

Morgan Lewis

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September 21, 2021

Mr. Ted Yu, Chief
Mr. David Plattner, Special Counsel
Office of Mergers and Acquisitions
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-2000

Re: Request for Exemptive Relief from Rule 14e-5 under the Securities Exchange Act of 1934 for The Advisors' Inner Circle Fund

Dear Messrs. Yu and Plattner:

We are writing on behalf of The Advisors' Inner Circle Fund (the "Trust"). The Trust is a Massachusetts voluntary association (commonly known as a business trust) registered as an open-end management investment company under the Investment Company Act of 1940, as amended ("1940 Act"). The Trust requests exemptive relief under the Securities Exchange Act of 1934, as amended (the "Exchange Act") on behalf of itself, the following series of the Trust: Cambiar Opportunity- Large Cap ETF, Cambiar Small Cap ETF and Cambiar SMID ETF (each a "Fund" and together the "Funds") and Authorized Participants (defined below) and AP Representatives (defined below) that engage in transactions in shares of the Funds ("Shares"), from the provision of Rule 14e-5.¹ The Funds will operate as exchange traded funds ("ETFs"), in reliance on

¹ The Commission has previously provided exemptive relief involving actively managed ETFs seeking relief substantially identical to the relief being requested herein. See, e.g., Letter from Ted Yu to Morgan, Lewis & Bockius LLP regarding Precidian ETF Trust II Request for Exemptive Relief from Exchange Act Rule 14e-5, dated May 22, 2019; see also, Letter from Ted Yu to Ryan L. Blaine regarding American Century ETF Trust Request for Exemptive Relief from Exchange Act Rule 14e-5, dated January 21, 2020; see also, Letter from Ted Yu to Vadim Avdeychik regarding Gabelli ETFs Trust Request for Exemptive Relief from Exchange Act Rule 14e-5, dated January 14, 2021. In addition, we note that on September 26, 2019, the Commission announced the adoption of Rule 6c-11 (the "ETF Rule") under the 1940 Act. In connection with the ETF Rule, the Commission also issued an order granting exemptive relief to ETFs operating in reliance on the ETF Rule from the requirements of Section 11(d)(1) of the Exchange Act and Rules 10b-10, 15c1-5, 15c1-6 and 14e-5 under the Exchange Act, subject to certain conditions (the "Conditional Order"). However, because the Funds would operate as non-transparent ETFs, and among other things, would not provide daily portfolio transparency, they would not meet the conditions of the ETF Rule, and would not be entitled to rely on the Conditional Order. As noted in the Conditional Order, the Commission staff will continue to consider requests with respect to relevant Exchange Act provisions in connection with newly formed ETFs that do not rely on the ETF Rule or otherwise do not satisfy the conditions of the Conditional Order. As a result, the

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exemptive relief from the U.S. Securities and Exchange Commission (the "Commission"), and each Fund's Shares will be listed on a national securities exchange, as defined in Section 2(a)(26) of the 1940 Act, such as the New York Stock Exchange Arca, Cboe BZX, or Nasdaq (an "Exchange").

Each Fund will continuously issue and redeem Shares in specified aggregations (each aggregation of Shares, a "Creation Unit") at net asset value ("NAV").² Each Fund will issue and redeem Shares in Creation Units through a broker-dealer registered under the Exchange Act (the "Distributor") acting on an agency basis and serving as the Funds' "principal underwriter" as defined in Section 2(a)(29) of the 1940 Act. As described below, consistent with other ETFs, transactions in Creation Units for a Fund occur between the Trust and persons, referred to as "Authorized Participants," who create and redeem Shares in Creation Units pursuant to contractual arrangements pertaining to the Trust and the Fund.³ The Funds described herein operate in a manner similar to all other ETFs except, (1) the Funds will not disclose the identities and quantities of the securities and other assets held by a Fund (the "Portfolio Securities") that will form the basis for each Fund's calculation of NAV at the end of each Business Day;⁴ and (2) the creation and redemption process for each Fund will require that transactions be effected through a confidential brokerage account ("Confidential Account") with an agent, which will be a broker-dealer ("AP Representative"), for the benefit of an Authorized Participant.

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

Trust, on behalf of itself, the Funds, Authorized Participants and AP Representatives requests that the Commission and the Commission staff grant the requested relief from Rule 14e-5 under the Exchange Act.

² Redeemability of Creation Units is attributable to the fact that the Trust is an open-end management investment company. The term "open-end company" is defined in Section 5(a)(1) of the 1940 Act, as a management company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the 1940 Act defines a "redeemable security" as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent. Creation Units are redeemable at NAV. Shares, however, are not individually redeemable. The Trust, like other ETFs, will rely on exemptive relief obtained from the Commission permitting it, among other things, to register as an open-end management investment company notwithstanding that Shares are redeemable only in Creation Unit sizes. The relief addresses the possible question that arises as to whether the definitional requirements of a "redeemable security" or an "open-end company" under the 1940 Act have been met.

³ 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 Unlike other ETFs, which publish an indicative intraday value every 15 seconds throughout the trading day, each Fund will disseminate through the facilities of the Consolidated Tape Association a verified indicative intraday value every second throughout the trading day (the "VIIV").

tender offer, and therefore a “covered person,” as defined in Rule 14e-5(c)(3)(ii), subject to the Rule, the Rule’s restrictions could impede the ability of a Fund to operate as intended and as disclosed in publicly filed documents, which could be detrimental to investors.⁵

The Commission has previously issued relief substantially similar to that requested herein to other ETFs listed and traded on an Exchange that meet certain conditions.⁶ In addition, the Commission has previously issued relief similar to that requested herein to certain exchange-traded managed funds (“ETMFs”) listed and traded on an Exchange that meet certain conditions.⁷

I. The Funds

The investment adviser to the Trust will be Cambiar Investors, LLC (the “Adviser”) or an entity controlling, controlled by, or under common control with the Adviser. The Trust currently intends to offer the below Funds that would be subject to the requested relief:

A. Cambiar Opportunity-Large Cap ETF

Under normal circumstances, the Fund invests at least 80% of its net assets, plus any borrowings for investment purposes, in common stocks of large-cap companies. The Fund generally considers large-cap companies to be companies with a market capitalization in excess of \$10 billion at time of initial purchase.

B. Cambiar Small Cap ETF

Under normal circumstances, the Fund invests at least 80% of its net assets, plus any borrowings for investment purposes, in common stocks of small-cap companies. The Fund generally considers small-cap companies to be those with market capitalizations not greater than either that of the largest company in the Russell 2000® Value Index (\$13.4 billion as of December 31, 2020) or \$3.5 billion, whichever is greater at the time of initial purchase.

C. Cambiar SMID ETF

Under normal circumstances, the Fund invests at least 80% of its net assets, plus any borrowings for investment purposes, in common stocks of small- to mid-sized companies. The

⁵ Consistent with the applicable precedent (see notes 6 and 7, *infra*), the Trust is the party that is requesting relief from the Commission. Although there is no guarantee of future results, the Trust believes that the “in-kind” purchase and redemption features of ETFs help facilitate the close correspondence between an ETF’s NAV and market price to the benefit of the ETF and its shareholders. The Trust and its series, the Funds, therefore have a strong interest in, and are beneficiaries of, the requested relief as it helps ensure that market participants are able to effect creations and redemptions, thereby permitting the Funds to operate as intended. The Trust further believes that the arbitrage activity described below is facilitated when more market participants are able to participate in the purchase and redemption of Creation Units. Additionally, the Trust is seeking relief on behalf of itself and the Funds in the event that the Trust and/or a Fund is deemed to be a “covered person” under Rule 14e-5(c)(3)(iv), as discussed in Part III below.

⁶ See, e.g., Letter from Ted Yu to Schiff Hardin LLP regarding WisdomTree U.S. Quality Shareholder Yield Fund, dated February 6, 2018.

⁷ See, e.g., Letter from Ted Yu to Calvert Research and Management regarding Calvert Management Series, dated January 11, 2018.

Fund generally considers small- and mid-sized companies to be those with market capitalizations not greater than either that of the largest company in the Russell 2500[®] Value Index (\$32.7 billion as of December 31, 2020) or \$12 billion, whichever is greater at the time of initial purchase.

II. Fund Operations

A. Operational Differences Between the Funds and Existing ETFs

Over the last decade, the Commission has issued over 100 orders under the 1940 Act that involve actively managed ETFs.⁸ One condition to those orders, however, has been that, before commencement of trading on each Business Day, which is defined as any day the Fund is open, the ETF would disclose on its website the identities and quantities of all of the portfolio instruments held by the ETF that would form the basis for the ETF's calculation of its NAV at the end of that day. Applicants believe that many asset managers employing a variety of investment strategies are reluctant to utilize a traditional ETF format for fear that the daily disclosure of portfolio holdings could lead to front-running of an ETF's portfolio trades and allow other investors to replicate an ETF's portfolio positioning. Applicants believe that many managers would acknowledge that such disclosure of portfolio holdings and weightings may help facilitate the arbitrage process that permits the shares of an ETF to trade at market prices that are at or close to NAV,⁹ but that the managers at the same time are concerned that the NAV itself may be adversely affected.¹⁰ Applicants propose to offer Funds, known as "ActiveSharesSM ETFs," which are designed

⁸ See, e.g., Destra Exchange-Traded Fund Trust, *et al.*, Investment Company Act Release Nos. 33049 (March 14, 2018) (notice) and 33069 (April 10, 2018) (order); Nationwide Fund Advisors and ETF Series Solutions, Investment Company Act Release Nos. 33042 (March 8, 2018) (notice) and 33065 (April 3, 2018) (order); Little Harbor Advisors, LLC and ETF Series Solutions, Investment Company Act Release Nos. 33035 (February 26, 2018) (notice) and 33057 (March 26, 2018) (order); Barclays Global Fund Advisors, *et al.*, Investment Company Act Release Nos. 28146 (February 6, 2008) (notice) and 28173 (February 27, 2008) (order); Bear Stearns Asset Management, Inc., *et al.*, Investment Company Act Release Nos. 28143 (February 6, 2008) (notice) and 28172 (February 27, 2008) (order); PowerShares Capital Management LLC, *et al.*, Investment Company Act Release Nos. 28140 (February 1, 2008) (notice) and 28171 (February 27, 2008) (order); and WisdomTree Trust, *et al.*, Investment Company Act Release Nos. 28147 (February 6, 2008) (notice) and 28174 (February 27, 2008) (order).

⁹ See Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Nancy M. Morris, Secretary, SEC, regarding Investment Company Act Release No. 28193 (Proposed ETF Rule) (May 19, 2008) (describing the connection between portfolio transparency and arbitrage).

¹⁰ See Ananth N. Madhavan, *EXCHANGE-TRADED FUNDS AND THE NEW DYNAMICS OF INVESTING* § 14.4.1 (2016 Oxford University Press) ("Trading ahead could increase the fund's transaction costs and erode its alpha."). See also Letter from Christopher P. Wilcox, Chief Executive Officer, J.P. Morgan Asset Management, to David W. Grim, Director, Division of Investment Management, SEC, (July 7, 2017) regarding Securities Exchange Act Release No. 80553 (April 28, 2017), 82 FR 20932 ("Daily portfolio disclosure presents two potential risks for active strategies that could negatively impact both investors and managers: (1) Market participants may use daily portfolio information to predict and "front run" managers' future trades, thereby decreasing investors' realized returns. (2) A manager's ability to sustainably generate excess returns ("alpha") could be diminished if proprietary market insights and trading strategies are reconstructed and potentially replicated by others ("free-riding")."); Vanguard (2014) Meeting with the US Securities and Exchange Commission on January 29, 2014 to discuss portfolio transparency and basket composition requirements in potential Commission rulemakings regarding exchange-traded funds. <https://www.sec.gov/comments/s7-07->

to provide an arbitrage mechanism that ensures the Shares will trade at market prices that are at or close to the NAV per Share of the Fund without disclosing the Fund's portfolio each day.

The arbitrage mechanism contemplates each Fund providing a VIIV, calculated every second throughout the trading day, that will permit investors to know the underlying value of a Share throughout the day. This VIIV will be equally available to, and easily usable by, all market participants. The VIIV will, when compared to a market price, permit retail investors to easily make an informed decision when considering whether and/or when to purchase or sell Shares. The VIIV, when combined with the ability to create and redeem shares using a Creation Basket (defined below) that is a pro rata slice of a Fund's portfolio, will also provide arbitrageurs with the information and ability to take advantage of any slight premium or discount in the market price of Shares, which should, as with existing ETFs, ensure that the Shares will trade at a market price at or close to the NAV per Share of the Fund.

As described more fully below, to protect the identity and weighting of its Creation Basket (defined below) and Portfolio Securities, the creation and redemption process for each Fund will require that transactions be effected through a Confidential Account with an AP Representative, for the benefit of an Authorized Participant. Each AP Representative will be given, before the commencement of trading each Business Day, the Creation Basket (defined below). This information will permit the AP Representative to buy and sell positions in the Portfolio Securities to permit creations or redemptions upon receiving a corresponding instruction from an Authorized Participant, without disclosing the information to the Authorized Participant.

B. Sales and Redemptions of Creation Units

Subject to limited exceptions, Creation Units of a Fund will be purchased by the AP Representative, as an agent of the Authorized Participant, by making a deposit of the instruments specified by the Fund for making a purchase ("Creation Basket"), and Authorized Participants redeeming Creation Units will, through its AP Representative,¹¹ receive a transfer of instruments specified by the Fund for meeting a redemption ("Redemption Basket").¹² On any given business day, the names and quantities of the instruments that constitute the Creation Basket and the names and quantities of the instruments that constitute the Redemption Basket will correspond pro rata to the positions in the Fund's portfolio and, thus, will be identical (referred to herein as the "Basket"). The Basket may include cash, securities and/or other transferable investment assets. 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.

As described above, to preserve the confidentiality of the Funds' trading activities, Authorized Participants will establish and maintain, a Confidential Account with an AP Representative for the benefit of the Authorized Participants, in order to engage in in-kind creation

[08/s70708-27.pdf](#). Here Vanguard argued that "front running by professional traders" hurts ETF performance.

¹¹ The AP Representative will receive securities in kind from a Fund, liquidate those securities the same day, and provide the resulting proceeds to the Authorized Participant.

¹² Terms and provisions governing sales and redemptions of Shares by a Fund are set forth in the applicable prospectus and statement of additional information; the application for the 1940 Act exemptive relief; and the Trust's Declaration of Trust.

and redemption activity. Each day, the custodian to a Fund will transmit the composition of the Fund's Basket to each AP Representative. Pursuant to a contract (the "Confidential Account Agreement"), the AP Representative will be restricted from disclosing the identity of the securities in the Basket of a Fund. In addition, the AP Representative will undertake an obligation not to use the identity of the securities in the Basket for any purpose other than executing creations and redemptions for facilitating the operations of a Fund. The Confidential Account will enable the Authorized Participant to transact in the underlying securities of the Basket through their AP Representative, enabling them to engage in in-kind creation or redemption activity without knowing the identity of those securities. Acting on execution instructions from an Authorized Participant, the AP Representative may purchase or sell the securities in the Basket for purposes of effecting in-kind creation and redemption activity during the day. Authorized Participants are responsible for all order instructions and associated profit and loss.

For reporting purposes, the books and records of the Confidential Account will be maintained by the AP Representative and provided to the appropriate regulatory agency as required. The Authorized Participant will instruct the AP Representative when to liquidate the Confidential Account, so that the account holds no securities positions at the end of day. The Confidential Account Agreement, like any account agreement, will be negotiated between the parties and should be similar in cost to other brokerage arrangements.

C. Information Available to Investors

In lieu of daily portfolio transparency, the Funds will disclose other data to the marketplace designed to provide adequate information to market participants to permit an arbitrage mechanism that will keep the trading price of the Shares at or close to their NAV per Share.¹³ The Exchange on which a Fund is primarily listed will disseminate the VIIV for each Fund in one-second intervals during regular trading hours, through the facilities of the Consolidated Tape Association. The VIIV functions as an intraday indicative NAV calculation that is made every second throughout the trading day. Each Fund will adopt procedures governing the calculation and dissemination of the VIIV and each Fund's Adviser will bear responsibility for the oversight of that process ("VIIV Procedures"). Each Fund's Adviser will also, as part of that oversight process, periodically, but no less than annually, review the VIIV Procedures. Any changes to the procedures will be submitted to the Board for review. As described above, the specific methodology for calculating the VIIV will be disclosed on each Fund's web site.

Pursuant to the VIIV Procedures, the VIIV will be calculated to the nearest penny by dividing the "Intraday Fund Value" as of the time of the calculation by the number of total Shares outstanding. Intraday Fund Value is the sum of the Fund's assets (e.g., the amount of cash and cash equivalents held in a Fund's portfolio, the current value of the securities positions in the Fund's portfolio, plus any accrued interest, and declared but unpaid dividends) minus all accrued liabilities. All Portfolio Securities will be valued throughout the trading day at the mid-point between the current national best bid and national best offer as disseminated by the Consolidated Quotation System or UTP Plan Securities Information Processor.

¹³ Arbitrageurs are expected to stand ready to take advantage of any slight premium or discount in the market price of Shares on the applicable Exchange versus the cost of depositing securities and creating a Creation Unit to be broken down into individual Shares.

Applicants acknowledge that, if the bid/ask spread on a security is significant, the mid-point may not accurately reflect the price at which the security could be bought or sold, which may cause the VIIV to deviate from the actual purchase or sale price of a Fund's underlying Portfolio Securities. In light of this possibility, the Adviser will monitor the bid and ask quotations for any portfolio security and, if the Adviser determines pursuant to the VIIV Procedures that the current quotations for a portfolio security are no longer reliable for purposes of calculating the VIIV, which could be the situation when, for example, an Exchange institutes an extended trading halt in a portfolio security, that fact, along with the identity and weighting of that security in the Fund's VIIV calculation, will be publicly disclosed on a Fund's web site. Only in such rare circumstances would a security currently contained in a Fund's Basket be publically disclosed.

D. Portfolio Holdings Disclosure

The Funds will not disclose their Portfolio Securities on a daily basis. Instead, the Funds will disclose their Portfolio Securities only at periodic intervals, and with a lag. The Funds will disclose their Portfolio Securities in full at least once quarterly, with a lag of not more than 60 days, in compliance with the requirements applicable to open-end investment companies.

E. Pricing of Shares

The secondary market price of Shares trading on an Exchange will be based on a current bid/ask market. The secondary market price of Shares of any Fund, like the price of all traded securities, is subject to factors such as supply and demand, in addition to the current VIIV. Shares available for purchase or sale on an intraday basis on an Exchange, do not have a fixed relationship to the previous day's NAV per Share or the current day's NAV per Share. Therefore, prices on an Exchange may be below, at, or above the most recently calculated NAV per Share of such Shares. The price at which Shares trade will be impacted by arbitrage opportunities created by the ability to purchase or redeem Creation Units at the current NAV per Share, which is designed to ensure that Shares will trade at a market price at or close to the NAV per Share of the Fund. Applicants believe that, because Authorized Participants and other market participants will have access to necessary information that will enable them to determine when a Fund is trading at a price materially different from the current NAV per Share, Shares will trade at a market price at or close to the NAV per Share of the Fund.

No secondary sales will be made to broker-dealers at a concession by the Distributor or by a Fund. Transactions involving the sale of Shares on an Exchange will be subject to applicable customary brokerage fees or commissions and charges.

III. Legal Analysis Under Rule 14e-5

Rule 14e-5 was originally promulgated as Rule 10b-13 under the Exchange Act to safeguard the interests of persons who sell their securities in response to a tender offer.¹⁴ Rule 14e-5 prohibits a "covered person" from directly or indirectly purchasing or arranging to purchase

¹⁴ Exchange Act Rel. No. 8712 (October 8, 1969) (the "1969 Adopting Release"). In this regard, the 1969 Adopting Release noted that "[w]hen securities are purchased for a consideration greater than that of the tender offer price, this operates to the disadvantage of the security holders who have already deposited their securities and who are unable to withdraw them in order to obtain the advantage of possible resulting higher market prices."

any equity securities that are the subject of a tender offer ("subject securities") or any securities immediately convertible into, exchangeable for, or exercisable for subject securities ("related securities") except as part of such tender offer. The term "covered person" includes, among others, a dealer-manager of a tender offer. The fact that most Authorized Participants are broker-dealers implicates Rule 14e-5 because the term "covered person" includes a dealer-manager of a tender offer. The term "covered person" also includes any person acting, directly or indirectly, in concert with other covered persons in connection with any purchase or arrangement to purchase any subject securities or any related securities. Therefore, the Trust also is seeking relief on behalf of itself and the Funds in the event that the Trust and/or a Fund is deemed to be a "covered person" under Rule 14e-5(c)(3)(iv), by virtue of the Participant Agreements pertaining to the Trust and the Funds. Likewise, the Trust is also seeking relief solely in the event that an AP Representative may be deemed a "covered person" by virtue of acting as an agent for the Authorized Participant in the purchase or redemption of a Creation Unit.

In order to address situations in which an Authorized Participant acts as a dealer manager of a tender offer, and a subject security or a related security is part of a group of securities that is received by a Fund when it issues a Creation Unit or part of a group of securities that a Fund distributes when it redeems a Creation Unit (i.e., the Basket), the Trust respectfully requests that the Commission grant an exemption from Rule 14e-5 as it applies to such Authorized Participants and their AP Representatives. The exemption would permit any such Authorized Participant to execute transactions through an AP Representative, and permit the AP Representative to execute such transactions on behalf of the Authorized Participant, that include, or are deemed to include, purchases of, or arrangements to purchase, subject securities or related securities, but that are not effected for the purposes of facilitating a tender offer and that are conducted in the ordinary course of business (in each case, from the time of the public announcement of the tender offer until the tender offer expires). For purposes of this exemptive relief, an Authorized Participant's ordinary course of business includes: (1) redeeming Shares of a Fund in Creation Unit size aggregations for instruments in the Basket, through its Confidential Account with an AP Representative, that may include a subject security or a related security; and (2) engaging in secondary market transactions in Shares. With respect to redemptions, the Trust notes that the Authorized Participant will have no knowledge of what Portfolio Securities are held by a Fund, so as a practical matter could not utilize the redemption process as a way to acquire individual securities held by the Fund. Further, even if the Authorized Participant had some idea what securities might be held by a Fund, such acquisition of individual securities by means of redemptions of Shares would be impractical and extremely inefficient in view of the relatively small number of shares of any one security included in a Basket and the requirement that a minimum number of Shares (i.e., a Creation Unit) be redeemed. Redemptions of and secondary market transactions in Shares under the circumstances described would not appear to result in the abuses at which Rule 14e-5 is directed.

In addition to the above request for relief, the Trust also is requesting exemptive relief in connection with purchases of Creation Units of Shares by an Authorized Participant acting as a dealer-manager of a tender offer. In this regard, in connection with purchasing Creation Units pursuant to the terms of its Participant Agreement, an Authorized Participant, acting through an AP Representative, may seek to purchase in the secondary market securities comprising a Basket that includes, with respect to a tender offer for which it acts as a dealer-manager, subject securities or related securities. However, because the securities comprising a Basket would be unknown to the Authorized Participant, the Authorized Participant could not know that the Basket contained subject securities or related securities. Even if the Authorized Participant had some idea what securities

might be held by a Fund, and thus in the Basket, the Trust notes that Rule 14e-5(b)(5) provides an exception to its prohibition for purchases or arrangements to purchase a basket of securities containing a subject security or a related security if: (i) the purchase or arrangement is made in the ordinary course of business and not to facilitate the tender offer; (ii) the basket contains 20 or more securities; and (iii) covered securities and related securities do not comprise more than 5% of the value of the basket (the "Basket Exception").

As indicated by the Commission in the release replacing former Rule 10b-13 with Rule 14e-5,¹⁵ transactions in baskets in accordance with the Basket Exception provide little opportunity for a covered person to facilitate an offer or for a security holder to exact a premium from the offeror.¹⁶ Given that the purchases and redemptions of Creation Units of the Funds in general involve baskets of securities, Authorized Participants acting as dealer-managers of tender offers for relevant securities should, in certain cases, be able to rely on the Basket Exception in purchasing Creation Units of Shares. However, because the Authorized Participant will not know the identity or number of the Portfolio Securities of a Fund, the Authorized Participant will not know if it can rely on the Basket Exception.¹⁷

In order to address situations where the Basket contains less than 20 securities and/or covered securities and related securities comprise more than 5% of the value of the Basket, the Trust respectfully requests that the Commission provide an exemption under Rule 14e-5 if an Authorized Participant acting as a dealer-manager of a tender offer purchases or arranges to purchase, through an AP Representative, subject securities or related securities in the secondary market for the purpose of transferring such securities to purchase one or more Creation Units of Shares, if (1) such purchases are not effected for the purpose of facilitating such tender offer and (2) are made in the ordinary course of business. Relief would be necessary in order to permit such Authorized Participants to effect purchases of subject and related securities under such circumstances given that the Basket Exception would not be available. This extension of the Basket Exception would accommodate a potential factual circumstance associated with the operation of the Funds and would be consistent with the rationale underlying the adoption of the Basket Exception. The Trust notes, in particular, that the Authorized Participant would not know if a Basket contained subject securities or related securities and purchases would not be effected for the purpose of facilitating a tender offer.¹⁸

Similarly, to the extent that an AP Representative is deemed a covered person because it is acting as the agent for an Authorized Participant for the purchase or redemption of a Creation Unit, the same rationale applicable to the Authorized Participant would also be true for the AP Representative. While the AP Representative would know the composition of the securities in a

¹⁵ Exchange Act Release No. 42055 (October 22, 1999) (the "1999 Release").

¹⁶ As discussed in the 1999 Release, "facilitation of an offer" includes purchases intended to bid up the market price of the covered or related security, and includes buying a basket to strip out the covered security in an effort to get the offeror the number of shares it is seeking. In this regard, the Trust believes that it would be inefficient to facilitate a tender offer in a particular security by means of purchasing all of the securities in a Basket.

¹⁷ The AP Representative, however, will know if a Basket contains less than 20 securities, and may know if covered securities and related securities comprise more than 5% of the value of the Basket. Nonetheless, the AP Representative is prohibited from disclosing any information about the constituents of the Basket to the Authorized Participant.

¹⁸ See *supra* note 15.

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Fund's Basket, any transaction on behalf of an Authorized Participant would be done solely at the specific request of the Authorized Participant. Further, in the context of a redemption, the exemption would permit any such AP Representative to execute transactions as an agent for an Authorized Participant that include, or are deemed to include, purchases of, or arrangements to purchase, subject securities or related securities, but that are not effected for the purposes of facilitating a tender offer and that are conducted in the ordinary course of business (in each case, from the time of the public announcement of the tender offer until the tender offer expires). In this regard, an AP Representative's ordinary course of business includes redeeming Shares of a Fund in Creation Unit size aggregations, on behalf of an Authorized Participant, for instruments in the Basket that may include a subject security or a related security. With respect to redemptions, as discussed above with regard to Authorized Participants, the acquisition of individual securities held by a Fund by means of redemptions of Shares is equally impractical and extremely inefficient whether being done directly by an Authorized Participant, or through an AP Representative acting as its agent. Further, an Authorized Participant would not know that any particular subject security or related security is being acquired. Redemptions of Shares under the circumstances described would not appear to result in the abuses at which Rule 14e-5 is directed.

In the case of purchases of Creation Units, if such purchases are not effected for the purpose of facilitating such a tender offer and are made in the ordinary course of business, and given that an Authorized Participant directing the purchase will not know the identity of the securities it is purchasing, the fact that they are being done on an agency basis by an AP Representative provides no greater likelihood of the abuses at which Rule 14e-5 is directed.

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

IV. Conclusion

Based on the foregoing, the Trust, on behalf of itself, the Funds, Authorized Participants and AP Representatives, respectfully requests that the Commission and the Commission staff grant the requested relief from Rule 14e-5 under the Exchange Act requested herein in connection with the purchase of, and arrangements to purchase, subject securities and related securities outside of a tender offer. The form of relief requested is substantially similar to those actions that the Commission and the Commission staff have taken in similar circumstances for other ETFs and for ETMFs. If the Commission or the Commission staff believes that a different format is appropriate (for example, a no-action position rather than an exemption), we would appreciate the opportunity to revise this request for relief accordingly. Should you have any questions please call me at (215) 963-5862.

Sincerely,



David W. Freese