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September 13, 2021

BY E-MAIL

Mr. Ted Yu, Chief
Mr. Daniel F. Duchovny, Special Counsel
Office of Mergers and Acquisitions
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Request for Exemptive Relief from Rule 14e-5 under the Securities Exchange Act of 1934

Dear Messrs. Yu and Duchovny:

I am writing on behalf of Schwab Strategic Trust (the “Trust”). The Trust is a Delaware statutory trust registered as an open-end management investment company under the Investment Company Act of 1940, as amended (the “1940 Act”). The Trust requests exemptive relief from Rule 14e-5 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), on behalf of itself, its series, the Schwab Ariel ESG ETF (the “Fund”),¹ and persons or entities engaging in transactions in shares of the Fund (“Shares”), including Authorized Participants (as defined below). The Fund will operate as an exchange-traded fund (“ETF”) in reliance on exemptive relief from the Securities and Exchange Commission (the “Commission”),² and the Fund’s Shares will be listed on a national securities exchange, as defined in Section 2(a)(26) of the 1940 Act, such as NYSE Arca, Cboe BZX, or Nasdaq (an “Exchange”).

The Fund will continuously issue and redeem Shares in specified aggregations (each aggregation of Shares, a “Creation Unit”).³ The Fund will issue and redeem Shares in Creation Units through a

¹ The Fund’s name and strategies are subject to change prior to launch. The Fund will otherwise operate in the manner described herein.

² See Schwab Strategic Trust, et al., Investment Company Act Rel. Nos. 34298 (June 11, 2021) (notice) and 34323 (July 7, 2021) (order).

³ 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 net asset value. Although Shares are not individually redeemable, the Fund, like certain other ETFs, will rely on exemptive relief obtained from the

broker-dealer registered under the Exchange Act (the “Distributor”) acting on an agency basis and serving as the Fund’s “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 the Fund will 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.⁴ Additionally, as indicated below, Authorized Participants may engage in secondary market transactions in Shares. The Fund described herein operates in a manner similar to other ETFs, except that the Fund will not disclose the identities and quantities of the securities and other assets held by the Fund that will form the basis for the Fund’s calculation of net asset value (“NAV”) at the end of each Business Day (as defined below).⁵

Authorized Participants are typically broker-dealers and, as discussed below, may act as dealer-managers of tender offers. The Trust, on behalf of itself, the Fund 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,” as described and discussed below. Without such relief, in situations where an Authorized Participant is also a dealer-manager of a 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 the Fund to operate as intended and as disclosed in publicly filed documents, which could be detrimental to investors.⁶

On September 25, 2019, the Commission issued an exemptive order granting relief substantially similar to that requested herein to ETFs (including actively managed ETFs) eligible to rely on Rule 6c-11

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.

⁴ All orders to purchase Creation Units must be placed with the Distributor by or through an “Authorized Participant,” which is a member or participant of a clearing agency registered with the Commission, and which has a written agreement with the Fund or one of its service providers that allows the Authorized Participant to place orders for the purchase and redemption of Creation Units (“AP Agreement”).

⁵ As described in greater detail below, the Fund will instead disclose other information that the Trust and the Adviser (as defined below) believe will be sufficient on its own to enable market participants’ intraday arbitrage in Shares, including hedging their positions in Shares.

⁶ Consistent with the applicable precedent (*see* notes 9-11, *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 Fund, 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 Fund 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 Fund in the event that the Trust and/or the Fund is deemed to be a “covered person” under Rule 14e-5(c)(3)(iv), as discussed in Part III below.

under the 1940 Act (“6c-11 ETFs”),⁷ subject to certain conditions (“Order”).⁸ Prior to the adoption of Rule 6c-11 and issuance of the Order, the Commission had previously issued relief substantially similar to that requested herein to both index-based ETFs (providing class relief) and actively managed ETFs that satisfy certain conditions.⁹ In addition, the Commission has issued similar relief to actively managed ETFs that do not disclose their portfolio holdings daily,¹⁰ as well as to certain exchange-traded managed funds.¹¹

This letter is divided into four parts. Part I describes the Fund; Part II describes Fund operations; Part III contains the legal analysis under Rule 14e-5; and Part IV sets forth the request for exemptive relief.

I. The Fund

⁷ See Rule 6c-11 under the 1940 Act (effective Dec. 23, 2019); Exchange-Traded Funds, Investment Company Act Rel. No. 33646 (Sept. 25, 2019) (adopting Rule 6c-11) (“Rule 6c-11 Adopting Release”).

⁸ See Order Granting a Conditional Exemption from Exchange Act Section 11(d)(1) and Exchange Act Rules 10b-10, 15c1-5, 15c1-6, and 14e-5 for Certain Exchange-Traded Funds, Exchange Act Rel. No. 87110 (Sept. 25, 2019). For the relief under the Order to be available, an ETF must be relying on Rule 6c-11, which requires daily disclosure of portfolio holdings. In addition, the Rule 14e-5 relief specifically requires compliance with certain conditions designed to ensure that parties relying on the relief do not engage in transactions for purposes of facilitating a tender offer. These conditions are described in greater detail in Part III.

⁹ See, e.g., Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Jack P. Drogin, Esq. regarding WisdomTree U.S. Quality Shareholder Yield Fund (Feb. 6, 2018); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Suzanne M. Russell, Esq. regarding First Trust Exchange-Traded Fund III (Aug. 23, 2017); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Suzanne M. Russell, Esq. regarding First Trust Exchange-Traded Fund VIII (Apr. 11, 2017); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Suzanne M. Russell, Esq. regarding First Trust Exchange-Traded Fund III (Sept. 6, 2016). Prior relief, like the Order, requires compliance with conditions designed to ensure that transactions are not effected for purposes of facilitating a tender offer.

¹⁰ See Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Adam T. Teufel, Esq. regarding ALPS ETF Trust (Feb. 3, 2021) (“ALPS Letter”); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Nathan D. Somogie, Esq. regarding Natixis ETF Trust II (August 26, 2020) (“Natixis Letter”); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Ryan L. Blaine regarding American Century ETF Trust (July 16, 2020) (“American Century Letter”); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to P. Georgia Bullitt, Esq. regarding T. Rowe Price Exchange-Traded Fund, Inc. (July 1, 2020) (“T. Rowe Letter”); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Cynthia Lo Bessette, Esq. regarding Fidelity Covington Trust (Dec. 18, 2019) (“Fidelity Letter”) (collectively, “Proxy Portfolio Letters”). Like the actively managed ETFs that are the subject of the Proxy Portfolio Letters, the Fund will use an alternative arbitrage mechanism that involves disclosure of a basket of securities and cash that is designed to closely track the daily performance of the Fund’s holdings.

¹¹ See, e.g., Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Maureen A. Gemma regarding Eaton Vance NextShares Trust II (Nov. 15, 2017); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Vadim Avdeychik, Esq. regarding Gabelli NextShares Trust (Nov. 30, 2016); Letter from Ted Yu, Chief, Office of Mergers and Acquisitions, to Philip A. Shipp, Esq. regarding Ivy NextShares (Oct. 20, 2016).

The investment adviser to the Fund will be Charles Schwab Investment Management, Inc. (the “Adviser”) or an entity controlling, controlled by, or under common control with the Adviser. The Trust intends to offer the following Fund that would be subject to the requested relief:¹²

A. Schwab Ariel ESG ETF

The Schwab Ariel ESG ETF seeks long-term capital appreciation. The Fund invests primarily in exchange-traded equity securities of U.S. companies that have been evaluated based on certain environmental, social, and governance (“ESG”) criteria. The Fund typically invests in exchange-traded securities of small- and mid-capitalization companies which are companies with capitalizations within the range of the Russell 2500TM Index, as measured at the time of purchase; however, the Fund may invest in exchange-traded securities of companies outside the stated range.

II. Fund Operations

A. Operational Differences Between the Fund and 6c-11 ETFs

The principal difference between the Fund and 6c-11 ETFs is that the Fund will not publicly disclose its complete portfolio holdings on a daily basis. Instead, as discussed in further detail below, on any day the Trust is open, including any day when the Trust satisfies redemption requests as required by Section 22(e) of the 1940 Act (“Business Day”), before commencement of trading of Shares, the Fund will publish on its website (1) a basket of securities and cash (the “Proxy Portfolio”) that is designed to closely track the daily performance of the Fund’s then-current portfolio (the “Actual Portfolio”), and (2) the percentage weight overlap between the holdings of the prior Business Day’s Proxy Portfolio compared to the holdings of the Actual Portfolio that formed the basis for the Fund’s calculation of NAV at the end of the prior Business Day (the “Proxy Overlap”).¹³ The Trust and the Adviser believe that daily disclosure of the Proxy Portfolio, the Proxy Overlap and related metrics, as described below (together, the “Proxy Portfolio Disclosures”), will permit effective arbitrage, including hedging of risks associated with arbitrage and market making activities.

1. The Proxy Portfolio

The Proxy Portfolio is designed to reflect the economic exposures and the risk characteristics of the Actual Portfolio on any given trading day. This is achieved by performing a “Factor Model” analysis of the Fund’s Actual Portfolio. The Factor Model is comprised of three sets of factors or analytical metrics: market-based factors, fundamental factors, and industry/sector factors.

The Fund will have a universe of securities (the “Model Universe”) that will be used to generate the Fund’s Proxy Portfolio. The Model Universe will be comprised of securities that the Fund can purchase and will be a financial index or stated portfolio of securities from which Fund investments will be selected. For example, the Model Universes could be the S&P 500 Index, the Russell 1000 Index or simply the 3,000 largest U.S.-listed equity securities.

¹² As explained in note 1, the Fund’s name and strategies are subject to change prior to launch, but the Fund will otherwise operate in the manner described herein. The Fund’s strategies are described in general terms in this section.

¹³ This approach is similar to that of the actively managed ETFs that are the subject of the Proxy Portfolio Letters, which involves disclosure of a basket of securities and cash that is designed to closely track the daily performance of the ETF, which market participants can then use to estimate the value of ETF shares throughout the trading day on their own. See Proxy Portfolio Letters, *supra* note 10.

The results of the Factor Model analysis of the Fund's Actual Portfolio are then applied to the Fund's Model Universe. The daily rebalanced Proxy Portfolio is then generated as a result of this Model Universe analysis with the Proxy Portfolio being a small sub-set of the Model Universe. The Factor Model is applied to both the Actual Portfolio and the Model Universe to construct the Fund's Proxy Portfolio that performs in a manner substantially identical to the performance of its Actual Portfolio.¹⁴

2. Proxy Portfolio Disclosures

As described above, the "Proxy Overlap" is the percentage weight overlap between the holdings of the prior Business Day's Proxy Portfolio compared to the Actual Portfolio's holdings that formed the basis for the Fund's calculation of NAV at the end of the prior Business Day. The Proxy Overlap will be calculated by taking the lesser weight of each asset held in common between the Actual Portfolio and the Proxy Portfolio and adding the totals. The Fund's website will note that the Proxy Overlap is calculated based on the Proxy Portfolio and portfolio holdings as of the prior Business Day.

At the end of each trading day, the Fund will calculate its Proxy Overlap and the standard deviation over the past three months of the daily proxy spread (i.e., the difference, in percentage terms, between the Proxy Portfolio per share NAV and that of the Actual Portfolio at the end of the trading day) (the "Tracking Error") and publish such information before the opening of Fund Share trading each Business Day. The Proxy Overlap and Tracking Error will provide additional information to the market making community. In particular, they will help market participants evaluate the risk that the performance of the Proxy Portfolio may deviate from the performance of the portfolio holdings of the Fund.

The Trust and the Adviser believe that the Proxy Portfolio Disclosures will enable arbitrageurs and market participants to use the component securities and their weightings in the Proxy Portfolio to calculate intraday values that approximate the value of the securities in the Actual Portfolio and, based thereon, assess whether the market price of the Shares is higher or lower than the approximate contemporaneous value of the Actual Portfolio and engage in arbitrage and hedging activities. The Trust and the Adviser believe that the Proxy Portfolio Disclosures will allow for effective hedging activities by market makers, so that Share market price bid/ask spreads will be narrow.

B. Purchases and Redemptions of Creation Units

In order to keep costs low and permit the Fund to be as fully invested as possible, Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Accordingly, except where the purchase or redemption will include cash, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments ("Deposit Instruments"), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments ("Redemption Instruments"). The names and quantities of the instruments that constitute the Deposit Instruments and the Redemption Instruments for the Fund (collectively, the "Creation Basket") will generally be the same as the Fund's Proxy Portfolio, but the Fund may accept Creation Baskets that differ from the Proxy Portfolio or may accept purchases and redemptions that are made entirely or in part on a cash basis. If there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference.

¹⁴ The Fund will have in place policies and procedures regarding the construction and composition of the Proxy Portfolio. Such policies and procedures will be covered by the Fund's compliance program and other requirements under Rule 38a-1 under the 1940 Act.

C. Information Available to Investors

As described above, the principal difference between the Fund and 6c-11 ETFs is that the Fund will not publicly disclose its complete portfolio holdings on a daily basis. Instead, on each Business Day, before the commencement of trading of Shares, the Fund will publish on its website the Proxy Portfolio and Proxy Overlap for that day. The Proxy Portfolio published on the Fund's website each Business Day will include the following information for each portfolio holding in the Proxy Portfolio: (1) ticker symbol; (2) CUSIP or other identifier; (3) description of holding; (4) quantity of each security or other asset held; and (5) percentage weight of the holding in the Proxy Portfolio.

The website for the Fund, which is and will be publicly accessible at no charge, will contain, on a per Share basis, the prior Business Day's NAV and closing price or bid/ask price, a calculation of the premium or discount of the closing price or bid/ask price against such NAV, and any other information regarding premiums and discounts as may be required for ETFs that operate in reliance on Rule 6c-11 under the 1940 Act. The website will also disclose any information regarding the bid/ask spread for the Fund as may be required for ETFs that operate in reliance on Rule 6c-11 under the 1940 Act.

D. Pricing of Shares

The price of Shares will be based on a current bid/ask in the secondary market. The price of Shares of the Fund, like the price of all traded securities, is subject to factors such as supply and demand, and will likely also vary as the value of the Proxy Portfolio changes. Shares of the Fund, available for purchase or sale on an intraday basis, do not have a fixed relationship to the previous day's NAV or the current day's NAV. Therefore, prices on the Exchange may be below, at or above the most recently calculated NAV of such Shares. No secondary sales will be made to broker-dealers at a concession by the Distributor or the Fund. Transactions involving the purchase or sale of Shares on an Exchange will be subject to customary brokerage fees and charges, if applicable.

The Trust and the Adviser believe that the Proxy Portfolio will be acceptable to market participants as a substitute for full daily portfolio transparency. In particular, the Trust and the Adviser believe that the Proxy Portfolio Disclosures will provide sufficient information to (1) allow for effective hedging by market participants that will have the effect of keeping Share bid/ask spreads within a narrow range that will foster liquid Share markets, and (2) support arbitrage activities by Authorized Participants and other arbitrageurs that will have the effect of keeping Fund Share trading prices at or close to NAV per Share. The Trust and the Adviser expect this to be the case because, among other matters, the component securities included in the daily Proxy Portfolio and their weightings can be used by market participants to value and hedge the Actual Portfolio.

The Trust and the Adviser believe that a reliable Fund Share hedging vehicle, where Proxy Portfolio performance is closely correlated to the Actual Portfolio performance, will reduce the risk of arbitrage trading and will encourage market making activity that drives Share market trading price closer to NAV per Share of the Fund. The Trust and the Adviser believe that market makers for the Shares would determine bid/ask spreads for the Shares based primarily on the market makers' costs to hedge their exposure to the Shares, much in the same way that they determine bid/ask spreads for actively managed and passive ETFs that are already listed and traded in the secondary market. The prices and determination of effective hedging instruments will be influenced by the expected Tracking Error and the price differentials between the Proxy Portfolio, which is fully disclosed, and the expected NAV per Share that will be calculated at the end of the trading day.

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.¹⁵ Rule 14e-5 prohibits a “covered person” from directly or indirectly purchasing or arranging to purchase 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 in the event it or the Fund may be deemed to be a “covered person” by virtue of the AP Agreements pertaining to the Trust and the Fund.

In light of the above, and consistent with the Order, the Trust seeks a conditional exemption from Rule 14e-5 for the Trust, the Fund, and Authorized Participants and any other persons who create and redeem Shares of the Fund in Creation Units pursuant to contractual arrangements pertaining to the Trust and the Fund, and who are covered persons with respect to a tender offer involving components of the Proxy Portfolio. The conditional exemption will allow such persons (i) to redeem Fund Shares in Creation Unit sizes for a Creation Basket that may include a subject security or related security, (ii) to engage in secondary market transactions with respect to Fund Shares after the first public announcement of a tender offer and during such tender offer given that such transactions could include, or be deemed to include, purchases of, or arrangements to purchase, subject securities or related securities, and (iii) to make purchases of, or arrangements to purchase, subject securities or related securities in the secondary market for the purpose of transferring such securities to purchase one or more Creation Units of Fund Shares.

Consistent with the Order, the relief would be subject to the following conditions:

- (1) no purchases of subject securities or related securities made by broker-dealers acting as dealer-managers of a tender offer would be effected for the purpose of facilitating a tender offer;
- (2) if there is a change in the composition of the Proxy Portfolio and a broker-dealer acting as a dealer-manager of a tender offer is unable to rely on the exception found in Rule 14e-5(b)(5) for basket transactions (the “Basket Exception”) because (i) the basket of subject securities or related securities contains fewer than 20 securities or (ii) the subject securities and related securities make up more than 5% of the value of the Proxy Portfolio, then any purchases of a Proxy Portfolio component by such dealer-manager during a tender offer will be effected for the purpose of adjusting a basket of securities in the ordinary course of its business and not for the purpose of facilitating a tender offer; and
- (3) except for the relief specifically granted herein, any broker-dealer acting as a dealer-manager of a tender offer will comply with Rule 14e-5.

Although the Fund differs from the 6c-11 ETFs to which the Order relates in that the Fund will not disclose its complete portfolio holdings on a daily basis, the Trust does not believe that this distinction is significant for purposes of the relief requested from Rule 14e-5. The Trust notes that the creation and

¹⁵ Exchange Act Rel. No. 8712 (Oct. 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.”

redemption process for the Fund is effectively the same as that for 6c-11 ETFs, as the Fund will transact with Authorized Participants in Creation Unit aggregations in exchange for a basket of securities and/or cash in lieu of such securities. While the Creation Basket will not reflect a pro rata representation of Fund holdings, this is consistent with 6c-11 ETFs, which are permitted to utilize “custom baskets” for creation and redemption transactions.¹⁶ In addition, as described above, the Trust and the Adviser believe that disclosure of the Proxy Portfolio and Proxy Overlap will provide arbitrageurs with adequate information to estimate the value of and hedge positions in the Fund’s Shares, which will facilitate the arbitrage process that permits the shares of an ETF to trade at market prices that are at or close to NAV. Accordingly, the Trust does not believe that the relief requested raises any significant new regulatory issues.

With respect to redemptions, the Trust notes that Authorized Participants will have no knowledge of which portfolio securities are held in the Actual Portfolio. Further, as in the case of 6c-11 ETFs, acquisition of individual securities held by the Fund 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 Creation Basket and the requirement that a minimum number of Shares (i.e., a Creation Unit) be redeemed. Accordingly, 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.

With respect to purchases, the Trust acknowledges that the Basket Exception provides an exception to the Rule 14e-5 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. As indicated by the Commission in the release replacing former Rule 10b-13 with Rule 14e-5,¹⁷ 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.¹⁸

Given that the purchases and redemptions of Creation Units of the Fund typically involve baskets of securities, Authorized Participants acting as dealer-managers of tender offers for relevant securities may, in certain cases, be able to rely on the Basket Exception in purchasing Creation Units of Shares. From time to time, however, a change in the composition of the Proxy Portfolio may result in a change in the Creation Basket that has been established for purposes of purchasing its Creation Units. As a consequence, the Creation Basket could contain less than 20 securities and/or covered securities and related securities could comprise more than 5% of the value of the Creation Basket. For example, a liquidation of the issuer of one of the securities or a merger involving the acquisition of the issuer of one of the securities could cause the number of securities in the Creation Basket to fall below 20 and/or could cause covered securities and related securities to comprise more than 5% of the value of the Creation Basket. Additionally, as a result of fluctuations in the market value of the securities held in the Creation Basket, covered securities and related securities could, at times, comprise more than 5% of the value of the Creation Basket. This composition would result in the unavailability of the Basket Exception for an

¹⁶ See Rule 6c-11 under the 1940 Act. In order to utilize custom baskets, a 6c-11 ETF must adopt certain policies and procedures. The 1940 Act exemptive relief on which the Fund relies similarly requires adoption of policies and procedures with respect to basket construction.

¹⁷ See Exchange Act Rel. No. 42055 (Oct. 22, 1999) (the “1999 Release”).

¹⁸ 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 Creation Basket.

Authorized Participant acting as a dealer-manager of a tender offer for the applicable securities and, absent the requested relief, may preclude an Authorized Participant from being able to rely on the Basket Exception.

In order to address situations (including but not limited to the foregoing examples) where the Creation Basket contains less than 20 securities and/or covered securities and related securities comprise more than 5% of the value of the Creation 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 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 Fund (similar to 6c-11 ETFs) and would be consistent with the rationale underlying the adoption of the Basket Exception.¹⁹ The Trust notes, in particular, that purchases would not be effected for the purpose of facilitating a tender offer.

For the reasons set forth above, the Trust believes that the requested relief will, like the relief granted to 6c-11 ETFs, “facilitate the ability of authorized participants and others to engage in creation or redemption transactions between the public announcement of a tender offer and its expiration, thereby permitting the ETF to operate as intended for the benefit of its holders and as disclosed in publicly filed documents.”²⁰ In addition, consistent with that relief, the conditions set forth herein will prevent those relying on the relief from effecting creation or redemption transactions for purposes of facilitating a tender offer.²¹

IV. Request for Exemptive Relief

Based on the foregoing, the Trust, on behalf of itself, the Fund, and Authorized Participants that act as dealer-managers of tender offers,²² respectfully requests that the Commission grant the exemptive relief from Rule 14e-5 under the Exchange Act requested herein in connection with purchases of, and arrangements to purchase, subject securities and related securities outside of a tender offer. As more fully discussed above, the Trust is requesting that the Commission grant exemptions from Rule 14e-5 to permit any Authorized Participant acting as a dealer-manager of a tender offer, under the circumstances described herein, (1) to execute transactions that include, or are deemed to include, purchases of, or arrangements to purchase, subject securities or related securities in connection with (a) redeeming Shares of the Fund in Creation Unit size aggregations and (b) engaging in secondary market transactions in Shares and (2) to purchase or arrange to purchase subject securities and related securities in the secondary market for the purpose of transferring such securities to purchase Creation Units. As a related matter, the Trust is requesting that, in light of the relevance of the activities contemplated by the AP Agreements described above to the Trust and the Fund, the Trust and the Fund be permitted to rely on any exemptive relief that is granted. The Trust believes that granting the requested exemptions is consistent with

¹⁹ *See id.*

²⁰ *See Order, supra* note 8.

²¹ *See id.*

²² As indicated above, the Trust also requests that the relief extend to any other persons who create and redeem Shares of the Fund in Creation Units pursuant to contractual arrangements pertaining to the Trust and the Fund.

precedent and will not result in the abuses that Rule 14e-5 was designed to address, and that it will facilitate the ability of Authorized Participants to engage in transactions in Creation Units, thereby permitting the Fund to operate as intended to the benefit of its shareholders.

* * *

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 202-261-3464.

Very truly yours,

/s/ Adam T. Teufel
Adam T. Teufel