conditions designed to protect investors. As more fully described in Section V of this release, the proposed amendments to rule 12d1-2 are intended to expand the investments options available to funds that rely on section 12(d)(1)(G) to include: (i) investments in unaffiliated ETFs beyond the limits of section 12(d)(1) of the Act consistent with proposed rule 12d1-4; and (ii) other non-securities assets, which do not appear to raise concerns that the investment limits of section 12(d)(1)(G) were intended to address. The proposed amendments to rule 12d1-2 would provide funds relying on section 12(d)(1)(G) with greater flexibility to meet their investment objectives.

C. Legal Basis

The statutory authority for proposed rules 6c-11 and 12d1-4 and the proposed amendments to rule 12d1-2 and Form N-1A is set forth in Section XI of this release.
D. Small Entities Subject to the Proposed Rule and Amendments

A small business or small organization (collectively, “small entity”) for purposes of the Regulatory Flexibility Act\textsuperscript{349} is a fund that, together with other funds in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.\textsuperscript{350} Of approximately 601 ETFs (593 registered open-end investment companies and 8 registered UITs), only 1 (an open-end fund) is a small entity.\textsuperscript{351} There are approximately 145 fund complexes\textsuperscript{352} and 43 business development companies\textsuperscript{353} that are small entities that could choose to rely on proposed rule 12d1-4 to invest in ETFs beyond the limits of section 12(d)(1).

1. ETFs

Commission staff expects proposed rule 6c-11 and amendments to Form N-1A would have little impact on small entities. Like other funds, small entities would be affected by proposed rule 6c-11 and the proposed amendments to Form N-1A only if they determine to rely on rule 6c-11 to operate as an ETF. Small entities that are open-end ETFs and currently rely on an exemptive order also would be affected by the proposed amendments to Form N-1A. Commission staff estimates that only one of the 61 orders permitting funds to operate as ETFs was issued to a small entity. The staff anticipates that the number of funds, including small

\textsuperscript{349} 5 U.S.C. 601-612.
\textsuperscript{350} 17 CFR 270.0-10.
\textsuperscript{351} For purposes of this IRFA, any series or portfolio of an ETF is considered a separate ETF. Therefore, there are 601 portfolios or series of registered investment companies operating as ETFs. For purposes of determining whether a fund is a small entity under the Regulatory Flexibility Act, however, the assets of funds (including each portfolio and series of a fund) in the same group of related investment companies are aggregated.
\textsuperscript{352} The 145 fund complexes contain in the aggregate 160 funds that are small entities. This estimate is derived from data reported on Forms N-SAR and N-CSR filed with the Commission for the period ending June 30, 2007.
\textsuperscript{353} This estimate is based on data reported on Forms 10-K and 10-Q filed with the Commission for the period ending June 30, 2007.
funds, that would operate as an ETF under proposed rule 6c-11 and also therefore be subject to the disclosure requirements contained in the proposed amendments to Form N-1A would increase as compared with the number of applicants. Nevertheless, the staff believes that the proportion of small entities compared to the total number of funds that operate as ETFs would remain small.

2. *Investment Company Investments in ETFs*

Commission staff expects proposed rule 12d1-4 and the proposed amendments to rule 12d1-2 to have little impact on small entities. Like other funds, small entities would only be affected by the rule and the amendments if they determine to rely on the exemptions provided by the proposed rule and amendments.\(^{354}\) Commission staff estimates that none of the approximately 15 exemptive orders issued to ETFs allowing other funds to invest in the ETFs beyond the limits of section 12(d)(1) was issued to a small entity. Similarly, none of the applications that has sought to allow a fund that relied on section 12(d)(1)(G) of the Act to invest in securities other than funds in the same complex, government securities, and short-term paper was a small entity. The staff anticipates that the number of funds, including small funds, that would rely on the proposed rule and rule amendments would be greater than the number of funds that currently rely on exemptive orders. Nevertheless, the staff believes that the proportion of small entities compared to the total number of funds that would rely on the proposed rule and rule amendments would be small.

\(^{354}\) Small acquiring funds could choose to rely on the proposed rule to invest in ETFs beyond the limits of section 12(d)(1)(A) of the Act, and small ETFs could choose to rely on the rule to sell their shares to other funds beyond the limits of section 12(d)(1)(B) of the Act. Small acquiring funds that rely on section 12(d)(1)(G) of the Act could choose to rely on the proposed amendments to rule 12d1-2 to invest in ETFs in reliance on proposed rule 12d1-4 and to invest in assets other than securities.
E. Reporting, Recordkeeping, and Other Compliance Requirements

1. ETFs

Proposed rule 6c-11 would not impose any recordkeeping requirements on any person and would not materially increase other compliance requirements. Proposed rule 6c-11 would impose reporting requirements on funds that choose to rely on the rule. Funds relying on the rule would have to disclose: (i) the foreign holidays that would prevent timely satisfaction of a redemption request; (ii) the basket assets; (iii) the number of shares in a creation unit; (iv) the fund’s NAV, the market closing price for its shares, and the premium/discount between its NAV and the market closing price daily on its Internet Web site; and (v) the identities and weightings of the component securities and other assets held by the fund. The proposed rule also would impose compliance requirements on ETFs that are essential to the operation of an ETF. A fund that chose to rely on the proposed rule would be required to have (i) its shares

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355 In addition to the reporting requirements, the proposed rule, unlike most of the ETF exemptive orders, would not include relief from section 24(d) of the Act and thus broker-dealers would be required to deliver prospectuses to investors in secondary market transactions. We also propose to amend the existing ETF exemptive orders issued to open-end funds to eliminate the section 24(d) exemptions and require ETFs relying on the orders to satisfy their prospectus delivery requirements. We understand that many, if not most, broker-dealers selling ETF shares in secondary market transactions, in fact, transmit a prospectus to purchasers. Therefore, we anticipate that the proposed amendment to the ETF orders would have little if any impact on ETFs, including small ETFs.

356 Proposed rule 6c-11(c)(1). Funds would have to disclose this information in their registration statements (Form N-1A) and in any sales literature.

357 Proposed rule 6c-11(e)(1).

358 Proposed rule 6c-11(e)(3).

359 Proposed rule 6c-11(e)(4)(iii), (iv).

360 Proposed rule 6c-11(e)(4)(iv)(A). If the fund has a stated investment objective of obtaining returns that correspond to the returns of a securities index, reliance on the proposed rule would be conditioned on the ETF tracking an index whose provider discloses on its Internet Web site the identities and weightings of the component securities and other assets of the index in lieu of disclosure on the fund’s Internet Web site. Proposed rule 6c-11(e)(4)(iv)(B).
approved for listing and trading on a national securities exchange,361 and (ii) the Intraday Value of the basket assets disseminated at regular intervals during the day by a national securities exchange.362

Proposed rule 6c-11 may benefit fund shareholders by allowing funds to operate as ETFs without incurring the costs and delays associated with the exemptive application process and without having to comply with some of the conditions included in the exemptive orders. While the rule would require ETFs to comply with reporting and compliance requirements, these requirements would not involve any new costs for ETFs because these requirements (as well as additional requirements) are included in the ETF exemptive orders.

The proposed amendments to Form N-1A would impose reporting requirements on open-end funds that operate as ETFs. The proposed amendments would require an ETF to disclose in its prospectus and annual reports: (i) returns based on the market price of its shares;363 (ii) the number of trading days on which the market price of its shares was greater than its NAV and the number of days it was less than its NAV (premium/discount information);364 and (iii) a

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361 Proposed rule 6c-11(e)(4)(iii).
362 Proposed rule 6c-11(e)(4)(i).
363 Proposed Instruction 5(a) to Item 2(c)(2) of Form N-1A; Proposed Instruction 3(f) to Item 8(a) of Form N-1A; Proposed Instruction 12(b) to Item 22(b)(7) of Form N-1A. Form N-1A currently only requires an ETF to disclose in its prospectus its return based on its NAV. The annual reports also would have to contain a new line graph comparing the initial and subsequent account values using market price, following the line graph using NAV required by Item 22(b)(7)(ii)(A) of Form N-1A. Proposed Instruction 12(a) to Item 22(b)(7) of Form N-1A.
364 Proposed Item 6(h)(4) of Form N-1A (requiring proposed premium/discount information in the prospectus to span the most recently completed calendar year and quarters since that year); Proposed Item 22(b)(7)(iv) of Form N-1A (requiring proposed premium/discount information disclosed in annual reports to span five fiscal years). The ETF would be required to present premiums or discounts as a percentage of NAV and to explain that shareholders may pay more than NAV when purchasing shares and receive less than NAV when selling, because shares are bought and sold at market prices. Proposed Instructions 2, 3 to Item 6(h)(4) of Form N-1A; Proposed Instruction (b), (c) to Item 22(b)(7)(iv).
comparison of its performance, if it is an index-based ETF, to its underlying index rather than a benchmark index.\textsuperscript{365} The proposed amendments also would require the ETF to disclose in its prospectus the trading symbol(s) and principal U.S. market(s) on which its shares are traded.\textsuperscript{366}

The proposed amendments to Form N-1A also would eliminate some disclosure requirements for ETFs with creation units of 25,000 or more shares and replace them with fewer disclosures. Under the proposed amendments, those ETFs would not have to: (i) disclose information on how to buy and redeem shares of ETF;\textsuperscript{367} or (ii) include in its fee table in its prospectus or annual and semi-annual reports fees and expenses for purchases or sales of creation units.\textsuperscript{368}

The amendments to Form N-1A are designed to accommodate the use of the form by ETFs and to meet the needs of investors (including retail investors) who purchase ETF shares in secondary market transactions rather than institutional investors purchasing creation units directly from the ETF. We believe that the amendments would have a negligible impact (if any) on the disclosure burdens on ETFs while providing necessary information to ETF investors. We do not believe that the proposed amendments to Form N-1A would disproportionately impact small funds.

\textsuperscript{365} Proposed Instruction 5(b) to Item 2(c)(2) of Form N-1A; Proposed Instruction 12(c) to Item 22(b)(7) of Form N-1A.

\textsuperscript{366} Proposed Item 6(h)(2) of Form N-1A.

\textsuperscript{367} Proposed Item 6(h)(1) of Form N-1A. Instead ETF prospectuses could simply state that individual fund shares can only be bought and sold on the secondary market through a broker-dealer. Proposed Item 6(h)(3) of Form N-1A.

\textsuperscript{368} Proposed Instruction 1(e)(i) to Item 3 of Form N-1A; Proposed Instruction 1(e)(i) to Item 22(d) of Form N-1A. An ETF would instead modify the narrative explanation preceding the example in the fee table to state that fund shares are sold on the secondary market rather than redeemed at the end of the periods indicated, and that investors in its shares may be required to pay brokerage commissions that are not reflected in the fee table. Proposed Instruction 1(e)(ii) to Item 3 of Form N-1A; Proposed Instruction 1(e)(ii) to Item 22(d) of Form N-1A.
2. Investment Company Investments in ETFs

Proposed rule 12d1-4 and the proposed amendments to rule 121-2 would not impose any reporting or recordkeeping requirements. The proposed amendments to rule 12d1-2 also would not impose any new compliance requirements on any person. Proposed rule 12d1-4 would impose compliance requirements on funds that choose to rely on it. Proposed rule 12d1-4 would permit fund investments in ETFs beyond the limits of section 12(d)(1) if: (i) the acquiring fund (and any entity in a control relationship with the acquiring fund) does not control the ETF;\(^\text{369}\) (ii) the acquiring fund does not redeem certain shares acquired in reliance on the proposed rule;\(^\text{370}\) (iii) the fees charged by the acquiring fund do not exceed the FINRA sales charge limits;\(^\text{371}\) and (iv) the acquired ETF is not itself a fund of funds (i.e., the rule would prohibit a fund of funds of funds, or three-tier fund, structure).\(^\text{372}\) In addition, an ETF could not redeem, and its principal underwriter, a broker or a dealer could not submit for redemption ETF shares acquired in reliance on proposed rule 12d1-4.\(^\text{373}\) These compliance requirements, however, would not impose any new costs on acquiring funds or ETFs. Most of these conditions (as well as number of other conditions which are not included in the proposed rule) are included in the exemptive orders that currently permit fund investments in ETFs beyond the limits of section 12(d)(1). We do not anticipate that the additional conditions prohibiting redemptions would impose

\(^{369}\) Proposed rule 12d1-4(a)(1). See supra notes 215-219 and accompanying text for a discussion of the proposed condition.

\(^{370}\) Proposed rule 12d1-4(a)(2). See supra note 220 and accompanying and following text for a discussion of the proposed condition.

\(^{371}\) Proposed rule 12d1-4(a)(3). See supra notes 230-233 and accompanying text for a discussion of the proposed condition.

\(^{372}\) Proposed rule 12d1-4(a)(4). See supra notes 225-229 and accompanying text for a discussion of the proposed condition.

\(^{373}\) Proposed rule 12d1-4(b)(1). See supra note 221 and accompanying text for a discussion of the proposed condition.
significant, if any, new costs on acquiring funds or ETFs because we understand that most funds do not redeem shares with ETFs, but sell their shares in secondary market transactions.

F. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any federal rules that duplicate, overlap, or conflict with the proposed rules or rule amendments.

G. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed rules and amendments, the Commission considered the following alternatives: (i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for small entities.

1. ETFs

Proposed rule 6c-11 is exemptive and compliance with the rule would be voluntary. We therefore do not believe that special compliance, timetable, or reporting requirements, or an exemption from coverage of the proposed rule for small entities would be appropriate. In addition, as discussed above, only one fund that meets the definition of a small entity currently relies on an exemptive order to operate as an ETF. Therefore, few of the entities that would be affected by the proposed rule would be considered to be small entities. The Commission also believes that proposed rule 6c-11 would decrease burdens on small entities by making it unnecessary for them to seek an exemptive order from the Commission allowing them to operate
as ETFS and by eliminating some of the conditions included in the exemptive orders from the proposed rule. As a result, we do not anticipate the potential impact of the proposed rule on small entities would be significant. For these reasons, alternatives to the proposed rule appear unnecessary and in any event are unlikely to minimize any impact that the proposed rule might have on small entities.

The proposed amendments to Form N-1A would only apply to funds that choose to rely on proposed rule 6c-11 or that rely on an exemptive order to operate as an ETF. As discussed above, the proposed amendments to Form N-1A are designed to accommodate the use of the form by ETFs and to meet the needs of investors (including retail investors) who purchase ETF shares in secondary market transactions rather than institutional investors purchasing creation units directly from the ETF. Therefore, we believe that any further clarification, consolidation, or simplification of the proposed amendments would not be consistent with the protection of investors. An exemption for small entities also would defeat the purposes of the amendments.

2. *Investment Company Investments in ETFs*

Proposed rule 12d1-4 and the proposed amendments to rule 12d1-2 are exemptive and compliance with proposed rule 12d1-4 and the proposed amendments to rule 12d1-2 would be voluntary. We therefore do not believe that special compliance, timetable, or reporting requirements, or an exemption from coverage of the proposed rule or the proposed amendments to rule 12d1-2 for small entities would be appropriate. The Commission believes that proposed rule 12d1-4 and the proposed amendments to rule 12d1-2 would decrease burdens on small entities by making it unnecessary for them to seek an exemptive order from the Commission allowing them to sell their shares to other funds beyond the limits in section 12(d)(1)(B) of the Act or to allow small entities that rely on section 12(d)(1)(G) to invest in assets other than
securities and ETFs beyond the limits of section 12(d)(1). In addition, proposed rule 12d1-4 has a limited number of conditions, most of which are included in the exemptive orders. The proposed amendments to rule 12d1-2 do not impose any compliance requirements. As a result the potential impact of the proposed rule and amendments on small entities should not be significant. For these reasons, alternatives to the proposed rule and amendments seem unnecessary and, in any event, unlikely to minimize any impact that the proposed rule and amendments might have on small entities.

H. Solicitation of Comments

The Commission encourages the submission of comments with respect to any aspect of this IRFA. Comment is specifically requested on the number of small entities that would be affected by the proposed rules and amendments, and the likely impact of the proposals on small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting its extent. These comments will be considered in connection with any adoption of the proposed rule and amendments, and reflected in a Final Regulatory Flexibility Analysis.

Comments should be submitted in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. Comments also may be submitted electronically to the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-07-08, and this file number should be included on the subject line if e-mail is used. Comment letters will be available for public inspection and copying in the Commission’s Public Reference Room, 100 Fifth Street, NE, Washington, DC 20549-1520, on official business days between the hours of 10:00 am and 3:00 pm.

374 Comments on the IRFA will be placed in the same public file that contains comments on the proposed rules and amendments.
Electronically submitted comment letters also will be posted on the Commission’s Internet Web site (http://www.sec.gov).

XI. **Statutory Authority**

The Commission is proposing rule 6c-11 pursuant to the authority set forth in sections 6(c) and 38(a) of the Investment Company Act [15 U.S.C. 80a-6(c) and 80a-37(a)]. The Commission is proposing amendments to rule 12d1-2 and new rule 12d1-4 pursuant to the authority set forth in sections 6(c), 12(d)(1)(J), and 38(a) of the Investment Company Act [15 U.S.C. 80a-6(c), 80a-12(d)(1)(J), and 80a-37(a)]. The Commission is proposing amendments to registration form N-1A under the authority set forth in sections 6, 7(a), 10 and 19(a) of the Securities Act of 1933 [15 U.S.C. 77f, 77g(a), 77j, 77s(a)], and sections 8(b), 24(a), and 30 of the Investment Company Act [15 U.S.C. 80a-8(b), 80a-24(a), and 80a-29].

**List of Subjects**

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

**TEXT OF PROPOSED RULES AND FORM AMENDMENTS**

For reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

**PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

1. The authority citation for Part 239 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24,
80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

2. The authority citation for Part 270 is amended by adding the following citation to read as follows:

Authority: 15 U.S.C. 80a-1 et seq., 80a-34(d), 80a-37, and 80a-39, unless otherwise noted.

* * * * *

Section 270.6c-11 is also issued under 15 U.S.C. 80a-6(c) and 80a-37(a).

* * * * *

3. The specific authority citation for §§ 270.12d1-1, 270.12d1-2 and 12d1-3 is revised to read as follows:

Authority: * * *

* * * * *

Sections 270.12d1-1, 270.12d1-2, 270.12d1-3, and 12d1-4 are also issued under 15 U.S.C. 80a-6(c), 80a-12(d)(1)(J), and 80a-37(a).

* * * * *

4. Section 270.6c-11 is added to read as follows:

§ 270.6c-11 Exchange-traded funds.

(a) Redeemable securities. Exchange-traded fund shares are considered “redeemable securities” for purposes of section 2(a)(32) of the Act (15 U.S.C. 80a-2(a)(32)).

(b) Pricing. A dealer in exchange-traded fund shares is exempt from section 22(d) of the Act (15 U.S.C. 80a-22(d)) and § 270.22c-1(a) with regard to purchases, sales and repurchases of
exchange-traded fund shares in the secondary market at the current market price.

(c) Postponement of redemption. If an exchange-traded fund includes a foreign security in its basket assets and a foreign holiday prevents timely delivery of the foreign security in response to a redemption request, the fund is exempt, with respect to the foreign security, from the prohibition in section 22(e) of the Act (15 U.S.C. 80a-22(e)) against postponing the date of satisfaction upon redemption for more than seven days after the tender of a redeemable security, if:

(1) The exchange-traded fund discloses in its registration statement the foreign holidays that it expects may prevent timely delivery of foreign securities, and the maximum number of days that it anticipates it will need to deliver the foreign securities; and

(2) Foreign securities are delivered no later than 12 calendar days after the tender of the exchange-traded fund shares.

(d) Affiliated transactions. A person who is an affiliated person of an exchange-traded fund solely by reason of holding with the power to vote 5 percent or more, or more than 25 percent, of securities issued by the exchange-traded fund (or who is an affiliated person of such a person), or issued by an investment company under common control with the exchange-traded fund, is exempt from sections 17(a)(1) and 17(a)(2) of the Act (15 U.S.C. 80a-17(a)(1) and (a)(2)) with regard to the deposit and delivery of basket assets. An investment company that has acquired exchange-traded fund shares in reliance on § 270.12d1-4 may not rely on this paragraph with regard to the purchase of basket assets.

(e) Definitions. For purposes of this section:

(1) Basket assets are the securities or other assets specified each business day in name and number by an exchange-traded fund as the securities or assets in exchange for which it will
issue or in return for which it will redeem exchange-traded fund shares; *provided that* the fund may require or permit a purchaser (or redeemer) of a creation unit to substitute cash for some or all of the securities in the basket assets.

(2) *Business day* means, with respect to an exchange-traded fund, any day that the fund is open for business, including any day on which it is required to make payment under section 22(e) of the Act (15 U.S.C. 80a-22(e)).

(3) *Creation unit* is a specified number of exchange-traded fund shares disclosed in the exchange-traded fund’s prospectus that the fund will issue (or redeem) in exchange for the deposit (or delivery) of basket assets. The creation unit must be reasonably designed to facilitate the purchase (or redemption) of shares from the exchange-traded fund with an offsetting sale (or purchase) of shares on a national securities exchange at as nearly the same time as practicable for the purpose of taking advantage of a difference in the current value of basket assets on a per share basis and the current market price of the shares.

(4) *Exchange-traded fund* is a registered open-end management company that:

(i) Issues (or redeems) creation units in exchange for the deposit (or delivery) of basket assets the current value of which is disseminated on a per share basis by a national securities exchange at regular intervals during the trading day;

(ii) In any sales literature, identifies itself as an exchange-traded fund, which does not sell or redeem individual shares, and explains that investors may purchase or sell individual exchange-traded fund shares on a national securities exchange;

(iii) Issues shares that are approved for listing and trading on a national securities exchange under section 12(d) (15 U.S.C. 78l(d)) of the Securities Exchange Act of 1934 and rule 12d1-1 (17 CFR 240.12d1-1) thereunder;
(iv) Discloses each business day on its Internet Web site, which is publicly accessible at no charge, the prior business day’s net asset value and closing market price of the fund’s shares, and the premium or discount of the closing market price against the net asset value of the fund’s shares as a percentage of net asset value; and

(v) Either:

(A) Discloses each business day on its Internet Web site, which is publicly accessible at no charge, the identities and weightings of the component securities and other assets held by the fund, or

(B) Has a stated investment objective of obtaining returns that correspond to the returns of a securities index specified in the fund’s registration statement, and the index provider discloses on its Internet Web site, which is publicly accessible at no charge, the identities and weightings of the component securities and other assets of the index.

(5) Exchange-traded fund share is an equity security issued by an exchange-traded fund.

(6) Foreign security is any security issued by a government or any political subdivision of a foreign country, a national of any foreign country, or a corporation or other organization incorporated or organized under the laws of any foreign country, and for which there is no established United States public trading market as that term is used in Item 201 of Regulation S-K under the Securities Exchange Act of 1934 (17 CFR 229.201).

(7) Index provider is the person that determines the securities and other assets that comprise a securities index.

(8) Sales literature means any advertisement, pamphlet, circular, form letter, or other sales material addressed to or intended for distribution to prospective investors other than a registration statement filed with the Commission under section 8 of the Act (15 U.S.C. 80a-8).
(9) **Weighting of the component security** is the percentage of the index's value represented, or accounted for, by such component security.

5. Section 270.12d1-2 is amended by:
   a. Revising the heading to paragraph (a);
   b. Removing “and” at the end of paragraph (a)(2);
   c. Removing the period at the end of paragraph (a)(3) and adding a “;”;
   d. Adding paragraphs (a)(4) and (a)(5); and
   e. Revising paragraph (b).

The additions and revisions read as follows:

§ 270.12d1-2 Exemptions for investment companies relying on section 12(d)(1)(G) of the Act.

   (a) **Exemption to acquire other securities and assets.** * * *

   (4) Securities issued by an exchange-traded fund, when the acquisition is in reliance on § 270.12d1-4; and

   (5) Other assets.

   (b) **Definitions.** For purposes of this section, “exchange-traded fund” has the same meaning as in § 270.12d1-4(d)(2) and “money market fund” has the same meaning as in § 270.12d1-1(d)(2).

6. Section 270.12d1-4 is added to read as follows:

§ 270.12d1-4 Exemptions for investments in exchange-traded funds.

   (a) **Exemptions for acquisition of exchange-traded fund shares.** Notwithstanding sections 12(d)(1)(A), 17(a)(1), and 57(a)(1) of the Act (15 U.S.C. 80a-12(d)(1)(A), 15 U.S.C. 80a-17(a)(1), and 15 U.S.C. 80a-56(a)(1)), an investment company ("acquiring fund") may
acquire exchange-traded fund shares if:

(1) *Control.* No acquiring fund or any of its investment advisers or depositors, and any company controlling, controlled by or under common control with the acquiring fund, or any of its investment advisers or depositors, each individually or together in the aggregate:

(i) Controls the exchange-traded fund; and

(ii) If, as a result of a decrease in the outstanding voting securities of the exchange-traded fund, any of those persons, each individually or together in the aggregate, become holders of more than 25 percent of the outstanding voting securities of the exchange-traded fund, each of those holders of shares issued by the exchange-traded fund will vote its shares of the exchange-traded fund in the manner prescribed by section 12(d)(1)(E) of the Act (15 U.S.C. 80a-12(d)(1)(E)).

(2) *No redemption.* An acquiring fund that relies on paragraph (a) of this section to acquire exchange-traded fund shares in excess of the limits of section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a-12(d)(1)(A)(i)) does not redeem any of those shares. For purposes of this paragraph, an acquiring fund will be deemed to have redeemed or sold the most recently acquired exchange-traded fund shares first.

(3) *Fees.*

(i) Any sales charge, as defined in rule 2830(b)(8) of the Conduct Rules of the NASD (“sales charge”), or service fee, as defined in rule 2830(b)(9) of the Conduct Rules of the NASD (“service fee”), charged in connection with the purchase, sale, or redemption of securities issued by the acquiring fund does not exceed the limits set forth in rule 2830(d)(3) of the Conduct Rules of the NASD; and

(ii) With respect to a separate account that invests in an acquiring fund:
(A) The acquiring fund and exchange-traded fund do not charge a sales load;

(B) Any asset-based sales charge, as defined in rule 2830(b)(8)(A) of the Conduct Rules of the NASD, or service fee is charged only by the acquiring fund or the exchange-traded fund; and

(C) The fees associated with a variable insurance contract that invests in the acquiring fund and the sales charges and service fees charged by the acquiring fund and the exchange-traded fund, in the aggregate, must be reasonable in relation to the services rendered, the expenses expected to be incurred and, with respect to the variable insurance contract, the risks assumed by the insurance company.

(4) Complex fund structures. The exchange-traded fund has a disclosed policy that prohibits it from investing more than 10 percent of its assets in:

(i) Other investment companies in reliance on section 12(d)(1)(F) or section 12(d)(1)(G) of the Act (15 U.S.C. 80a-12(d)(1)(F) or 15 U.S.C. 80a-12(d)(1)(G)) or this section; and

(ii) Any other company that would be an investment company under section 3(a) of the Act (15 U.S.C. 80a-3(a)) but for the exceptions to that definition provided in sections 3(c)(1) and 3(c)(7) of the Act (15 U.S.C. 80a-3(c)(1) and 80a-3(c)(7)).

(b) Exemptions for sale of exchange-traded fund shares.

(1) Notwithstanding sections 12(d)(1)(B), 17(a)(1), 17(a)(2), 57(a)(1), and 57(a)(2) of the Act (15 U.S.C. 80a-12(d)(1)(B), 15 U.S.C. 80a-17(a)(1), 15 U.S.C. 80a-57(a)(1), and 15 U.S.C. 80a-56(a)(2)), an exchange-traded fund, any principal underwriter thereof, and a broker or a dealer may sell or otherwise dispose of exchange-traded fund shares if the exchange-traded fund does not redeem, or the principal underwriter, broker or dealer does not submit for redemption any of the exchange-traded fund’s shares that were acquired by an acquiring fund in
excess of the limits of section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a-12(d)(1)(A)(i)) in reliance on paragraph (a) of this section. For purposes of this paragraph, an acquiring fund will be deemed to have redeemed or sold the most recently acquired exchange-traded fund shares first.

(2) An exchange-traded fund, a principal underwriter thereof, or broker or dealer will be deemed to have complied with the condition in paragraph (b)(1) of this section if it has:

(i) Received a representation from the acquiring fund that none of the exchange-traded fund shares it is redeeming was acquired in excess of the limits of section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a-12(d)(1)(A)(i)) in reliance on paragraph (a) of this section; and

(ii) No reason to believe that the acquiring fund is redeeming any exchange-traded fund shares that the acquiring fund acquired in excess of the limits of section 12(d)(1)(A)(i) of the Act (15 U.S.C. 80a-12(d)(1)(A)(i)) in reliance on paragraph (a) of this section.

(c) Exemption from certain monitoring and recordkeeping requirements under § 270.17e-1. Notwithstanding the requirements of §§ 270.17e-1(b)(3) and 270.17e-1(d)(2), the payment of a commission, fee, or other remuneration to a broker shall be deemed as not exceeding the usual and customary broker’s commission for purposes of section 17(e)(2)(A) of the Act (15 U.S.C. 80a-17(e)(2)(A)) if:

(1) The commission, fee, or other remuneration is paid in connection with the sale of securities to or by an acquiring fund;

(2) The broker and the acquiring fund are affiliated persons because each is an affiliated person of the same exchange-traded fund; and

(3) The acquiring fund is an affiliated person of the exchange-traded fund solely because the acquiring fund owns, controls, or holds with power to vote five percent or more of the
outstanding securities of the exchange-traded fund.

(d) Definitions.

(1) Depositor includes the person primarily responsible for the organization of the unit investment trust, the person who has continuing functions or responsibilities with respect to the administration of the affairs of the trust, and the sponsor or manager of the trust.

(2) Exchange-traded fund has the same meaning as in § 270.6c-11(e)(4) and also includes a registered unit investment trust that satisfies the criteria set forth in § 270.6c-11(e)(4).

(3) Exchange-traded fund share has the same meaning as in § 270.6c-11(e)(5).

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

7. The authority citation for Part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

*       *       *       *       *

8. Form N-1A (referenced in §§ 239.15A and 274.11A) is amended by:

a. Adding the definitions “Exchange-Traded Fund” and “Market Price” in alphabetical order to General Instructions A.;

b. Adding paragraph 5 to the Instructions to Item 2 paragraph (c)(2);

c. Adding paragraph 1(e) to the Instructions to Item 3;

d. Revising paragraph 1(a) and adding paragraph (h) to Item 6;

e. Adding paragraph 3(f) to the Instructions to Item 8(a); and

f. Adding paragraph 12 to the Instructions to paragraphs (b)(7)(i) and (ii), paragraph (iv) to paragraph (b)(7), and paragraph 1(e) to the Instructions to paragraph (d) of Item 22.
The additions and revisions read as follows:

Note: The text of Form N-1A does not, and this amendment will not, appear in the Code of Federal Regulations.

Form N-1A

General Instructions

A. Definitions

“Exchange-Traded Fund” means a Fund whose shares are traded on a national securities exchange and satisfies the criteria set forth in rule 6c-11(e)(4) (17 CFR 270.6c-11(e)(4)).

“Market Price” refers to the last price at which Exchange-Traded Fund shares trade on the principal U.S. market on which the Fund’s shares are traded during a regular trading session.

Item 2. Risk/Return Summary: Investments, Risks, and Performance

(c) Principal risks of investing in the Fund

(2) Risk/Return Bar Chart and Table

Instructions

5. Exchange-Traded Funds.
(a) Add a caption in the “Average Annual Total Returns” table directly above the caption titled “Index”. Title the caption “Returns—Market Price”. Disclose in the caption the Fund’s average annual total return based on the Market Price for the periods indicated. In a footnote to the caption, explain how Market Price returns are calculated and how they differ from NAV returns.

(b) If the Fund has an investment objective of obtaining returns that correspond to the returns of a securities index, the table must show the average annual total returns of the securities index specified in its registration statement for the same periods. The Fund may exclude the returns of an appropriate broad-based securities market index as defined in Instruction 5 to Item 22(b)(7) for the same periods.

Item 3. Risk/Return Summary: Fee Table

Instructions

1. General.

(e) (i) If the Fund is an Exchange-Traded Fund and issues or redeems shares in creation units of not less than 25,000 shares each, exclude any fees charged for the purchase and redemption of the Fund’s creation units.

(ii) Modify the narrative explanation to state that Fund shares are sold on a national securities exchange at the end of the time periods indicated, and that brokerage commissions for buying and selling Fund shares through a broker are not reflected.

Item 6. Shareholder Information
(a) * * * *

(1) An explanation that the price of Fund shares is based on the Fund’s net asset value and the method used to value Fund shares (market price, fair value, or amortized cost); except that if the Fund is an Exchange-Traded Fund, an explanation that the price of Fund shares is based on Market Price.

* * * *

(h) Exchange-Traded Funds.

(1) If the Fund issues or redeems Fund shares in creation units of not less than 25,000 shares each, the Fund may omit from the prospectus the information required by Items 6(a)(2), (b) and (c).

(2) Identify the principal U.S. market or markets on which the Fund shares are traded and the trading symbol(s) for those shares, unless the information appears on the front cover page.

(3) Specify the number of Fund shares that the Fund will issue (or redeem) in exchange for the deposit (or delivery) of basket assets as defined in rule 6c-11 [17 CFR 270.6c-11] (i.e., a creation unit) and explain that individual Fund shares may only be purchased and sold on a national securities exchange through a broker-dealer.

(4) Premium/Discount Information. Provide a table showing the number of days the Market Price of the Fund shares was greater than the Fund’s net asset value and the number of days it was less than the Fund’s net asset value for the most recently completed calendar year, and the most recently completed calendar quarters since that year, or the life of the Fund (if shorter).

Instructions.
1. Provide the information in tabular form.

2. Express the information as a percentage of the net asset value of the Fund, using separate columns for the number of days the Market Price was greater than the Fund’s net asset value and the number of days it was less than the Fund’s net asset value. Round all percentages to the nearest hundredth of one percent.

3. Adjacent to the table, provide a brief explanation that: shareholders may pay more than net asset value when they buy Fund shares and receive less than net asset value when they sell those shares, because shares are bought and sold at current market prices.

4. Include a statement that the data presented represents past performance and cannot be used to predict future results.

* * * * *

**Item 8. Financial Highlights Information**

(a) * * *

* * * * *

3. **Total Return.** * * *

(f) **Exchange-Traded Funds.** (i) Change the caption “Total Return” to “Total Return—NAV”.

(ii) Add a caption following “Total Return—NAV” titled “Total Return—Market Price”. Disclose in the caption the Fund’s total return using Market Price, assuming a purchase of Fund shares at the Market Price on the first day and a sale of the shares on the last day of each period shown.
Item 22. Financial Statements

(b) Annual Report.

(7) Management’s Discussion of Fund Performance.

Instructions.

12. Exchange-Traded Funds.

(a) Include a second line graph immediately following the line graph required by paragraph (b)(7)(ii)(A) of this Item, assume an initial investment of $10,000 was made at the Market Price on the business day before the first day of the first fiscal year, and base the subsequent account values on the Market Price on the last business day of the first and each subsequent fiscal year. Calculate the final account value by assuming the investor sold all Exchange-Traded Fund shares at the Market Price on the last business day of the most recent fiscal year.

(b) For purposes of the table required by paragraph (b)(7)(ii)(B) of this Item, add a caption titled “Returns—Market Price”. Disclose in the caption the Fund’s average annual total return based on Market Price for the periods indicated. In a footnote to the caption, explain how Market Price returns are calculated and how they differ from returns based on net asset value.

(c) If the Fund has an investment objective of obtaining returns that correspond to the returns of a securities index, the table must show the average annual total returns of the securities index specified in its registration statement for the same periods. The Fund may exclude the returns of an appropriate broad-based securities
market index as defined in Instruction 5 to paragraph (b)(7)(i) and (ii) of this Item for the same periods.

* * * * *

(iv) **Premium/Discount Information.** Provide a table showing the number of days the Market Price of the Fund shares was greater than the Fund’s net asset value and the number of days it was less than the Fund’s net asset value for the most recently completed five fiscal years (or the life of the Fund if shorter), but only for periods subsequent to the effective date of the Fund’s registration statement.

**Instructions.**

(a) Provide the information in tabular form.

(b) Express the information as a percentage of the net asset value of the Exchange-Traded Fund, using separate columns for the number of days the Market Price was greater than the Fund’s net asset value and the number of days it was less than the Fund’s net asset value. Round all percentages to the nearest hundredth of one percent.

(c) Adjacent to the table, provide a brief explanation that: shareholders may pay more than net asset value when they buy Fund shares and receive less than net asset value when they sell those shares, because shares are bought and sold at current market prices.

(d) Include a statement that the data presented represents past performance and cannot be used to predict future results.

* * * * *

(d) **Annual and Semi-Annual Reports.** * * *

**Instructions.**
1. General.

*   *   *   *   *

(e) (i) If the Fund is an Exchange-Traded Fund and issues or redeems shares in creation units of not less than 25,000 shares each, exclude from the narrative explanation and the Example any fees charged for the purchase and redemption of the Fund’s creation units.

(ii) Modify the narrative explanation to state that Fund shares are sold on a national securities exchange at the end of the time periods indicated, and that brokerage commissions for buying and selling Fund shares through a broker are not reflected.

*   *   *   *   *

By the Commission.

Nancy M. Morris
Secretary

Dated: March 11, 2008