WILLIAM & MARY
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Kevin S. Haeberle
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Email: [redacted]

June 6, 2018

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Public Comment regarding Proposal to Adopt a New NYSE Arca Rule 8.900-E to Permit It to List and Trade Managed Portfolio Shares and to List and Trade Shares of the Royce Pennsylvania ETF and Royce Premier ETF and Royce Total Return ETF; File Number SR-NYSE-Arc-2018-04

Dear Mr. Fields:

I submit this brief letter to follow up on my Second Comment Letter (dated February 16, 2018) relating to the above-referenced Proposal. Previously, I had submitted my Initial Comment Letter (dated December 15, 2017). The Initial Comment Letter related to the then-current version of the same proposal at issue in this file. Indeed, my Second Comment Letter merely expands on points I made in my Initial Comment Letter. I write now to ensure that my Initial Comment Letter is part of the record of Release No. 34-82549, File No. SR-NYSEArca-2018-04, and to ensure that the second letter is read in conjunction with the initial one as the Commission determines whether to approve or disapprove the Proposal under the April 26, 2018 Order Instituting Proceedings relating to the same. (My Initial Comment Letter is explicitly referenced in, and part of, my Second Comment Letter, but the Initial Comment Letter is filed with the SEC under Release No. 34-80553, File No. SR-NYSEArca-2017-36. I attach it to this filing for the convenience of readers.)

It also bears emphasizing at this time that despite the proceedings instituted by the Commission on April 26, those behind the Proposal have failed to respond to the legal problems with the Proposal that I have raised publicly. Comments were due by May 23, 2018, yet none appear to have been received to date. That the Commission explicitly referenced my letter and its concerns, makes this failure on the part of the Proposal's proponents all the more telling. (More generally, no comments in favor of the Proposal have been filed since the Commission's Order.)

As stated by the Commission in its Order, "[t]he Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be 'designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'"[1]

The Proposal does not meet this standard. In fact, it does the opposite, as made clear by the many legal problems my public letters identified and discussed. For that reason alone, the Proposal should be disapproved.

Sincerely,

Kevin Haeberle

Kevin S. Haeberle
Associate Professor of Law
William & Mary Law School

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[1] *See* Order Instituting Proceedings, dated April 26, 2018 (quoting the 15 U.S.C. 78f(b)(5) (ellipsis in original)).

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Kevin S. Haeberle
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December 15, 2017

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Public Comment regarding Proposed Rule Change to Adopt a New NYSE Arca Equities Rule 8.900 and to List and Trade Shares of the Royce Pennsylvania ETF; Royce Premier ETF; and Royce Total Return ETF under Proposed NYSE Arca Equities Rule 8.900 [Release No. 34-80553; File No. SR-NYSEArca-2017-36].

Dear Mr. Fields:

I write to provide public comment on the above-referenced proposed rule change (the "Proposal") to permit the listing and trading of Managed Portfolio Shares and the associated request for exemptive relief to permit the operation of actively managed exchange-traded funds issuing Managed Portfolio Shares (issuers of which are "Funds").[1] As made clear from the SEC's prior orders and correspondence relating to the Proposal and from the public comment letters entered to date, the trading of Managed Portfolio Shares presents serious concerns for investors and the National Market System in the United States. Chief among these concerns are reasons for doubting that Managed Portfolio Shares would trade in a sufficiently liquid market at prices that closely approximate the current value per share of the associated Fund's underlying net assets. Indeed, the SEC's disapproving view and denials of the Proposal

[1] This comment letter is based on the amended rule change request dated December 5, 2017 (Amendment No. 1 to SR-NYSEArca-2017-36) and the amended and restated application for exemptive relief dated December 4, 2017 (File No. 812-14405). Unless set up here as new shorthand terms, capitalized terms of art are borrowed from the above-referenced rule change application as well as the publicly available correspondence with the SEC that followed it. When I use these terms, I do so as they are defined in those documents. More generally, I assume the reader will have familiarity with the Proposal, SEC orders relating to it, and the relevant public comment letters.

to date seem to a strong degree to be (understandably) driven by concerns about how poorly Managed Portfolio Shares may trade.

However, there is another broad category of concern relating to the securities-law issues arising from the Funds' proposed selective disclosure of material, non-public information and proposed trading on behalf of "Authorized Participants" on the basis of that information. The SEC and commenters have raised this second concern in at least a general way—and stated that the underlying problems that give rise to it present further reason to deny the Proposal.[2] Upon looking more closely at this concern, I conclude that the Proposal's contemplated selective disclosure of material, non-public information would lead to much conduct that violates the letter of federal securities law. I also conclude that the proposed selective disclosure is at odds with longstanding SEC rules, guidance, and policy. I thus write here to explain my conclusions, as it is very much in the public's interest that these significant problems not be overlooked when evaluating the merits of the Proposal for which the requested rule change and exemptive relief are being sought.

To summarize the conclusions that follow, the contemplated selective disclosure of material, non-public information about Funds' portfolio holdings to the so-called "AP Representatives" found at the core of the Proposal violates the letter and intent of the federal securities law. (The "AP" here of course refers to Authorized Participants. Applicants sometimes also refer to the AP Representatives as "Trusted Agents.") The AP Representatives will be registered broker-dealers that are, by definition, in the business of buying and selling securities on behalf of customers and for their own accounts.[3] They will come from the general pool of broker-dealers that have long been regulated to avoid illegal and damaging front-running behavior relating to customer orders to buy and sell securities.[4] (Certain broker-dealers have also, of course, shown a

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[2] *See, e.g.*, SEC letter to W. John McGuire re Precidian ETFs Trust, et al.; File No. 812-14405 (Apr. 17, 2015) pp. 4-5 ("Even more fundamental, this [proposed selective] disclosure would seem to run afoul of a foundational federal securities law principle. The Commission has consistently opposed the selective disclosure of non-public material information, in particular where the recipients of such information could use it to trade for their own profit.").

[3] *See* Securities Exchange Act of 1934 § 3(a)(4), 15 U.S.C. § 78c (1934) ("The term 'broker' means any person engaged in the business of effecting transactions in securities for the account of others."); *id.* Section 3(a)(5) (The term 'dealer' means any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise.")

[4] For a nice overview of the relevant front-running concerns, *see* FINRA Rule 5270 FAQs: Front Running of Block Transactions, Shearman & Sterling LLP Client Publication (Jan. 9, 2013), available at http://www.shearman.com/~/media/files/newsinsights/publications/2013/01/finra-rule-5270-faqs-front-

propensity to engage in illegal insider-trading and tipping, given the value of material, non-public information and their specialized skills that help them capture it.) Yet the information at issue here is the composition of Funds' underlying actively managed investment portfolios as a whole, and not simply individual orders to buy and sell securities. The value of this underlying portfolio information is likely far larger than that typically associated with knowledge of a customer's buy and sell orders. Yet under the Proposal, a Fund's confidential portfolio holdings information would be made available to broker-dealers serving as AP Representatives on a current daily basis, whereas the public would have access to Fund holdings only quarterly, with a delay of up to 60 days. The broker-dealers that serves as AP Representatives thus will have material, non-public information that the market as a whole will not have—and, remarkably, they will have it for sustained periods on *every* trading day throughout the year.

To be clear, this non-public information on the current composition of a Fund's underlying portfolio will be especially valuable for trading purposes—and hence material—for at least three main reasons. First, it is of value to those who want to front-run Fund trades. Second, the information is of value to arbitrageurs who seek to profit by identifying divergences between the market price of the Managed Portfolio Shares and the value per share of the underlying Fund portfolio. Third, and perhaps most strikingly, the information is valuable with respect to trading in *all of* the constituent securities of the selectively disclosed portfolio, as well as the broader universe of securities with returns that correlate with those securities. Use of the material, non-public information at issue in any of these ways violates federal securities law. Yet, as explored below, the incentive to pursue such uses will be high, and enforcement to stop it will be—at best—imperfect and taxing on the resources of the SEC Division of Enforcement and the Department of Justice ("DOJ"), among others.

More generally, the large regulatory focus long placed on limiting front-running of customer orders by broker-dealers counsels against creating a new, far broader set of material, non-public information that would create enormous opportunities not just for front-running, but for insider trading. It would be strange, indeed, if the agency charged with regulating the National Market System in line with the principles of modern securities law were to use its exemptive authority to open the door to these

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types of illegal activity on such a potentially vast scale. If permitted, the proposed selective daily disclosure of Fund holdings information would plant a legal minefield that market participants could find unavoidable.

In the remainder of this letter, I provide more detail on my concerns. In particular, the three parts of this letter that follow explain, in turn, the following three sets of substantive securities-law problems triggered by the contemplated selective disclosure of material, non-public information to AP Representatives: (1) problems under insider-trading law that arise out of Section 10(b) and SEC rules promulgated thereunder (namely, Rule 10b-5 as well as Rule 10b5-1); (2) problems under Regulation Fair Disclosure and related SEC guidance specifically on the selective disclosure of portfolio holdings by registered open-end funds, and (3) problems relating to the best-execution requirements found in both a prominent Financial Industry Regulatory Authority ("FINRA") rule and state common law.

Before turning to these points, two threshold considerations bear mention. First, it is important to note my special concern with the Proposal. That concern arises out of my current scholarly activities. In a series of works now in progress, I and my co-author (M. Todd Henderson, University of Chicago Law School) have examined what we have labeled "Information-Dissemination Law." I have spent much time over the last few years studying this area of the law.[5] Since before beginning that project through today, I have also worked on a series of papers relating to the law governing stock trading in the National Market System. More generally, my professional background and relevant scholarly area of expertise relates to the mechanics and economics of securities markets, the law governing securities trading in the National Market System, and securities litigation and enforcement.[6] The Proposal implicates serious issues with respect to each of these areas.

Second, in full disclosure, my interest in taking the time to review the Proposal and provide my thoughts on it in this level of detail is also influenced by financial

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[5] My co-author and I have published one paper in this series, and are in the process of completing the other two. The published paper is *Information-Dissemination Law: The Regulation of How Market-Moving Information Is Revealed*, 101 CORNELL L. REV. 1373 (2016). The two works in progress (*Making a Market for Corporate Disclosure*, and *A New Market-Based Approach for Securities Law*) are set to be published in 2018, one with the YALE JOURNAL ON REGULATION and the other with the UNIVERSITY OF CHICAGO LAW REVIEW. I expect drafts of these two papers to be ready in the coming months.

[6] More about my professional background and academic work can be found on the William & Mary Law School website, at https://law2.wm.edu/faculty/bios/fulltime/kshaeberle.php

support from Eaton Vance Management ("Eaton Vance"). (To be precise, Eaton Vance is compensating me for the time associated with the research and writing necessary to complete this letter, and assisting me in my research of the factual record.) An affiliate of Eaton Vance is the principal sponsor of NextShares exchange-traded managed funds. NextShares are a type of actively managed exchange-traded product first approved by the SEC in 2014 that may be competitive with Managed Portfolio Shares, if the latter are brought to market. Eaton Vance, like me, believes the Proposal should be rejected. Both it and I have a number of additional concerns beyond those in focus here, including how Managed Portfolio Shares, if allowed to trade in the National Market System, might affect investor confidence in the market, ordinary-investor wellbeing and fairness, and perceptions about exchange-traded products. My conclusions and reasoning are my own, and are consistent with my scholarly research and larger thinking on securities laws. In fact, I may engage in further unfunded research into this area and publish my broader thoughts on what types of exchange trading arrangements tied to underlying open-end funds make sense for society, and which ones do not. But there is this conflict of interest present, and readers of this letter should know of it here at the outset. (Readers should also know that I have served as an expert consulting and testifying witness for the SEC. In that role, I worked with staff attorneys in the Division of Enforcement. I have not discussed the Proposal or my thoughts on it with anyone at the Commission (including the SEC staff).)

I. Problems Under Section 10(b) Insider-Trading Law

It has long been established that certain types of insider trading constitute illegal securities fraud under Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.[7] Of particular interest here, those laws work together to bar the deceptive misappropriation of material, non-public information from its source

[7] Section 10(b) is codified at 15 U.S.C. § 77j(b) (2012), and Rule 10b-5 at 17 C.F.R. § 240.10b-5 (2017). Much of the insider trading that is illegal under these provisions is also proscribed by Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 771 (2012)) as well as the federal prohibitions on mail and wire fraud (18 U.S.C. § 1341 & 13143 (2012)). For an overview of the extent to which the mail and wire fraud statutes differ from Section 10(b), see William K.S. Wang, Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tipping, 70 MIAMI L. REV. 220 (2015). Due to the prominence of the Section 10(b) and Rule 10b-5, I focus only on those provisions in the text.

when that misappropriation is in connection with the purchase or sale of securities.[8] In short, illegal "deceit" occurs when one takes material, non-public information from another person or entity despite some duty to keep it confidential or the like, and then buys or sells securities on the basis of it (or tips others knowing that they are likely to do the same).[9] That illegal deceit is prosecutable both civilly by the SEC (and private plaintiffs) and criminally by the DOJ.[10]

The requisite deception of the informational source usually comes in the form of a breach of a confidentiality agreement. The breach, in turn, generally comes via use of information that was to be kept confidential to trade in relevant securities[11] (or tipping others knowing that they will likely use it in that way[12]). Crucially, under case law, mere *possession* of material, non-public information while trading in affected securities creates a presumption that the trading was in fact made *on the basis of* the information—and is thus illegal when done despite a confidentiality agreement with the source of the information.[13] An overlapping SEC rule goes even further, stating that such possession is in fact considered use of the information,[14] subject to a limited set of affirmative defenses[15].

Defendants in a civil or criminal case can rebut that judicial presumption or overcome the administrative general rule. But room for such rebuttal or perseverance is

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[8] *See United States v. O'Hagan*, 521 U.S. 642 (1997). In addition to this "misappropriation" theory of insider trading, the other main theory (the "classical" one) may also apply to the contemplated trading. In the name of brevity and focus, I discuss only the former in this letter.

[9] Those with a background in this area of law might notice that I avoid mention of the personal-benefit requirement here, which has been—for better or worse—generally applied by courts in misappropriation cases. I reference it later in this letter, but for ease of exposition avoid mention of it here.

[10] Section 32 of the Securities Exchange Act of 1934 generally makes any willful violation of Exchange Act provisions and rules (including Section 10(b) or Rule 10b-5 promulgated thereunder) a federal crime. *See* 15 U.S.C. § 78ff (2012).

[11] *See, e.g., United States v. O'Hagan*, 521 U.S. 642 (1997).

[12] *See, e.g., Dirks v. SEC*, 463 U.S. 646 (1983).

[13] *See SEC v. Adler*, 137 F.3d 1325, 1337 (11th Cir. 1998) ("[W]hen an insider trades while in possession of material, nonpublic information, a *strong* inference arises that such information was used by the insider in trading." (emphasis added)).

[14] *See* Exchange Act Rule 10b5-1(b), 17 CFR § 240.10b5-1(b) ("[A] purchase or sale of a security of an issuer is 'on the basis of' material non-public information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale.").

[15] The affirmative defenses are laid out in subsection (c) of Rule 10b5-1.

narrow. The significance of the "possession equals use" law should be fatal to the contemplated selective disclosure of secret portfolio holdings information to AP Representatives under the Proposal. The AP Representatives will receive material, non-public information each day. That information will relate not to a single security, but generally instead to *all* of the securities currently held by the Funds. (Although the instant proposal is for Managed Portfolio Shares relating to just three Funds, it is clear that the principal sponsor envisions a very long line of future Funds offering Managed Portfolio Shares.) Accordingly, if this proposed new type of actively managed exchange-traded fund is permitted and broadly used, AP Representatives could hold material, non-public information relating to basically every publicly traded stock (and potentially other securities). This represents a considerable expansion from the scope of material, non-public information that sits in the hands of broker-dealers today.

AP Representatives could each be said to be presumptively violating the law when acting in the way the Proposal calls for them to act. The Proposal anticipates AP Representatives buying and selling the securities held in a Fund's portfolio on behalf of Authorized Participants in connection with the Authorized Participants' purchases and redemptions of Creation Units of Fund shares. When an Authorized Participant wants to purchase one or more Creation Units, it will instruct its AP Representative to buy the securities held by the underlying Fund. When an Authorized Participant wants to redeem Creation Units, it will instruct its AP Representative to sell the underlying Fund securities on its behalf.[16] In each of these types of AP Representative transactions, the AP Representative is trading in the relevant securities while in possession of material, non-public information, and therefore—as discussed above—on the basis of it. To the extent an AP Representative goes beyond its Authorized Participant client's strict instructions by even an iota, the AP Representative has presumptively committed illegal insider trading. Moreover, to the extent either an AP Representative or its client (i.e., the Authorized Participant) uses selectively disclosed holdings information in a manner not authorized by the Fund, it has committed illegal insider trading. Because the boundary between (arguably permissible) trading in disclosed Fund holdings to facilitate Creation Unit transactions and (likely impermissible) trading in the same

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[16] Here and throughout this letter, for ease of exposition and due to the likely relative rates of occurrence, I avoid discussion of purchases and redemptions of Creation Units of Fund shares by non-Authorized Participant market makers and other investors effected through Authorized Participants (and their AP Representatives), and instead focus only on the contemplated purchase and redemption activities of Authorized Participants themselves. However, the problems I discuss with the latter are generally triggered whenever the former occurs as well.

securities to earn arbitrage profits or for other purposes is fuzzy, Authorized Participants and AP Representatives will, at best, always operate in a gray zone of legality.[17]

Further, under the Proposal, Authorized Participants would have an ongoing ability to trade through their AP Representatives using selectively disclosed portfolio information, whereas others in the market would not be able to do so. Thus, some market participants would be able to trade on the basis on material, non-public information when others could not. Whatever position the SEC Division of Enforcement and DOJ would take on that trading alone, the problem is far larger.

As introduced at the outset of this letter, there is a self-evident incentive for broker-dealers serving as AP Representatives to use the material, non-public information disclosed to them to front-run Fund trades (or tip others to do the same), to engage in arbitrage trading in Managed Portfolio Shares and the underlying Fund assets (or tip others to do the same), or to use the selectively disclosed Fund portfolio information for other trading purposes (or tip others so that they could do the same). If even one AP Representative (or one or more of its employees) ends up being less than trustworthy, approval of the Proposal could precipitate securities fraud on a massive scale. Not to be lost here is that any broker-dealer could qualify to be an AP Representative so long as it provides the associated Fund with the requisite representations regarding the confidentiality of disclosed portfolio holdings, information barriers, and insider-trading policies and procedures.

Alarmingly, there's much reason to believe that there could be a significant rate of untrustworthiness among broker-dealers serving as AP Representatives (or one or more of their employees). Not to be lost in these thoughts on the Proposal and its consistency with securities law and the SEC policy that animates it is that the AP Representatives are broker-dealers operating from trading desks external to the Funds.

[17] To see this, think about the situation in which the AP Representative broker-dealer fills any part of the underlying orders out of its own inventory as a principal. Such practices are common among broker-dealers—thus the *dealer* part of the term. In this situation, the AP Representative would be committing an insider-trading violation. This conclusion flows from the above discussion about trading while in mere possession of material, non-public information. Notably, "filling orders out of inventory" is not one of the affirmative defenses found in Rule 10b5-2(c). Additionally, this raises the broader question of whether an AP Representative's own profits must be limited when trading on the material, non-public information it has. Should the AP Representative be prohibited from trading in cross trades with other clients if by doing so the AP Representative is increasing its own profitability beyond just acting as agent of the Authorized Participant?

It is the job of these broker-dealers to trade on behalf of their customers or for their own accounts.[18] The most recent iteration of the Proposal represents that each AP Representative will maintain a firewall between its personnel holding material, non-public Fund information and the rest of the firm, but does not explain how such a firewall could be effective when the same trading desk is used both to trade confidentially disclosed Fund securities for Authorized Participants and to execute other customer or proprietary trades, potentially in the same securities. Under the Proposal, the mere humans (trader humans, to be precise) that staff the trading desks of AP Representatives are to become fiduciaries bound to trade on behalf of their Authorized Participant clients using the confidentially disclosed Fund holdings information, yet also bound to not otherwise trade on the basis of this information or share it with others with the same in mind. It is upon these traders' honor (and ability to compartmentalize within their brains the disclosed Fund information) that the legality of the Proposal rests. The numerous opportunities this scheme affords an AP Representative (and one or more of its employees) to place profit interests over compliance with the law are obvious.[19]

Just think about the three main ways in which confidentially disclosed Fund holdings information may be valuable to an AP Representative beyond the function of strict portfolio-amassing/portfolio-liquidating trading for its Authorized Participant client: front-running Fund trades, arbitrage trading between Managed Portfolio Shares and underlying Fund securities, and other trading in the underlying securities (and securities with returns that correlate with those securities' returns) elsewhere in the market.

First, the incentive broker-dealers have to front-run customers' orders (or tip others with an eye on the same) exists today even when they have only limited information as to the customers' holdings (e.g., a mutual fund wants to buy a large amount of Facebook stock this afternoon). Securities regulators and institutional investors have long allocated significant resources to police and curb front-running activity, which is thought to be socially harmful. Enter the Proposal, which gives AP

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[18] *See supra* note 3 and accompanying text.

[19] That insider-trading enforcement is far from perfect in terms of detection and access to evidence today should underscore the significance of the point.

Representatives working as agents of their Authorized Participant clients a complete picture of current Fund portfolio holdings every trading day of the year, even though the rest of the market will have that picture only quarterly, with a delay of up to 60 days. The AP Representatives could front-run Fund trades by learning to anticipate future purchases and sales of securities based on the pattern of Fund trading revealed through daily changes in portfolio holdings. Monitoring and protecting against this potential new avenue of securities fraud would not be easy.

Second, the incentive for AP Representatives to engage in arbitrage (or tip others to enable them to do the same) using the material, non-public information disclosed to them is likewise clear enough. For example, an AP Representative could potentially gain trading business from market makers and other high-volume traders by tipping a Fund's portfolio holdings information. The tippees could then use the information to, for example, buy a Fund's underlying holdings and sell the associated Managed Portfolio Shares when the market price of the latter is higher than that of the former. In fact, the economic incentive to do so could be considerable, since the market in general would be in the dark as to this information, meaning that a select few Authorized Participants or other traders could profit from the information without robust competition.

Less obvious, yet perhaps even more striking, is the third and final of the main insider-trading concerns. The AP Representatives would be in continuous possession of material, non-public information relating to each security held by every Fund. Each Fund would typically hold dozens of securities. Because the AP Representatives would be in possession of material, non-public information about these securities held by Funds, they would be generally barred from trading in *any* of the affected securities. Once again, an SEC rule contains a possession-equals-use standard (subject to a circumscribed set of affirmative defenses), and related case law has a rebuttable presumption along the same lines.[20] Even if these standards do not stop AP Representatives from carrying out their trusted-agent buying and selling of Fund portfolio securities on behalf of Authorized Participants, they would be difficult to get past in basically all other instances involving trading by AP Representatives.[21] Since each Fund would hold many securities and a large number of Funds may appear in due time, it is not implausible to conclude that an AP Representative's traders (and their

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[20] *See supra* notes 13 - 15.

[21] *See, e.g., supra* note 17 and accompanying text.

colleagues on the same trading desk) could be barred from trading a large percentage of the 3,500 or so U.S. public stocks, and potentially also a long list of other securities. For these reasons, you could have a situation in which entire trading desks would be barred from legally trading in the securities held by the Funds—all because the AP Representatives would be provided with material, non-public information about current Fund portfolio holdings to support their role in the trading of Managed Portfolio Shares. And securities held by the Funds could, before long, cover essentially the entire universe of U.S. publicly traded stocks, as well as much of the universe of other large securities markets.

Given the resulting severe restrictions on their other trading, what broker-dealers would willingly serve as AP Representatives? Only those with extremely high risk tolerances with respect to violating the law, or who find the AP Representative business alone to be lucrative enough to justify its pursuit. Perhaps there would be a handful of broker-dealers willing to serve as AP Representatives and do no other trading business. Perhaps larger broker-dealers could establish specialized trading teams to focus on just this business. And perhaps each AP Representative (and all of its employees) would comply with insider-trading law. But even if all of these were true, one would think that the end result would be a lack of robust competition in the market for AP Representative services. Such a shortfall in competition would, in turn, exacerbate the larger economic concerns for Managed Portfolio Share pricing and liquidity shared by the SEC and other commenters.

Still, even if the AP Representative business came to fruition with sufficient competition to ensure reasonable pricing and service, the broker-dealers pursuing it would have to be walled off from their intra-firm and extra-firm colleagues in a way that is hard to imagine in reality. While investment bankers at a financial firm might wall themselves off from their firm's broker-dealer arm when they are working on certain deals,[22] it is hard to imagine that the broker-dealer industry would be willing

[22] The history of insider-trading enforcement is rife with examples of breaches of these walls. The law nevertheless allows investment banks to have access to material, non-public information associated with tender offers and the like for good reason. For one thing, the banks provide a valuable social role in, for example, underwriting new offerings to help disperse share ownership throughout society in a way that reduces the overall pain associated with the promise of varying future returns. For another, there is no legal requirement for SEC permission for the arrangement, as there is here. Moreover, the limited period in which illegal pre-tender-offer trading typically takes place helps with law-enforcement detection. And, there is a specialized insider-trading provision targeted at tender-offer insider-trading alone—one that was promulgated only after years of problematic market behavior relating to the selective disclosure of tender-offer information. *See* Transactions in Securities on the Basis of Material, Nonpublic Information in

and able to wall off its staff serving as AP Representatives from its larger trading business on essentially every trading day of the year as proposed. Once again, these are folks who are "in the business" of buying and selling securities.[23] Moreover, even if these walls somehow worked within a single firm, it is tough to imagine that the information wouldn't sometimes be tipped around Wall Street in return for quid pro quos. Stepping back, the idea of traders functioning as AP Representatives living cloistered away from Wall Street trading desks while living . . . on Wall Street trading desks seems far-fetched.

Professor Angel's concern along the above lines stated in his comment letter echoes mine. That concern is worth repeating here:

> The Trusted Agents will have information the general market does not have, and the humans entrusted with this information will be tempted to profit from that information, either by front running fund trades or by passing the information on to their clients and friends. The ongoing difficulties that the SEC has in enforcing insider trading rules make it most unwise to create yet more valuable secret information that could corrupt humans on trading desks.[24]

Admittedly, it is at least theoretically possible that the activities of an AP Representative's traders could be restricted to portfolio-amassing and portfolio-liquidating trades for its Authorized Participant clients. It is likewise theoretically possible that such traders could be sufficiently walled off from their intra-firm and extra-firm colleagues, and that the overall market for the provision of AP Representative services would be competitive. As a professor, I appreciate the thought experiment to which the Proposal's intended use of selectively disclosed Fund holdings information for trading purposes leads. But as someone with familiarity with these markets and the industry more generally, I have a hard time believing that there is

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the Context of Tender Offers, Exchange Act Rule 14e-3, 17 CFR § 240.14e-3 (2017). In contrast, the Proposal to permits Funds offering Managed Portfolio Shares to list and trade appears to be relatively insignificant for society, requires an SEC rule change and exemptive order, and involves the selective disclosure of material, non-public information on every trading day throughout the year on an ongoing basis. It also of course is not (yet!) the target of a specialized SEC restriction like that found in Rule 14e-3.

[23] *See supra* note 3 and accompanying text.

[24] James J. Angel, Comment Letter (May 25, 2017), available at https://www.sec.gov/comments/sr-nysearca-2017-36/nysearca201736-1774133-152313.pdf.

enough ability or desire on behalf of enough broker-dealers to assure the SEC that sufficient walls would be created to separate traders that have material, non-public information from those traders on the same desk that do not.

In sum, when material, non-public information of this type is disclosed only to select broker-dealers, the foxes are left in charge of a very long line of hen houses. In this way, the Proposal changes the status quo on Wall Street in a way that opens the door to insider-trading violations on an enormous scale. Unless the Division of Trading and Markets seeks to create a large universe of additional targets for its Division of Enforcement colleagues and DOJ co-enforcers, granting a rule change request to permit Managed Portfolio Shares to trade in the manner proposed is, at best, highly problematic.

II. Problems Under SEC Rules Targeting Selective Disclosure

Dating back to at least the Supreme Court's seminal discussion of Section 10(b)'s application to tipping cases in *Dirks v. SEC*,[25] the SEC has taken issue with the scope of insider-trading law as defined by Section 10(b) (including the federal courts interpretation of it). In short, the SEC has often found what is prosecutable under that statute (and its judicial interpretations) to be inadequate to fully protect the market from the negative effects of selective disclosure by issuers and their agents. For those interested, this can be seen by surveying the development of insider-trading law tracing back to Chairman Cary's opinion for the Commission in *Cady, Roberts*[26] on through the SEC's position in a number of insider-trading cases in federal courts over the years, including *Dirks* itself.

Although looking at that history in detail is well beyond the scope of this letter, one particular SEC response to the limits of Section 10(b) that is very much relevant here is Regulation Fair Disclosure. Promulgated in 2000, Reg FD, as it is commonly known, aims to ensure that when material, non-public information is first released beyond an issuer to investment professionals, it is made available to all market participants at the same exact time. In particular, Reg FD states that "[w]henever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this

[25] 103 S. Ct. 3255 (1983).

[26] *In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).

section, the issuer shall make public disclosure of that information . . . ."[27] The referenced paragraph (b)(1) of the rule then specifically includes any person outside the issuer who is a broker or dealer, or any person who is associated with a broker or dealer.[28]

To see the problem with prevailing views as to the limited scope of Section 10(b) and why Reg FD helps address it in ways that are relevant here, think about one specific requirement imposed by the former. Dating back to *Dirks*, the federal courts have generally held that tips of material, non-public information must be made in return for a "personal benefit," if those tips are to be illegal under Section 10(b). The end result is a major obstacle in the way of SEC and DOJ efforts to find sufficient evidence to stop much trading activity that is in fact illegal under Section 10(b). Just think about the evidence required to prosecute a case in which an issuer's material, non-public information is tipped from an investor relations employee to a sell-side analyst to a financial advisor to a client who ultimate trades on the information. In the real world, prosecutors may have little to work with when trying to prove the requisite personal benefits and knowledge thereof—even where they exist. This is especially so if honor reigns among thieves of confidential information.

Enter Reg FD. This SEC regulation doesn't care about personal benefits or other subtleties of insider-trading law under Section 10(b) or judicial interpretations of it. It only cares about something broader: stopping selective disclosure of material, non-public information by issuers to investment professionals who may trade on it or leak it out to the market unevenly. Thus, the SEC has long aimed to restrict the selective dissemination of material, non-public information in a broad, bright-lined way to prevent a larger amount of asymmetrically informed trading from occurring. And it has explicitly done so with an eye on stopping broker-dealers from receiving such information before the market as a whole receives it.

The Proposal makes clear that a Fund's current portfolio (which generally qualifies as material, non-public information) would be provided each trading day to AP Representatives *for the express purpose* of enabling the AP Representatives to trade on the information on behalf of their Authorized Participant clients. This in turn means that the selective disclosures here would allow the AP Representatives (and therefore their Authorized Participant clients) to trade the underlying portfolio of securities while

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[27] 17 C.F.R. § 243.100(a) (2017).

[28] 17 C.F.R. § 243.100(b)(1) (2017).

much of the market is not able to buy or sell the precise Fund holdings. On its face, the proposed arrangement thus violates the general rule of Reg FD. Or, in the words of the SEC in prior correspondence addressing a previous version of the Proposal:

> Selectively disclosing information to trustees of the blind trusts for the benefit of Authorized Participants, but not others, and allowing the Authorized Participants to continuously trade on that selective information, constitutes a major departure from this long-standing principle [of opposing selective disclosure]. A cure to selective disclosure is public disclosure.[29]

More generally, all of the concerns about the improper use of the portfolio holdings information discussed in Part I of this letter relating to insider trading dictate that the purpose of Reg FD is also frustrated by the selective disclosure at issue in the Proposal. Reg FD does not want material, non-public information unevenly distributed in the market. Yet, under the Proposal, a potentially large number of broker-dealers would be provided with daily access to Funds' confidential holdings—and would therefore have the means to trade on or leak such information in violation of Section 10(b) as discussed in Part I above. Given the wording of Reg FD and the SEC history relating to the same, it is safe to conclude that the regulation aims to avoid this situation altogether by broadly stopping the uneven dissemination of material, non-public information in the first place.

To be sure, Reg FD was not explicitly directed at registered open-end funds. But it does properly apply to ETFs, if not by Reg FD's stated terms, then by the listing exchange's requirement that an ETF must disclose material, non-public information in a Reg FD-compliant manner. When Reg FD was adopted, ETFs were in their infancy and actively managed ETFs did not exist. But the SEC's reasoning in adopting Reg FD applies fully to ETFs, and would certainly apply to the Funds. It is hard to imagine that the drafters of Reg FD would view the Proposal's intended use of selectively disclosed portfolio holdings information for trading purposes as falling outside the scope of what the regulation was intended to prevent.

Still, there may be ambiguity about the extent to which the strict letter of Reg FD would preclude the Funds' selective disclosure of portfolio holdings information at issue here. Under the Proposal, that information is provided to the AP Representatives under a confidentiality agreement. The AP Representatives, because of that

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[29] *See* SEC letter to W. John McGuire re Precidian ETFs Trust, et al.; File No. 812-14405 (Apr. 17, 2015).

confidentiality agreement, would be considered by the SEC to owe a duty of trust and confidence to the source of the information (the Funds).[30] It is for these reasons that AP Representatives would be precluded from using the disclosed information for their own trading or tipping purposes under Section 10(b) of the Exchange Act, at least outside of robotic brokering using external trading venues to execute accumulation and liquidation trades in Fund portfolio securities in connection with an AP's Creation Unit transactions.[31] But Reg FD has two interconnected explicit carve-outs that are relevant here. Reg FD excludes from its coverage "disclosure made: (i) to a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker, or accountant) [or] (ii) to a person who expressly agrees to maintain the disclosed information in confidence."[32] Notably, each recipient of the confidential information will of course be subject to Section 10(b) civil and/or criminal liability if they use the information to trade.

By their terms, these exclusions would appear to apply here. But these exclusions were not intended to help the flow of material, non-public information to trading desks—especially to trading desks that will use the disclosed information to trade. Rather, the exception in (i) was intended to cover the situation in which issuers give information to professional service providers who work temporarily inside the firm. In particular, as suggested by the list in the parenthetical contained under (i), these professional service provides come from the attorney, banker, and accountant ranks—not the broker-dealer ones. Those professionals may need access to an issuer's material, non-public information to engage in their work. So long as they stay away from trading on the information, they are thus in the clear under both Section 10(b) and Reg FD.

The exception in (ii) is admittedly there to protect an even broader array of information providers and recipients. But it is unlikely that the drafters of Reg FD meant to exempt external actors in the business of buying and selling securities[33] from the regulation under these exclusions so that they and their clients could trade with use of the confidential information while the rest of the market could not. Criminal liability might be enough to protect the SEC's concerns with respect to lawyers, bankers, and

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[30] *See* Exchange Act Rule 10b5-2. Courts too would find this duty under the common law and judicial understandings of these types of confidentiality agreements, but I focus on the SEC in the text.

[31] *See supra* Part I of this letter.

[32] *See* Reg FD, 17 CFR § 243.100((b)(2).

[33] *See supra* notes 3 and accompanying text (reciting the Exchange Act's definitions of "broker" and "dealer").

accountants. But it is unlikely that the drafters of Reg FD would want confidential information in the hands of professional traders so far ahead of when the information would be available to the public as a whole.

In the end, it is not completely clear how Reg FD would be applied to the proposed conduct. Reg FD can only be enforced by the SEC and DOJ. What position they would take on the extent to which the Proposal's selective disclosure comports with Reg FD is uncertain. Moreover, how courts would interpret the rule and the scope of its exemptions is likewise uncertain. What is clear, however, is that the selective disclosure proposed for Funds issuing Managed Portfolio Shares raises serious issues that go to the heart of both the letter of Reg FD as well as the SEC policy it seeks to further.

On a closely related note, it is, however, easy enough to see how the SEC would likely view the selective disclosure of the portfolio holdings information at issue. In 2004, the SEC adopted amendments to rules under the Securities Act of 1933 and the Investment Company Act of 1940 relating to selective disclosure by open-end funds. In an adopting release entitled "Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings," the Commission noted its concern with the selective release of portfolio holdings information by open-end funds. The SEC introduced its release by noting abuses relating to selective disclosure:

> Many of these abuses relate to 'market timing,' including the overriding of stated market timing policies by fund executives to benefit large investors at the expense of small investors, or to benefit the fund's investment adviser. Other abuses involve the selective disclosure by some fund managers of their funds' portfolio holdings in order to curry favor with large investors. This selective disclosure can facilitate fraud and have severe, adverse ramifications for a fund's investors if someone uses that portfolio information to trade against the fund, or otherwise uses the information in a way that would harm the fund."[34]

Moreover, in proposing these amendments to the public, the SEC stated:

> We are concerned about the misuse of material, non-public information that may occur when a mutual fund's portfolio

[34] Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, Release Nos. 33-8408; IC-26418 (Apr. 23, 2004) (footnotes omitted) at 22300.

> holdings are selectively disclosed and *professional traders* are given the opportunity to use this information to their advantage to the detriment of fund shareholders. For many issuers, Regulation FD generally requires that when an issuer discloses material information, it do so through public disclosure, not through selective disclosure. Regulation FD does not, however, apply to mutual funds. We have concluded that the recent allegations regarding selective disclosure of portfolio holdings by some mutual fund managers suggest that we need to take steps to reinforce funds' and advisers' obligations to prevent the misuse of portfolio holdings information that is selectively disclosed.[35]

These quotes show just how valuable the underlying information can be, and just how large the AP Representative incentives to use it for trading or tipping would therefore be. The following quote from the same SEC adopting release shows something more about the intended disclosure of confidential Fund holdings information to AP Representatives—namely, an inconsistency between the proposed selective information release, on the one hand, and both the letter and spirt of the law, on the other:

> Divulging nonpublic portfolio holdings to selected third parties is permissible only when the fund has legitimate business purposes for doing so and the recipients are subject to a duty of confidentiality, *including a duty not to trade on the nonpublic information*. Examples of instances in which selective disclosure of a fund's portfolio securities may be appropriate, subject to confidentiality agreements *and trading restrictions*, include disclosure for due diligence purposes to an investment adviser that is in merger or acquisition talks with the fund's current adviser, disclosure to a newly hired investment adviser or sub-adviser prior to commencing its duties, or disclosure to a rating agency for use in developing a rating.[36]

Notably, there is no SEC exemptive authority under Reg FD and related SEC rules governing selective disclosure by ETFs and other open-end funds. The same, of

[35] Investment Company Act Release No. 26287 (Dec. 1, 2003), 68 FR 70402 (Dec. 17, 2003) (emphasis added).

[36] Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, Release Nos. 33-8408; IC-26418 (Apr. 23, 2004) (footnotes omitted; emphases added) at 22306.

course, applies with respect to Section 10(b) and the SEC rules discussed in the initial part of this letter.

In sum, there are strong policy rationales for maintaining markets that prevent material, non-public information like that in focus in the Proposal from being released to selective audiences. When those selective audiences are broker-dealers that will use the information for the contemplated trading purposes and will have much incentive to use it in connection with their broader trading, those rationales apply with even greater force. Thus, the bright-line rule against tiered information release found in Reg FD, at a minimum, counsels against the SEC granting the requested rule change and exemptive relief to permit a new type of ETF whose very existence depends on selective disclosure of material, non-public information to broker-dealers. The exchange rules relating to selective disclosure by issuers of ETFs do the same. And the on-point guidance found in the open-end fund rules promulgated in 2004 shows that the Proposal's tiered information release contravenes the letter and intent of SEC prohibitions against selective disclosure.

III. Problems Relating to Best-Execution Law

Lastly, yet another problem triggered by the Proposal calls for additional SEC skepticism of the same. Securities law as a whole contains a variety of "best-execution requirements." These requirements are distinct from the prohibitions on certain types of insider trading and selective disclosure discussed in the previous two parts of this letter. But the best-execution requirements are also implicated by the Proposal's contemplated selective disclosure of material, non-public information to AP Representatives.

Two best-execution requirements are notable here. The first is found in FINRA Rule 5310, which states that "[i]n any transaction for or with a customer . . . a member and persons associated with a member shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions."[37] This rule generally applies to all broker-dealers,[38] including those serving as AP

[37] Finra Rule 5310(a)(1), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=10455.

[38] *See* Securities Exchange Act of 1934, § 15(b), Manner of Registration of Brokers and Dealers, 15 U.S.C. § 78o(b)(as amended 2012) (generally requiring brokers and dealers to registered with FINRA).

Representatives. As even just the explicit terms of the rule quoted above make clear, AP Representatives would be required to pursue execution of their Authorized Participant clients' orders to buy and sell the securities found in the portfolios at issue with an eye on achieving the best overall prices on the clients' behalf.

The second notable best-execution rule comes from state common law—specifically the common law relating to agency relationships. Securities brokers are agents, and they consequently owe certain duties to their clients, who are, of course, principals. Relevant here, courts have found brokers to owe their clients a duty of best execution as part of their duty of loyalty.[39] Although grounded in state common law, this duty imposes the same general requirements as the FINRA rule relating to execution prices for client orders. In fact, the FINRA rule is essentially a reflection of the self-regulatory agency's take on what the common law developed over the years, and on what its members should adhere to.

Each of these overlapping best-execution requirements is likely to be violated in the trading of a Fund's underlying securities by AP Representatives on behalf of their Authorized Participant clients. And these violations are likely to occur at far higher rates than those associated with more ordinary broker trading of public securities. This is because these best-execution laws don't work very well without sophisticated market participants, equipped with basic information, policing their agents. The basic information needed to police one's agents in this instance relates to the execution prices at which a trade took place and the operative market data at that time (namely, the identity of the securities being traded, the quantity in which they are being traded, and the prevailing market bid and ask prices (including information on quote depth)). Yet when it comes to trades made through AP Representatives in confidential accounts, all of this information is hidden from the client and instead only visible to the AP Representative. For example, in connection with an AP's redemption of a Creation Unit of a Fund's shares, the AP Representative would be tasked with selling an appropriate quantity of each of the securities then held in the Fund's portfolio and then sending

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[39] *See, e.g., In re Merrill Lynch*, 911 F. Supp 754, 760 (1995); *id.* at 769 ("A broker-dealer's duty to seek to obtain the best execution of customer orders derives from the common law agency of loyalty" (citations and quotation marks omitted)). The SEC has also recognized this duty. *See, e.g.,* MARKET 2000: AN EXAMINATION OF CURRENT EQUITY MARKET DEVELOPMENTS, DIVISION OF MARKET REGULATION OF THE SEC, STUDY V, at *5-6 (1994) (noting that "a broker-dealer has a duty to seek to obtain best execution for customer orders."). *See also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 115 F.3d 1127 (3d Cir. 1997); Order Execution Obligations, Final Rules, Exchange Act Release No. 34-37619A (Sept. 6, 1996), 61 FR 48290, 48322 (Sept. 12, 1996).

over to the Authorized Participant the proceeds of the sales. Here, the client will lack the information necessary to determine whether or not the sale of the underlying Fund securities took place in a way that provided the best available prices for them. After all, the client won't know the identity of the securities traded, and the AP Representative is bound to keep confidential the key information about the trades (including not just the securities names, but also the precise number of shares and what price was received (or paid)). Accordingly, the client would be problematically in the dark with respect to what was happening with its trades.

It follows that an AP Representative's incentive to execute its Authorized Participant clients' portfolio composition and decomposition trades in the manner that involves the greatest benefit to the AP Representative rather than at the best client prices is far worse than in normal broker trading. The AP Representative, knowing its Authorized Participant clients' inability to police best execution, has every incentive to act in a way that behooves it and not the client. Today's market provides many ways for this to be accomplished. For example, the AP Representative could route Authorized Participant client trades to take liquidity from the quotes at the trading venue that provides the highest taker rebate rather than the best execution prices. Or, it could route trades as aggressively priced non-marketable limit orders to the venues that provide the highest maker rebates—once against, rather than the best execution prices. Still yet, it could route trades to internal broker-dealer alternative trading systems (so-called "dark pools") to benefit the broker-dealers' firm at a cost to the client.[40] Indeed, the AP Representative could even simply route the trades to a trading platform that provides it with other sub rosa benefits—including better deals for its other trading business.

To be sure, all of these issues are relevant in everyday trading today. The perverse broker-dealer incentives relating to maker-taker fees are well known to the SEC (in particular, to the Division of Trading and Markets). So too are the examples where broker-dealers route client orders to their own trading platforms rather than outside ones with better overall execution potential. And sub-rosa payments on Wall Street are not new. What is important to see here is that, like with respect to insider-trading as well as the SEC rules prohibiting selective disclosure, the proposed trading by AP Representatives for their Authorized Participant clients on a confidential basis provides the former with more room to avoid the existing legal devices set out to stop problematic behavior—thereby taking away protections (here, basic transparency) that

[40] This approach likely presents a violation of Section 10(b) and Rule 10b-5. *See supra* note 17 and accompanying text.

might otherwise limit violations of the law. In the end, it becomes clear that the Proposal would likely trigger best-execution violations far more often than the same amount of ordinary trading does today.

Conclusion

In sum, the broad selective disclosure of material, non-public information that is part and parcel of the Proposal is problematic along each of the three dimension of securities law discussed above. Indeed, it constitutes a clear violation of SEC policies and long-established principles of law. I have supported these conclusions in some detail in this letter, focusing on how the selective disclosure implicates insider-trading law, specific law and SEC guidance on information releases, and best-execution requirements. But it helps to close by seeing things from a broader perspective. To do that, I ask the reader to engage in a brief thought experiment.

Imagine a world in which the Proposal could be implemented without the SEC granting exemptive relief. In that world, if a new actively managed ETF operating along the lines of the Proposal were brought to market, there is a strong chance that the issuer or its agents would become subject to civil and possibly criminal prosecutions, not for violating relevant law for which the SEC has exemptive authority, but for violating securities law for which there is no provision for exemption. The three above-described aspects of securities law might frame the core of those prosecutions, or regulators taking a deeper look at this trading might find yet additional problems not contemplated here. Whatever the precise contours of those actions, even a quick look at this letter should leave the reader with the impression that there would likely be such an action. There is, accordingly, as I have stated earlier, a legal minefield introduced by the Proposal. And the introduction of this minefield in and of itself should be enough to compel the SEC to deny the use of its exemptive power to allow the Proposal.

Overall, given the concerns about the trading performance of Managed Portfolio Shares that have been front and center in the SEC's disapproval of the Proposal to date, and given these additional concerns relating to the securities-law problems the Proposal triggers that I expand on in this letter, the SEC should deny applicants request for permission to list and trade Managed Portfolio Shares.

In closing, stepping back from the nuanced discussion in the body of this letter and brief thought experiment in the preceding paragraph, it becomes clear that the Proposal would likely lead to considerably more insider trading in violation of Section

10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, more selective disclosure of material, non-public information that is inconsistent with Reg FD and related SEC guidance for open-end funds, and more failures to meet FINRA and state common law best-execution requirements. At a broader level, using the Commission's exemptive power to open the door to proposed conduct that creates a legal minefield of this magnitude would be, at best, a strange use of that authority. In sum, the Proposal's use of tiered-information dissemination to cure its disclosure and pricing problems runs contrary to the thrust of key parts of modern federal securities law, as well as SEC policy over the course of at least the past few decades. For that reason alone, it should be denied. When the other concerns of the SEC and other commenters are factored in, the conclusion that the Proposal should be denied becomes even clearer.[41]

Sincerely,

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41 Although I have not focused on it in this letter, one has to worry about the unintended consequences of the SEC "endorsing" selective disclosure by permitting the selective-disclosure arrangement at the heart of the Proposal.