

November 1, 2018

Josephine J. Tao  
Assistant Director  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

**Re:** Request of Amplify ETF Trust for Exemptive, Interpretive and/or No-Action Relief from Rule 10b-17 and Rules 101 and 102 of Regulation M promulgated under the Securities Exchange Act of 1934 for an Index-Based ETF

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Dear Ms. Tao:

**SUMMARY OF REQUEST FOR RELIEF**

I am writing on behalf of Amplify ETF Trust (the “Trust”), an open-end management investment company registered under the Investment Company Act of 1940, as amended (the “1940 Act”), with respect to the Amplify BlackSwan Growth & Treasury Core ETF (the “Fund”), a series of the Trust.

The Trust, on behalf of itself, the Fund, or any national securities exchange on or through which shares of the Fund (“Shares”)<sup>1</sup> are listed (each, a “Listing Exchange”) and/or may subsequently trade (with each such market referred to herein as a “Market”)<sup>2</sup>, Quasar Distributors LLC (the “Distributor”) and other persons or entities engaging in transactions in Shares, including APs (as defined below), hereby requests, as applicable, from the staff of the Division of Trading and Markets (the “Staff”) of the Securities and Exchange Commission (the “Commission”), or

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<sup>1</sup> The Trust intends to list the Shares of the Fund described herein on NYSE Arca, Inc. (“NYSE Arca”). The Securities and Exchange Commission has issued an order approving the listing and trading of Shares on NYSE Arca. See Securities Exchange Act Release Nos. 84348 (October 3, 2018), 83 FR 51027 (October 10, 2018) (order) and 83845 (August 14, 2018), 83 FR 42188 (August 20, 2018) (notice) (“Notice”).

<sup>2</sup> In the future, the Trust may determine to list Shares on a Market other than the Listing Exchange. If the Trust lists Shares on a Market other than the Listing Exchange, Shares will be listed in accordance with exchange listing standards that are, or will become, effective pursuant to Section 19(b) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). If the Shares also trade on a Market pursuant to unlisted trading privileges, such trading will be conducted pursuant to self-regulatory organization rules that have become effective pursuant to Section 19(b) of the Exchange Act.

from the Commission, exemptions, interpretive advice or no-action advice, as applicable, regarding Rule 10b-17, and Rules 101 and 102 of Regulation M, under the Exchange Act.

The Trust will issue Shares of the Fund. The Fund is an exchange-traded fund (“ETF”) organized as a series of the Trust. The Fund will seek to track the performance of an underlying index developed by S-Network Global Indexes, Inc. (the “Index Provider”).

The Commission and its Staff have previously issued class exemptive relief similar to that requested herein to index-based ETFs listed and traded on a national securities exchange that meet certain conditions.<sup>3</sup> The Fund is an index-based ETF and thus could rely on such prior relief if it met the conditions precedent to such relief. However, as discussed further below, in light of the nature of the Underlying Index (defined below), which includes predominantly U.S. Treasury securities, but also U.S. exchange-traded options contracts, the Fund will not meet certain conditions set forth in the Fixed Income ETF Class Relief Letter. However, in all material respects, the Fund will operate in the same manner as other index-based ETFs. The Trust does not believe that the Fund raises any significant new regulatory issues that have not already been addressed by the Commission and Staff.<sup>4</sup>

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<sup>3</sup> See Letter from James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to Claire P. McGrath, Esq., Vice President and Special Counsel, The American Stock Exchange, dated August 17, 2001 (re: exemptive relief for exchange-traded index funds) (“2001 Class Letter”); Letter from James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated January 3, 2005 (re: no-action relief from Rule 200(g) of Regulation SHO); Letter from Catherine McGuire, Esq., Chief Counsel, Division of Market Regulation, to the Securities Industry Association Derivative Products Committee, dated November 21, 2005 (re: expanded class relief for ETFs with respect to Section 11(d)(1) of the Exchange Act and Rules 10b-10, 11d1-2, 15c1-5, and 15c1-6 under the Exchange Act) (“SIA Letter”); Letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Stuart M. Strauss, Esq., Clifford Chance US LLP, dated October 24, 2006 (re: ETFs comprised of equity securities and incorporating relief from certain prior letters) (“Equity ETF Class Relief Letter”); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Benjamin Haskin, Esq., Willkie, Farr & Gallagher LLP, dated April 9, 2007 (re: ETFs comprised of fixed income securities and incorporating relief from certain prior letters) (“Fixed Income ETF Class Relief Letter”); Letter from Brian A. Bussey, Assistant Chief Counsel, Division of Market Regulation, to W. Thomas Conner, Esq. and Eric C. Freed, Esq., Sutherland Asbill & Brennan LLP, dated June 29, 2007 (re: request of Ameristock ETF Trust in connection with certain ETFs tracking an underlying fixed income securities index comprised of a limited number of U.S. Treasury securities) (“Ameristock Letter”); and Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to Domenick Pugliese, Esq., Paul, Hastings, Janofsky and Walker LLP, dated June 27, 2007 (re: ETFs that are comprised of both equity and fixed-income securities) (“Combination ETF Class Relief Letter”) (collectively, “ETF Class Relief” or “ETF Class Relief Letters”).

<sup>4</sup> The fixed income portion of the Underlying Index will meet the conditions of the Fixed Income ETF Class Relief Letter. In addition, the Commission and its Staff have previously issued exemptive relief to certain ETFs tracking indexes that included exchange-listed options as components. See, e.g., Securities Exchange Act Release Nos. 81942 (October 25, 2017) (re: WisdomTree CBOE Russell 2000 PutWrite Strategy Fund)

The Trust hereby requests, as applicable, exemptions, interpretive or no-action advice regarding Rule 10b-17, and Rules 101 and 102 of Regulation M, under the Exchange Act.

This Letter is divided into five parts. Part I is a description of the Fund and its underlying index. Part II contains a discussion of the availability of certain relevant information. Part III contains a discussion of the Fixed Income ETF Class Relief Letter and the WisdomTree Relief. Part IV contains the requests for relief and Part V is the conclusion.

## PART I

### A. The Fund, Its Investment Objective and Underlying Index

The Fund will seek investment results that generally correspond (before fees and expenses) to the price and yield of the S-Network BlackSwan Core Total Return Index (the “*Underlying Index*”). Amplify Investments LLC (the “*Advisor*”) will act as investment adviser to the Fund and CSAT Investment Advisory, L.P., d/b/a Exponential ETFs and ARG Investment Services, LLC (the “*Sub-Advisors*”) will act as investment sub-advisers to the Fund. Under normal market conditions,<sup>5</sup> the Fund will invest at least 80%<sup>6</sup> of its total assets in the securities that comprise the Underlying Index, which will include U.S. Treasury securities and long-dated call options

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and 77173 (February 18, 2016) (re: WisdomTree Put Write Strategy Fund) (collectively, the “*WisdomTree Relief*”).

<sup>5</sup> The term “under normal market conditions” includes, but is not limited to, the absence of trading halts in the applicable financial markets generally; operational issues (e.g., systems failure) causing dissemination of inaccurate market information; or force majeure type events, such as natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

<sup>6</sup> As disclosed in the prospectus, the Fund may invest the remainder of its assets in cash equivalents or it may hold cash. The percentage of the Fund invested in such holdings will vary and will depend on several factors, including market conditions.

# Chapman and Cutler LLP

November 1, 2018

Page 4

(“LEAPS”)<sup>7</sup> on the SPDR S&P 500 ETF Trust (“SPY”).<sup>8</sup> (These options are referred to herein as “SPY LEAPS”).

The Underlying Index is a rules-based, quantitative index that seeks to provide capital protection against the unpredictable, rare and highly disruptive events that have come to be referred to as “Black Swans.” The Underlying Index endeavors to provide investment returns that correspond to those of the S&P 500 Index, while mitigating against significant losses. One portion of the Underlying Index is a portfolio of U.S. Treasury securities and the other is a portfolio of SPY LEAPS. Twice a year, in June and December, on the index reconstitution and rebalance date, the Underlying Index places 90% of its index market capitalization in the portfolio of U.S. Treasury securities and 10% of its index market capitalization in the portfolio of SPY LEAPS.<sup>9</sup>

The Shares are expected to be listed on NYSE Arca and will trade at market prices that may differ to some degree from the net asset value (“NAV”) of the Shares. Unlike conventional mutual funds, as described further below, the Fund will issue and redeem Shares on a continuous basis, at NAV, only in large specified blocks of 50,000 Shares, each of which is called a “Creation Unit.”

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<sup>7</sup> Long-term Equity Anticipation Securities<sup>SM</sup> (“LEAPS<sup>®</sup>”) are long-term exchange-traded call options. Call options allow holders the opportunity to participate in the underlying securities’ appreciation in excess of a specified strike price without receiving payments equivalent to any cash dividends declared on the underlying securities. A holder of a LEAPS will be entitled to receive a specified number of shares of the underlying stock upon payment of the strike price, and therefore the LEAPS will be exercisable when the price of the underlying stock is above the strike price. However, if at expiration the price of the underlying stock is at or below the strike price, the LEAPS will expire and be worthless. LEAPS are traded on U.S. options exchanges.

<sup>8</sup> Regardless of the representation that the Fund generally will invest at least 80% of its net assets in the securities that comprise the underlying index, the Fund will seek to have a tracking error of less than five percent measured on a monthly basis over a one-year period.

<sup>9</sup> SPY LEAPS are highly liquid and derive their value from the actively traded S&P 500 Index components. The contracts are cash settled and trade in competitive auction markets with price and quote transparency. As of August 9, 2018, open interest in SPY LEAPS was 1,072,869 contracts. In addition, options on SPY have the highest liquidity among all exchange-traded fund options, with open interest far in excess of other ETFs in option market liquidity. As of June 19, 2018, open interest on SPY options contracts was 17,771,528, whereas the next highest ETF options were iShares MSCI Emerging Markets ETF (EEM) and PowerShares QQQ Trust (QQQ) at 6,635,087 and 6,488,055, respectively. Source: Bloomberg.

# Chapman and Cutler LLP

November 1, 2018

Page 5

## B. The Advisor, Sub-Advisors, Distributor and APs

### 1. Advisor and Sub-Advisors

The Advisor will act as the Fund's investment adviser pursuant to an investment advisory agreement with the Trust, on behalf of the Fund (the "*Advisory Agreement*"). The Advisor, located at 310 South Hale Street, Wheaton, Illinois 60187, is registered with the Commission as an investment adviser. Pursuant to the Advisory Agreement, the Advisor will manage the investment and reinvestment of the Fund's assets and administer the affairs of the Fund to the extent requested by, and subject to the supervision of, the Board of Trustees of the Trust (the "*Board*"). The Advisor has retained the Sub-Advisors, which have overall responsibility for selecting and continuously monitoring the Fund's investments.

### 2. Distributor and APs

The Board has appointed the Distributor, a broker-dealer registered under the Exchange Act and a member of the Financial Industry Regulatory Authority, Inc. ("*FINRA*"), to act as the distributor and principal underwriter of the Creation Units of Shares. The Distributor will distribute Shares on an agency basis. The Board may appoint a different distributor in the future. Entities that have entered into an agreement (an "*AP Agreement*") with the Distributor to become "authorized participants" ("*APs*") may place orders with the Distributor to purchase or redeem Creation Units, as described below.

## C. Shares

As described in subparts I.D. through I.F. below, the Fund will issue and redeem its Shares in Creation Units. Shares will not be individually redeemable. The Trust intends that the initial NAV of Shares will be established at a level convenient for trading purposes. Purchasers of Creation Units will be able to unbundle the Creation Units into the individual Shares comprising such Creation Unit.

## D. Purchasing Shares

The Trust will issue Shares at NAV only in Creation Units. Creation Unit transactions to purchase Shares will typically be conducted in exchange for the deposit or delivery of an in-kind basket of securities in which the Fund invests and/or cash. Currently, the Fund generally intends to effect creations for cash, rather than in-kind securities.

Individual Shares of the Fund may only be purchased and sold in secondary market transactions through brokers. Shares of the Fund are expected to be listed for trading on NYSE Arca and, because Shares will trade at market prices rather than NAV, Shares of the Fund may trade at a price greater than or less than NAV.

*E. Procedures Applicable to Purchases of the Fund*

As noted above, currently the Fund generally expects to effect creations for cash. However, the consideration for purchase of Creation Units of the Fund may consist of (i) a designated portfolio of securities and other assets (the “*Deposit Instruments*”) per each Creation Unit and/or (ii) cash in lieu of all or a portion of the Deposit Instruments together with, in each case, an amount of cash—the “*Deposit Balancing Amount*”—computed as described below. Together, the Deposit Instruments (including any cash with respect to cash purchases and cash in lieu amounts) and the Deposit Balancing Amount constitute the “*Fund Deposit*,” which represents the minimum initial and subsequent investment amount for a Creation Unit of the Fund.

The Deposit Balancing Amount serves the function of compensating for any differences between the NAV per Creation Unit and the Deposit Amount (as defined below). The Deposit Balancing Amount is an amount equal to the difference between the NAV of Shares (per Creation Unit) and the market value of the Deposit Instruments and/or cash in lieu of all or a portion of the Deposit Instruments (the “*Deposit Amount*”). If the Deposit Balancing Amount is a positive number (*i.e.*, the NAV per Creation Unit exceeds the Deposit Amount), the creator will deliver the Deposit Balancing Amount. If the Deposit Balancing Amount is a negative number (*i.e.*, the NAV per Creation Unit is less than the Deposit Amount), the creator will receive the Deposit Balancing Amount.

Each business day, before the open of trading on the Listing Exchange (currently 9:30 a.m., Eastern Time), the Fund will cause to be published through the National Securities Clearing Corporation (“*NSCC*”) the list of the names and the quantities of the Deposit Instruments to be included in the current Fund Deposit, as well as the estimated Deposit Balancing Amount (if any), for that day.

Currently, in order to be eligible to place orders with the Distributor and to create a Creation Unit of the Fund, an entity must be (i) a “*Participating Party*,” *i.e.*, a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the NSCC (the “*Clearing Process*”), a clearing agency that is registered with the Commission; or (ii) a participant that uses the facilities of The Depository Trust Company (“*DTC*,” and such participant, a “*DTC Participant*”).

All orders to create Creation Units, whether through the Clearing Process (through a Participating Party) or outside the Clearing Process (through DTC facilities or otherwise), must be received on behalf of the Fund no later than the order cut-off time designated as such in the applicable AP Agreement (ordinarily 4:00 p.m., Eastern Time), in each case on the date such order is placed in order for the creation of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form. In the case of custom orders, the order must be received no later than 3:00 p.m., Eastern Time, or such earlier time as may be designated by the Fund and disclosed to APs.

A creation transaction fee (the “*Creation Transaction Fee*”) is applicable to each purchase transaction regardless of the number of Creation Units purchased in the transaction. When an AP is permitted to substitute cash in lieu of depositing one or more of the requisite Deposit Instruments, the AP may also be assessed an amount to cover the cost of purchasing the Deposit Instruments, including operational processing and brokerage costs, transfer fees, stamp taxes, and part or all of the spread between the expected bid and offer side of the market related to such Deposit Instruments.

To the extent contemplated in the applicable AP Agreement, Shares of the Fund may be issued in advance of receipt of Deposit Instruments subject to various conditions, including an undertaking by the AP to deliver the missing Deposit Instruments as soon as possible, which undertaking will be secured by the delivery and maintenance of collateral.

F. *Procedures Applicable to Redemptions of the Fund*

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the Fund and only on a business day. Each business day, before the open of trading on the Listing Exchange (currently 9:30 a.m., Eastern Time), the Fund will cause to be published through the NSCC the list of names and the quantities of the Redemption Instruments (as defined below), as well as the estimated Redemption Balancing Amount (as defined below) (if any), for that day.

Although redemption payments may be made in cash, in-kind, or a combination of both, currently, the Fund generally intends to effect redemptions for cash. If cash redemptions are not available or specified for the Fund, the redemption proceeds for a Creation Unit will generally consist of a portfolio of securities and other assets (“*Redemption Instruments*”)—as announced on the business day of the request for redemption received in proper form—plus or minus cash in an amount equal to the difference between the NAV of the Shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Redemption Instruments (the “*Redemption Balancing Amount*”), less the applicable Redemption Transaction Fee (defined below) and, if applicable, any operational processing and brokerage costs, transfer fees or stamp taxes. In the event that the Redemption Instruments have a value greater than the NAV of the Shares, a compensating cash payment equal to the difference plus the applicable Redemption Transaction Fee and, if applicable, any operational processing and brokerage costs, transfer fees or stamp taxes, is required to be made by or through an AP by the redeeming shareholder.

Orders to redeem Creation Units must be delivered through an AP that has executed an AP Agreement. Investors other than APs are responsible for making arrangements for a redemption request to be made through an AP. Redemptions may be made either through or outside the Clearing Process. A redemption request outside the Clearing Process will be considered to be in proper form on a particular date (the “*Transmittal Date*”) if: (i) a duly completed request form is received from the AP at a time specified by the Fund (ordinarily 4:00 p.m., Eastern Time) on the

Transmittal Date; (ii) arrangements satisfactory to the Fund are in place for the AP to transfer or cause to be transferred to the Fund the Creation Unit being redeemed through the book-entry system of DTC on or before the contractual settlement of the redemption request; and (iii) all other procedures set forth in the AP Agreement are properly followed.

A redemption transaction fee (the "*Redemption Transaction Fee*") is applicable to each redemption transaction regardless of the number of Creation Units redeemed in the transaction. Investors will also bear the costs of transferring the Redemption Instruments from the Trust to their account or on their order.

## PART II

### A. Availability of Information about the Fund's Portfolio Holdings and the Underlying Index

On each business day, before commencement of trading of Shares on the Listing Exchange, the Trust will disclose on the website for the Fund (the "*Website*") the following information regarding each portfolio holding, as applicable to the type of holding: ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding); the identity of the security, index or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio.

In addition, a portfolio composition file ("*PCF*"), which will include the security names and quantities of securities and other assets required to be delivered in exchange for the Fund's Shares, together with estimates and actual cash components, will be publicly disseminated prior to the opening of the Listing Exchange via the NSCC. APs may refer to the PCF for information regarding SPY LEAPS, U.S. Treasury securities and any other instrument that may comprise the Fund's portfolio on a given day. Further, quotation and last sale information for LEAPS will be available via the Options Price Reporting Authority. Price information for fixed income portfolio securities, including U.S. Treasury securities, cash equivalents and other short-term instruments, will be available from major broker-dealer firms or market data vendors, as well as from automated quotation systems, published or other public sources, or online information services.

Further, the value of the Underlying Index will be widely disseminated by one or more major market data vendors at least once per day.

### B. Availability of Information about Shares

In order to provide current Share pricing information for the Fund for use by investors, professionals and persons wishing to create or redeem Shares, (i) the Listing Exchange will disseminate continuously throughout the trading day, through the facilities of the Consolidated



Tape Association, the market value of a Share and (ii) the Listing Exchange, market data vendors or other information providers will disseminate, every 15 seconds throughout the trading day, a calculation of the intraday indicative value of a Share. Comparing these two figures will allow an investor to determine whether, and to what extent, Shares are selling at a premium or a discount to NAV.

In addition, the Website will contain the following information on a per Share basis for the Fund: the prior business day's reported NAV; the mid-point of the bid/ask spread at the time of calculation of the NAV (the "*Bid/Ask Price*"); and a calculation of the premium or discount of the Bid/Ask Price against such NAV. The Website will also display the Fund's prospectus and certain additional information that is updated on a daily basis.

## PART III

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

The Trust believes that the relief requested herein is substantially similar to the relief previously granted by the Commission to ETFs tracking indices comprised of fixed income securities and/or exchange-listed options.

### B. Applicability to the Fund of Relief Previously Granted by the Commission

The Fixed Income ETF Class Relief Letter provides exemptive and/or no-action or interpretive relief with respect to Rule 10b-17, as well as Rules 101 and 102 of Regulation M, to any fixed income ETF ("*Fixed Income ETF*") that meets the criteria set forth in the Fixed Income ETF Class Relief Letter. The Fixed Income ETF Class Relief Letter sets forth six general conditions (the "*General Conditions*") that a Fixed Income ETF must meet in order to rely upon the Fixed Income ETF Class Relief Letter. These are:

1. The Fixed Income ETF shares are issued by an open-end investment company or unit investment trust registered with the Commission under the 1940 Act;

2. The Fixed Income ETF shares are listed and traded on a national securities exchange or on a facility of a national securities association that has obtained approval from the Commission pursuant to Section 19(b) of the Exchange Act of a rule change regarding the listing and trading of shares on a national securities exchange or on a facility of a national securities association (or that is relying on Rule 19b-4(e) to list and trade shares);

3. The Fixed Income ETF seeks to: (i) provide investment results that correspond to the performance of a particular underlying index; (ii) exceed the performance of a particular underlying index by a specified multiple; or (iii) to correspond to the inverse of the performance of a particular underlying index by a specified multiple;

4. The underlying index must consist of only fixed income securities;

5. The Fixed Income ETF shares must be issued and redeemed in creation unit aggregations of 50,000 shares or such other amount where the value of a creation unit is at least \$1 million at the time of issuance; and

6. The intra-day proxy value of the Fixed Income ETF per share and the value of the underlying index must be publicly disseminated by a major market data vendor during the trading day.

In addition, the relief provided under the Fixed Income ETF Class Relief Letter is subject to certain “rule specific” conditions. In this regard, a Fixed Income ETF is eligible for relief from Rules 101 and 102 of Regulation M where:

(i) No Component Security<sup>10</sup> (excluding a U.S. Treasury security) represents more than 30% of the weight of the Fixed Income ETF, and the five highest weighted Component Securities in the Fixed Income ETF do not in the aggregate account for more than 65% of the weight of the Fixed Income ETF;<sup>11</sup> and

(ii) The Fixed Income ETF (except where the fund consists entirely of exempted securities) must include a minimum of 13 non-affiliated issuers.

However, where the Fixed Income ETF is wholly comprised of non-convertible fixed income securities that are rated “investment grade”

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<sup>10</sup> “Component Securities” are individual fixed income securities that comprise the Fixed Income ETF basket and that are assembled to correspond to the performance of the specified underlying index.

<sup>11</sup> Whether any one Component Security constitutes more than a particular percentage of the total value of the Fixed Income ETF shall be determined as of the most recent rebalancing of the Fixed Income ETF’s reference securities index.

by at least one nationally recognized statistical rating organization (as that term is used in Rule 15c3-1 in one of its generic rating categories that signifies investment grade) (“NRSRO”), conditions (i) and (ii) (the “Regulation M Relief Conditions”) above shall not apply.

The Fund will meet all of the General Conditions of the Fixed Income ETF Class Relief Letter set forth above, with the exception of Condition 4. With respect to Condition 4, while approximately 90% of the index market capitalization of the Underlying Index will be comprised of U.S. Treasury securities, approximately 10% of the index market capitalization of the Underlying Index will be comprised of SPY LEAPS. In addition, with respect to the Regulation M Relief Conditions, the Fund will not be wholly comprised of non-convertible fixed income securities that are rated “investment grade” by at least one NRSRO, and while the Fund will meet Condition (i),<sup>12</sup> the Fund will not meet Condition (ii) given that it will not consist entirely of exempted securities and will not include 13 non-affiliated issuers.

As indicated above, taking into account only the fixed income portion of the Underlying Index, the Fund would meet the General Conditions and the Regulation M Relief Conditions of the Fixed Income ETF Class Relief Letter. However, although on each rebalancing date, the Underlying Index places 90% of its index market capitalization in U.S. Treasury securities, it places the remaining 10% in a portfolio of exchange-listed options (*i.e.*, SPY LEAPS), thereby precluding it from satisfying all of the criteria of the Fixed Income ETF Class Relief Letter. Nonetheless, in light of the WisdomTree Relief, the Trust does not believe that the presence of SPY LEAPS as components of the Underlying Index raises new issues. In this regard, the Trust represents that (a) the arbitrage mechanism will be facilitated by the transparency of the Fund’s portfolio, the availability of the intra-day indicative value, the liquidity of the securities held by the Fund, the ability to access such securities, and the arbitrageurs’ ability to create workable hedges; (b) the Fund will invest solely in liquid securities; (c) the Fund will invest in securities that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges; (d) the Trust believes that arbitrageurs are expected to take advantage of price variations between the Fund’s market price and its NAV; and (e) a close alignment between the market price of Shares and the Fund’s NAV is expected. Therefore, the Trust hereby requests that the Commission grant exemptive, interpretive or no-action relief from Rule 10b-17 and Rules 101 and 102 of Regulation M as discussed below. As noted above, this relief is substantially similar to relief previously granted by the Commission.

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<sup>12</sup> For the avoidance of doubt, it is assumed that the exclusion for U.S. Treasury securities applies to the entire condition; it is possible that, at times, the five highest weighted Component Securities that are U.S. Treasury securities may, in the aggregate, account for more than 65% of the weight of the Fund.

A. Requests for Relief—Introduction

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

1. Rule 10b-17

Rule 10b-17 requires an issuer of a class of publicly-traded securities to give notice of certain specified actions (*e.g.*, dividends, stock splits, rights offerings) relating to such class of securities in accordance with Rule 10b-17(b). Specifically, Rule 10b-17(b)(1)(v)(A-B) require such advance notice to specify (a) for cash distributions, the amount of cash to be paid or distributed per share<sup>13</sup>, and (b) for in-kind distributions, the amount of the security outstanding immediately prior to and immediately following the dividend or distribution and the rate of such dividend or distribution. Paragraph (c) of the Rule, however, states that the Rule shall not apply to redeemable securities issued by open-end investment companies and unit investment trusts registered under the 1940 Act. Except for the fact that Shares must be redeemed in Creation Units, the Trust is intended to function like any other open-end fund continuously offering its shares. It is in recognition of the foregoing that the Division of Investment Management issued an order upon which the Trust may rely permitting the Trust to issue shares with limited redeemability while still treating the Trust like any other open-end investment company.

In addition, compliance with Rule 10b-17(b)(1)(v)(A-B) would be impractical in light of the nature of the Fund. This is because it is not possible for the Fund to accurately project ten days in advance what dividend, if any, would be paid on a particular record date. Because of this inability to project the amount of any dividend ten days in advance of a record date, applying the timing requirements of Rule 10b-17(b)(1)(v)(A-B) to the Fund would increase the chances that the Fund would mis-estimate the amount of any such dividend.<sup>14</sup>

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<sup>13</sup> The Rule permits a reasonable approximation of the per share distribution to be provided if exact amounts cannot be given because of existing conversion rights which may be exercised during the notice period and may affect the per share cash distribution, as long as the actual per share distribution is subsequently provided on the record date.

<sup>14</sup> As a RIC, the Fund is required by the Code to distribute at least 98% of its ordinary income and 98.2% of its capital gains during the calendar year. If the Trust, with respect to the Fund, declares too small a dividend, it will be charged an excise tax. If it declares too large a dividend, the excess could be considered a return of capital to investors. To avoid an over- or under-distribution of ordinary income, RICs, including the Fund, must estimate: (i) the amount of ordinary income to be earned during the period from the date the dividend is declared to December 31; and (ii) the number of shares that will be outstanding as of the record date. Requiring the Trust to declare the amount of a dividend ten days in advance of the record date would increase the period for estimating ordinary income and the number of outstanding shares, and thus increase the risk of an over- or under-distribution. Requiring the Trust to declare the amount of a dividend ten days in advance of the record date also would increase the chance that the Fund would over- or under-distribute capital gains.

The Trust represents that it will comply with the requirements of Rule 10b-17 (other than paragraphs (b)(1)(v)(A-B) thereof). The Trust further represents that, as soon as practicable following the end of trading on the Listing Exchange on the day prior to the ex-date (but not later than the last time at which the Listing Exchange accepts such information on such date) with respect to any distribution to be made by the Fund, the Trust will provide notice to the Listing Exchange containing the information required in Rule 10b-17(b)(1)(v)(A-B).

In the proposing release for Rule 10b-17 (the “*Proposing Release*”)<sup>15</sup>, in discussing the rights to receive dividends and other rights, which accrue to holders of record of securities as of a record date, the Commission stated:

It has been the experience of the Commission and the securities industry that the failure of a publicly held company to provide a timely announcement of the record date with respect to these types of rights has had a misleading and deceptive effect on both the broker-dealer community and the investing public. As a direct result of such failure, purchasers and their brokers may have entered into and settled securities transactions without knowledge of the accrual of such rights and were thus unable to take necessary steps to protect their interests. Further, sellers who have received the benefits of such rights as recordholders on the specified record date after having disposed of their securities, have also disposed of the cash or stock dividends or other rights received as such recordholders without knowledge of possible claims of purchasers of the underlying security to those rights. . . . In many instances, innocent buyers and sellers have suffered losses. In addition, some issuers have made belated declarations of stock splits or dividends with the apparent knowledge that this action would have a manipulative effect on the market for their securities.

The Trust respectfully submits that none of these concerns raised by the Commission in the *Proposing Release*<sup>16</sup> will be implicated if the requested relief is granted. As set forth above,

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Further, unlike ordinary income, the Fund does not have the problem of estimating the aggregate amount of capital gains it will earn between the declaration date and year-end, but as noted above, requiring the Trust to declare the amount of a dividend ten days in advance of the record date would increase the chance that the Trust would mis-estimate the number of outstanding shares. This, in turn, would increase the chance that the Trust would mis-estimate the per share amount of capital gains that the Fund must distribute.

<sup>15</sup> Exchange Act Release No. 9076 (February 17, 1971).

<sup>16</sup> The foregoing concerns were largely reiterated by the Commission in the release adopting Rule 10b-17. See Exchange Act Release No. 9192 (June 7, 1971) (the “*Adopting Release*”).

the Trust will comply with the requirements of Rule 10b-17 except for the timing requirements for notification of the actual amounts of the distributions under Rule 10b-17(b)(1)(v)(A-B). Accordingly, market participants will receive timely notification of the existence and timing of a pending distribution, and will be able to plan their transactions in Shares accordingly. As a result, there should be no confusion or opportunity for manipulation regarding parties' rights to receive distributions, which concerns inspired the Commission to propose and adopt Rule 10b-17. Therefore, the requested relief concerning the timing requirements of Rule 10b-17(b)(1)(v)(A-B) is consistent with the purposes underlying the adoption of Rule 10b-17 as outlined in the Proposing Release and Adopting Release. The exemption under paragraph (c) of Rule 10b-17, which covers open-end investment companies with fully redeemable shares, thus should be applicable to the Trust with respect to the timing requirements of Rule 10b-17(b)(1)(v)(A-B).

## 2. Rule 101 of Regulation M

The Trust respectfully requests that the Commission grant interpretive relief from Rule 101, as discussed below, to permit persons participating in a distribution of Shares of the Fund to bid for or purchase, redeem or engage in other secondary market transactions in such Shares. Alternatively, the Trust requests that the Commission grant an exemption under paragraph (d) of Rule 101 to such effect.

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

We understand that while broker-dealers that: (i) tender Fund Deposits to the Trust in return for Shares of the Fund in Creation Units; or (ii) redeem Shares of the Fund in Creation Units for receipt of Redemption Instruments and cash (or cash only) held by the Fund generally will not be part of a syndicate or selling group, and while no broker-dealer will receive fees, commissions or other remuneration from the Trust for the sale of Shares of the Fund in Creation Units, under certain circumstances such broker-dealers could be deemed to be "underwriters" or "distribution participants" as such terms are defined in Rule 100(b).

Paragraph (c)(4) of Rule 101 exempts from its application, *inter alia*, redeemable securities issued by an open-end management investment company (as such terms are used in the 1940 Act). The Trust is registered as an open-end management investment company under the 1940 Act. However, as discussed above, individual Shares are not redeemable except in Creation Units. Due to the redeemability of the Shares in Creation Units, there should be little disparity between the Shares' market price and their NAV per Share. Accordingly, the rationale for exempting

redeemable securities of open-end management investment companies from the application of Rule 101 is equally applicable to the Shares. Although redemption is subject to the condition of tendering the appropriate number of Shares of Creation Units, the Trust otherwise will continue to function as an open-end fund continuously offering its Shares.

It is in recognition of the special nature of such offerings that open-end management investment company and unit investment trust securities are exempted under paragraph (c)(4). Without such an exemption, they could not operate as intended. In view of the foregoing, the Trust requests that the Commission confirm that as a result of registration of the Trust as an open-end management investment company and the redeemable nature of the Shares in Creation Units, transactions in the Shares would be exempted from Rule 101 on the basis of the exception contained in paragraph (c)(4) of such Rule.

The purpose of Rule 101 is to prevent persons from conditioning the market to facilitate a distribution. Creation Units of Shares may be created and redeemed at NAV, on any business day. Holders of Shares also have the benefit of intra-day secondary market liquidity by virtue of their Market listing. Thus, the secondary market price of Shares should not vary substantially from the NAV of such Shares. Because of the redeemability of Shares in Creation Units, coupled with the open-end nature of the Trust, any significant disparity between the market price of the Shares and their NAV should be eliminated by arbitrage activity. Because the NAV of Shares is largely based on the market value of the relevant Fund holdings, neither the creation nor redemption of Shares, nor purchases or sales of Shares in the secondary market, will impact the NAV, and such transactions should not have a significant impact on the market value of Shares.<sup>17</sup>

The Trust requests that the Commission clarify that, to the extent applicable, the tender of the Shares to the Fund for redemption and the receipt of Redemption Instruments upon redemption does not constitute a bid for or purchase of any of such securities, or an “attempt to induce any person to bid for or purchase a covered security, during the applicable restricted period” for the purposes of Rule 101. Redemption entails no separate bid for any of the Redemption Instruments. As described above, following notice of redemption, to the extent that redemption proceeds are not paid partially or entirely in cash, the Fund will deliver the specified Redemption Instruments after the redemption request is received in proper form. Absent unusual circumstances, the Fund will not purchase Redemption Instruments in the secondary market to fulfill a redemption request. Therefore, redemptions of Shares cannot be expected to affect the market price of the Redemption

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<sup>17</sup> As discussed in the Notice, “sufficient protections are in place to protect against market manipulation of the Fund’s Shares and SPY LEAPS for several reasons: (i) the diversity, liquidity, and market cap of the securities underlying the S&P 500 Index, which deters manipulation of the S&P 500 Index and mitigates risk associated with manipulation in SPY LEAPS; (ii) liquidity in the market for SPY LEAPS and shares of the SPDR S&P 500 ETF Trust; and (iii) surveillances by the [Listing] Exchange and the Financial Industry Regulatory Authority (“FINRA”) designed to detect violations of self-regulatory organization (“SRO”) rules and the federal securities laws.” (citations omitted). See Notice at 83 FR 42190. See also footnote 9, *supra*.

Instruments. The Distributor will not engage in any secondary market transactions in Shares, either for its own account or for investors.

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

### 3. Rule 102 of Regulation M

The Trust respectfully requests that the Commission confirm that, as a result of registration of the Trust as an open-end management investment company and the redeemable nature of the Shares in Creation Units, for the reasons previously stated under our request for relief under Rule 101(c)(4), transactions in Shares would be exempted from Rule 102 on the basis of the exception contained in paragraph (d)(4) of such Rule. Application of Rule 102 in this context would not further the anti-manipulative purposes of the Rule. Alternatively, the Trust requests that the Commission grant an exemption under paragraph (e) of Rule 102 to such effect. Application of Rule 102 in this context would not further the anti-manipulative purpose of this Rule.

The purpose of Rule 102 is to prevent persons from manipulating the price of a security during a distribution and to protect the integrity of the offering process by prohibiting activities that could artificially influence the market for that particular security. For the reasons described in connection with the requested Rule 101 relief, redemption transactions and secondary market transactions in the Shares are not viable means to manipulate the price of a security in the Fund's portfolio during a distribution of such security. The Trust will redeem the Creation Units of Shares at the NAV of the Shares. Although Shares are traded on the secondary market, Shares may only be redeemed in Creation Units. Thus, the Trust believes that the redemption by the Trust of the Shares of the Fund at NAV does not involve the abuses that Rule 102 was intended to prevent.

## **PART V**

### A. Conclusion

Based on the foregoing, the Trust respectfully requests that the Commission and the Division of Trading and Markets grant the relief requested herein. The forms of relief requested are substantially similar to relief which the Commission and the Division of Trading and Markets have granted under similar circumstances.



# Chapman and Cutler LLP

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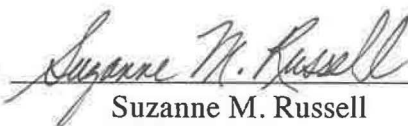
November 1, 2018

Page 17

Thank you for your consideration of this request. Should you have any questions or require additional information, please do not hesitate to call the undersigned at (312) 845-3446.

Very truly yours,

CHAPMAN AND CUTLER LLP

By  \_\_\_\_\_  
Suzanne M. Russell