

May 10, 2022

VIA EMAIL

Mr. Ted Yu, Chief
Mr. Perry Hindin, 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 IndexIQ Active ETF Trust

Dear Messrs. Yu and Hindin:

I am writing on behalf of IndexIQ Active ETF 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 (“1940 Act”). The Trust requests exemptive relief under the Securities Exchange Act of 1934 (the “Exchange Act”) on behalf of itself, its series, **IQ Winslow Large Cap Growth ETF** and **IQ Winslow Focused Large Cap Growth ETF** (each a “Fund” and together the “Funds”) and persons or entities engaging in transactions in shares of the Funds (“Shares”), including Authorized Participants (defined below), from the provision of Rule 14e-5. The Funds will operate as exchange traded funds (“ETFs”) in reliance on exemptive relief from the 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”).¹ Each Fund will issue and

¹ 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

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 each 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 each Fund.² The Funds described herein operate in a manner similar to all other ETFs except that the Funds will not disclose the identities and quantities of the securities and other assets held by a Fund that will form the basis for each Fund’s calculation of NAV at the end of each Business Day (the “Actual Portfolio”). Instead, the Funds will utilize a portfolio transparency substitute and publish related information metrics (“Periodically Disclosed ETFs”).

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 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.³

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.

² 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.

³ Consistent with the applicable precedent (see notes 4-6, *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 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.

The Commission has previously issued relief substantially similar to that requested herein to other Periodically Disclosed ETFs,⁴ traditional fully transparent ETFs,⁵ and certain exchange-traded managed funds (“ETMFs”)⁶ listed and traded on an Exchange that meet certain conditions.

I. The Funds

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

A. IQ Winslow Large Cap Growth ETF. The Fund seeks long-term growth of capital. Under normal circumstances, the Fund invests at least 80% of its assets (net assets plus any borrowings for investment purposes) in large capitalization companies, which are companies having a market capitalization in excess of \$4 billion at the time of purchase. Typically, Winslow Capital Management, LLC invests substantially all of the Fund’s investable assets in domestic securities. However, the Fund is permitted to invest up to 20% of its net assets in depositary receipts issued by a trust (including American Depositary Receipts (“ADRs”)) of foreign securities and in common stocks listed on a foreign exchange that trade on such exchange contemporaneously with the Shares. Generally, an issuer of a security is considered to be U.S. or foreign, based on the issuer’s “country of risk,” as determined by a third-party service provider such as Bloomberg. The Fund is actively managed and does not intend to track an index. The Fund is classified as “non-diversified” under the Investment Company Act of 1940.

B. IQ Winslow Focused Large Cap Growth ETF. The Fund seeks long-term growth of capital. Under normal circumstances, the Fund invests at least 80% of its assets (net assets plus any borrowings for investment purposes) in large capitalization companies, which are companies having a market capitalization in excess of \$4 billion at the time of purchase. Typically, Winslow Capital Management, LLC invests substantially all of the Fund’s investable assets in domestic securities. However, the Fund is permitted to invest up to 20% of its net assets in depositary receipts issued by a trust (including American Depositary Receipts (“ADRs”)) of foreign securities and in common stocks listed on a foreign exchange that trade on such exchange contemporaneously with the Shares. Generally, an issuer of a security is considered to be U.S. or foreign, based on the issuer’s “country of risk,” as determined by a third-party service provider such as Bloomberg. The Fund will normally hold a core position of between 25 and 35

⁴ See e.g., Letter from Ted Yu to Principal Exchange-Traded Funds, dated April 11, 2022; Letter from Ted Yu to Natixis ETF Trust II, dated August 26, 2020; Letter from Ted Yu to American Century Investments regarding American Century ETF Trust, dated July 16, 2020.

⁵ See, e.g., Letter from Ted Yu to Schiff Hardin LLP regarding WisdomTree U.S. Quality Shareholder Yield Fund, dated February 6, 2018.

⁶ See, e.g., Letter from Ted Yu to Calvert Research and Management regarding Calvert Management Series, dated January 11, 2018.

securities, although the number of securities held by the Fund may occasionally exceed this range at times. The Fund is actively managed and does not intend to track an index. The Fund is classified as “non-diversified” under the Investment Company Act of 1940.

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.⁷ 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. Additionally, in September 2019, the Commission adopted Rule 6c-11 under the 1940 Act, which allows most ETFs to operate without obtaining an exemptive order.⁸ A condition under Rule 6c-11 is that the ETF must disclose, on a free and publicly available website, each business day before the opening of trading, each portfolio holding that will form the basis for the next NAV calculation, and the cash balancing amount for a creation unit.⁹

The Trust believes that asset managers employing certain 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. While 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,¹⁰ managers at the same time are concerned that the NAV itself may be

⁷ 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).

⁸ See “Exchange-Traded Funds,” SEC Release Nos. 33-10695 & IC-33646 (September 25, 2019), <https://www.sec.gov/rules/final/2019/33-10695.pdf>. The Trust is unable to rely on Rule 6c-11 because it will not be able to meet the conditions of the rule as it will not provide daily portfolio transparency.

⁹ Section 270.6c-11(c)(1)(i).

¹⁰ 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).

adversely affected.¹¹ The Trust proposes to offer Funds, which are designed 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.

Instead of publishing the Fund’s then-current portfolio holdings (the “Actual Portfolio”), the Fund will utilize an effective Fund portfolio transparency substitute to facilitate efficient trading of Shares. That is, the Fund will publish the holdings of a basket of securities that is designed to closely track the daily performance of a Fund’s Actual Portfolio (the “Proxy Portfolio”). The arbitrage mechanism underlying this Proxy Portfolio methodology contemplates each Fund providing daily disclosure of the Proxy Portfolio contents, Proxy Overlap (as defined below), and related metrics, as described below (together, the “Proxy Portfolio Disclosures”).

The goal of the Proxy Portfolio methodology is to permit a Fund’s Proxy Portfolio, during all market conditions, to track closely the performance of a Fund’s Actual Portfolio and minimize intra-day misalignment between the performance of the Proxy Portfolio and the performance of the Actual Portfolio. The Proxy Portfolio is designed to reflect the economic exposures and the risk characteristics of the Actual Portfolio on any given trading day. The Trust believes 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. These activities will ensure that Fund market prices remain close to the Fund’s NAV per Share. Moreover, the Proxy Portfolio Disclosures generated by the Proxy Portfolio methodology will allow for effective hedging activities by market makers, so that Share market price bid/ask spreads will be narrow.

B. Sales and Redemptions of Creation Units

Subject to limited exceptions, Creation Units of a Fund will be purchased by the Authorized Participant, making an in-kind deposit of the instruments specified by the Fund for making a purchase (“Creation Basket”), and Authorized Participants redeeming Creation Units will receive an in-kind transfer of instruments specified by the Fund for meeting a redemption

¹¹ See Madhavan, *supra* note 5 (“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”).”).

(“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 be the same as a pro rata slice of the Fund’s Proxy 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 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 pay to the other an amount in cash equal to that difference.

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 Daily disclosure of the Proxy Portfolio Disclosures will permit effective arbitrage, including hedging of risks associated with arbitrage and market making activities. The Proxy Portfolio Disclosures should permit market making in Fund Shares that keep bid/ask spreads narrow and the secondary market prices of Fund Shares at or close to NAV.

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 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. 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.

In addition to the Proxy Overlap, at the end of each trading day, each Fund will calculate 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) (“Tracking Error”) and publish such information before the opening of Fund Share trading each Business Day.

The Funds are also required to disclosure certain information on their website. The Funds’ website will include on a daily basis, per Share for each Fund, the prior Business Day’s NAV and the closing price or bid/ask price, and a calculation of the premium/discount of the

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; and are also set forth in the Trust’s application for the 1940 Act exemptive relief; and the Trust’s Declaration of Trust.

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.

closing price or bid/ask price against such NAV.¹⁴ The website also will include the Proxy Portfolio for each Fund, the Proxy Overlap and Tracking Error for each Fund and bid/ask spread information for each Fund.

The Trust acknowledges that a security held in the Actual Portfolio but not in the Proxy Portfolio might not have readily available market quotations, which could be the situation when, for example, an Exchange institutes an extended trading halt in a portfolio security, leading to a potential increase in the difference between the value of the Actual Portfolio and Proxy Portfolio. If the trading of a security held in a Fund's Actual Portfolio is halted or otherwise does not have readily available market quotations and the Adviser believes that the lack of any such readily available market quotations may affect the reliability of the Proxy Portfolio as an arbitrage vehicle or otherwise determines it is in the best interest of the Fund, the Adviser promptly will disclose on the Fund's website the identity and weighting of such security for so long as such security's trading is halted or otherwise does not have readily available market quotations and remains in the Actual Portfolio. This intraday corrective measure will allow sufficient market information so that market participants can continue to engage in Share arbitrage and hedging transactions effectively.¹⁵

D. Portfolio Holdings Disclosure

The Funds will not disclose the portfolio securities in the Actual Portfolio on a daily basis. Instead, the Funds will disclose the portfolio securities of their Actual Portfolios only at periodic intervals and with a lag. The Funds will disclose the portfolio securities of their Actual Portfolios 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. 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

¹⁴ The Funds may also provide additional quantitative information on their website. In addition, each Fund will provide any other information on its website regarding premiums/discounts that ETFs registered under the 1940 Act may be required to provide.

¹⁵ If securities representing 10% or more of a Fund's Actual Portfolio do not have readily available market quotations, the Fund or Adviser would promptly request that the Exchange halt trading in the Fund's Shares. The Funds recognize that many retail investors do not have the tools to identify and monitor such major disruptions in the market, and believe the 10% threshold strikes an appropriate balance between two competing interests of a Fund's investors: (1) protection from the potential significant negative impact of unusual market events and (2) the ability to freely trade Shares of a Fund.

will trade at a market price at or close to the NAV per Share of the Fund. The Trust believes 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.¹⁶ 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 a Fund may be deemed to be a “covered person” by virtue of the Participant Agreements pertaining to the Trust and the Funds.

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. The exemption would permit any such Authorized Participant to execute transactions 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 Authorized Participant’s ordinary course of business includes: (1) redeeming Shares of a Fund in Creation Unit size aggregations for instruments in the Basket that may include a subject security or a related security; and (2) engaging in secondary market transactions in Shares.

¹⁶ 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.”

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 under 1940 Act (“6c-11 ETFs”), subject to certain conditions (“Order”).¹⁷ 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 a Fund’s 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 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 Tracking Basket 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 Funds differ from the 6c-11 ETFs to which the Order relates in that the Funds will not disclose their 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 redemption process for the Funds is effectively the same as that for 6c-11 ETFs, as the Funds will transact with Authorized Participants in Creation Unit aggregations in exchange for a basket of securities and/or cash in lieu of such securities.¹⁷ While the Creation Basket and Redemption 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.¹⁸ In addition, as described above, the Trust and the Adviser believe that disclosure of the Proxy Portfolio and Portfolio Overlap will provide arbitrageurs with adequate information to estimate the value of and hedge positions in a 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 the Authorized Participant will have no knowledge of what portfolio securities are held by a Fund in its Actual Portfolio, so as a practical

¹⁷ Because creations and redemptions will not be effected through a Confidential Account with an AP Representative, Authorized Participants will have knowledge of the components of the Creation Basket and Redemption Basket (as is the case with respect to 6c-11 ETFs).

¹⁸ 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 Funds rely similarly requires adoption of policies and procedures with respect to basket construction.

matter could not utilize the redemption process as a way to acquire individual securities held by a Fund. Further, acquisition of individual securities contained in the Fund's Proxy Portfolio 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 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, 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-5,¹⁹ 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.²⁰ 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.

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 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

¹⁹ Exchange Act Release No. 42055 (October 22, 1999) (the "1999 Release").

²⁰ 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.

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.²¹ The Trust hereby confirms that any purchases of a portfolio security by a dealer-manager during a tender offer will be effected as an adjustment to a basket of securities in the ordinary course of business as a result of a change in the composition of the Fund's actual portfolio or proxy portfolio.

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

IV. Conclusion

Based on the foregoing, we respectfully request that the Commission and the Commission staff grant the requested relief. 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 Periodically Disclosed ETFs. Should you have any questions please call me at (202) 478-6492 or email me at pershkow@chapman.com

Sincerely,

/s/ Barry Pershkow

Barry I. Pershkow

²¹ See *supra* note 15.