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Submitted electronically through http://www.regulations.gov

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: **Exchange-Traded Funds: File Number S7-15-18**

Dear Mr. Fields,

Fidelity Investments ("Fidelity")[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission ("SEC" or "Commission") on proposed rule 6c-11 under the Investment Company Act of 1940 ("1940 Act") that would permit exchange-traded funds ("ETFs") that meet certain conditions to operate without obtaining exemptive relief (the "Proposal")[2].

Fidelity fully supports the SEC in its efforts to create a "consistent, transparent, and efficient regulatory framework" for ETFs, which will facilitate increased choice for investors and greater competition among industry participants.[3] Since their introduction in 1992, ETFs have become an increasingly popular investment vehicle for investors and the ETF industry has experienced significant growth. As of August 31, 2018, total net assets in ETFs were approximately $3.7 trillion.[4] Fidelity believes the Proposal will facilitate clarity, consistency and comparability of ETFs by modernizing the existing regulatory framework for ETFs to reflect the development and evolution of these investments products.

Fidelity supports the Commission's efforts to eliminate the disparities in previously issued ETF exemptive relief. As acknowledged in the Release, the SEC has granted over 300 exemptive orders to ETFs with varying conditions and representations that have changed over

[1] Fidelity and its affiliates are leading providers of mutual fund management and distribution, securities brokerage, and retirement recordkeeping services, among other businesses.
[2] On June 28, 2018, the SEC proposed rule 6c-11, which would permit the formation and operation of open-end ETFs, including index-based and actively managed ETFs, without obtaining exemptive relief from the SEC, subject to certain conditions. The Proposal would, among other things: (i) rescind the existing "patchwork" of exemptive orders and codify much of the relief previously granted by the SEC, (ii) permit custom basket creation and redemption, (iii) implement new disclosure and recordkeeping requirements, and (iv) rescind the existing master-feeder exemptive relief for funds that do not rely on such relief as of June 28, 2018. Exchange-Traded Funds, Release Nos. 33–10515; IC–33140; 83 Fed. Reg. 37332 (July 31, 2018), *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-07-31/pdf/2018-14370.pdf (the "*Release*").
[3] *Id* at 37333.
[4] Morningstar Direct, as of Aug. 31, 2018 (U.S.-based ETFs only).

time, resulting in an uneven playing field among ETF sponsors and an inconsistent ETF regulatory framework. Fidelity believes that proposed rule 6c-11, if adopted, would help to create a level playing field for ETFs and would foster greater competition in the ETF marketplace.

Fidelity offers one of the industry's leading platforms for ETFs, with more than $402 billion in ETF assets under administration (which constitutes 11% of all U.S.-domiciled ETF assets[5]), providing our customers access to thousands of ETFs. Fidelity's ETF assets under administration have experienced tremendous growth with a compound annual growth rate of 24% from December 31, 2013 to July 31, 2018. Fidelity currently offers 265 ETFs on a commission-free basis, including 10 Fidelity factor-based ETFs, three Fidelity actively-managed fixed income ETFs, 11 Fidelity passive sector ETFs, and the Fidelity Nasdaq Composite Index Tracking Stock ETF or ONEQ. Our extensive ETF experience informs our comments below, which are designed to help improve the Proposal to ensure that its full benefits can be realized by the marketplace and investors.

I. EXECUTIVE SUMMARY

Fidelity strongly supports the Proposal; however, we recommend the following modifications, which we believe will enhance its effectiveness:

- We strongly support the SEC providing ETFs with custom basket flexibility but suggest the SEC modify the proposed definition of custom baskets to exclude all-cash or partial cash baskets ("cash baskets").

- We support the SEC's goals to provide investors with disclosure relating to costs attributable to bid-ask spread, however, we recommend that the SEC replace the proposed question and answer ("Q&A") disclosure format with more succinct narrative bid-ask spread disclosure in the prospectus and simplified numerical bid-ask spread information on a fund's website. Should the SEC also require ETFs to provide an interactive calculator for investors to calculate bid-ask spread costs, we recommend a more simplified version for the SEC's consideration.

- We recommend that the SEC not rescind its ETF master-feeder relief and instead make the relief uniform with new conditions or provide a sunset provision to allow ETFs additional time to implement a master-feeder structure.

- We support the Proposal's exemptive relief from section 17(a) and suggest expanding this relief to permit entities affiliated with an ETF's adviser to transact with the ETF to provide in-kind seed capital to the ETF.

- We support the Proposal's relief from section 22(e) but recommend that the SEC eliminate the proposed sunset provision limiting this relief in duration to only ten

[5] Fidelity Finance Data Hub, as of July 31, 2018.

years and instead take action when appropriate.

- We support standardization and consistency in the presentation of ETF portfolio holdings disclosures and suggest using a disclosure format that follows or is substantially similar to the website disclosure required by generic listing standards for actively managed ETFs rather than requiring a new format that complies with Article 12 of Regulation S-X.

- We recommend that the SEC provide additional guidance with respect to existing no-action relief from provisions of the Securities Exchange Act of 1934 ("Exchange Act") and modify the listing approval process to apply uniform standards to treat similar products consistently and streamline the process to make it more efficient.

II. ENHANCEMENTS TO THE PROPOSED RULE

A. Custom Baskets

Since approximately 2006, the SEC has required that an ETF's basket correspond *pro rata* to its portfolio holdings, with certain limited exceptions. ETFs with orders issued prior to 2006 were not subject to such restrictions on basket construction, which, as the SEC acknowledges, created an uneven playing field in the industry. The Proposal permits an ETF to use custom baskets if the ETF has adopted written policies and procedures that (i) set forth detailed parameters for the construction and acceptance of custom baskets that are in the best interests of the ETF and its shareholders and (ii) specify the titles or roles of employees who are required to review custom baskets for compliance with such parameters.[6]

We strongly support providing ETFs with the ability to customize baskets in circumstances that would benefit the ETF and its investors. We commend the SEC for addressing the disadvantages faced by ETFs that operate under exemptive orders with more stringent restrictions on baskets and believe the proposed rule will level the playing field in this respect. We agree with the SEC that allowing custom baskets to differ from a *pro rata* representation or allowing the use of different baskets for different authorized participants could benefit the ETF and its shareholders by providing greater operational flexibility.

While we strongly support the Proposal's inclusion of custom basket flexibility, we do not agree that cash baskets should be included in the definition of custom baskets. Cash baskets are standard in the industry today, particularly with respect to many fixed income ETFs that exclusively use cash baskets. Purchasing or redeeming using a cash basket does not create opportunities for "cherry picking," "dumping" or other abuses identified in the Release and therefore does not give rise to the risk of overreaching that the proposed custom basket policies and procedures were designed to prevent.[7] To the extent cash baskets do result in additional transaction costs, such costs should be covered by the transaction fees borne by authorized participants, not the fund. For these reasons, we believe it is unnecessary to subject cash baskets

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[6] *Release* at 37345.
[7] *Id.* at 37355.

to the additional heightened layer of policies and procedures that are applicable to other custom baskets.

While not included in the proposed rule, the SEC suggests in the Release that ETFs should consider whether employees outside of portfolio management should review the components of custom baskets prior to approval of a creation or redemption.[8] We do not think it is necessary or practical to involve compliance personnel in the real-time decision making of accepting custom baskets and encourage the SEC not to include this as a requirement in the final rule. We view the review and approval of custom baskets as a portfolio management decision because the custom basket criteria that a fund will accept will be primarily dependent on the fund's investment strategy. Compliance, more appropriately, should maintain oversight of the overall process and review the results of custom basket activity.

B. ETF Bid-Ask Spread Prospectus Disclosure and Interactive Calculator

The Proposal introduces new prospectus disclosure requirements, including a new section in a Q&A format in Item 3 of Form N-1A that would require disclosure related to ETF trading information and costs, including (i) calculation and disclosure of the ETF's median bid-ask spread over the most recently completed fiscal year, and (ii) disclosure of hypothetical trading costs for one $10,000 "round-trip" trade, assuming mid-range and high-end spread costs, and the mid-range and high-end spread costs associated with 25 round-trip $10,000 (each) trades.[9]

The Proposal also requires an ETF to provide an interactive calculator on its website to enable investors to customize the hypothetical calculations to their specific investing situation. The calculator would be limited to two investor-input data points – investment amount and number of trades – and would be required to use the calculation methodology described in proposed instructions 5(a)-(d) of Item 3 to provide the information required by Q&As 3-5.[10]

We strongly support transparency of ETF trading costs to give investors a more complete picture of their costs to trade ETFs. Indeed, Fidelity already publishes educational materials on its website alerting investors to the cost of investing in ETF shares and other important expense information.[11] However, as we discuss below, we have concerns with the content and placement of the proposed bid-ask spread disclosure because it overemphasizes bid-ask spread and presents challenges for ETF sponsors to obtain and disclose bid-ask spread data.

1. The Proposed Disclosure Overemphasizes Bid-Ask Spread

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[8] *Release* at 37357.
[9] *Id.* at 37372-37375.
[10] *Id.*
[11] *See, e.g.*, "Understanding an ETF's spreads and volumes," https://www.fidelity.com/learning-center/investment-products/etf/etfs-spreads-volumes.

We believe that the proposed bid-ask spread disclosures place an outsized importance on bid-ask spread which is only one component of an ETF's trading costs.[12] Trading costs associated with ETFs also include commissions and premium/discount, and the long-term costs of investing in ETFs also includes the fund's expense ratio. Recent surveys conducted by Fidelity of its customers that trade ETFs[13] revealed that only 16% of respondents considered bid-ask spread cost the *most* important cost factor in trading ETFs and 56% of respondents indicated that it was their third most important cost to consider after expense ratio and commission. While investors appropriately factor in bid-ask spread as one cost component when trading ETFs, based on our experience, they may not view it as a primary cost.

Bid-ask spread costs are also highly dependent on each individual scenario and identifying bid-ask spread as a primary cost would marginalize two other parts of the ETF's cost structure – brokerage commissions and expense ratio – that can be a larger factor in the overall costs borne by an ETF investor. Depending on the magnitude of each cost component, an investor's trade size, holding period, and other factors, the cost drivers will vary. For example, for an investor paying a brokerage commission of $4.95 or $7.95 (standard commission rate for many brokerage platforms), the brokerage commission alone would typically outweigh the bid-ask spread costs on trade sizes of $10,000 or less. Moreover, placing undue emphasis on bid-ask spread cost in the prospectus would also risk overshadowing the expense ratio, a significant cost in the total cost picture of investing in ETFs. For example, an investor could trade $1,000,000 in an ETF with a 1 basis point spread 25 times before it would equal the annual cost to own an ETF with a 25-basis point expense ratio.

2. There are Challenges with Disclosing Bid-Ask Spread

The bid-ask spread an investor will pay is determined by the investor's broker-dealer when the trade is placed. As a result, the information necessary to perform the calculation does not reside with the ETF sponsor. While bid-ask spread data may be obtained from third party data providers, there are several challenges with disclosing this third-party data, including lack of visibility into bid-ask spread calculations and difficulty verifying bid-ask spreads. Currently, data providers will calculate and provide mean bid-ask spread information for an ETF, but ETF sponsors do not have visibility into the calculation methodology. It is therefore difficult for ETFs to verify the accuracy of bid-ask spread data, and even when spreads can be verified, errors have been detected. In addition, there is currently no industry standard for how to calculate bid-ask spread. For such information to be useful and comparable for investors, we believe that an industry standard would need to be developed.

3. Recommended Disclosure Modifications

We recommend that the SEC remove the proposed Q&A disclosure format and instead (i) require concise narrative disclosure that investors who trade ETFs will incur costs attributable to

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[12] Notably, while bid-ask spread costs are also a cost of trading other exchange traded products, such as closed-end funds, those products are not required to provide bid-ask spread disclosure comparable to that proposed for ETFs.
[13] Based on an online survey of 417 Fidelity customers from April- May of 2018.

bid-ask spread, and (ii) require that simplified numerical information relating to bid-ask spread be included on the ETF sponsor's website.

a. *Prospectus Disclosure*

The SEC's proposed bid-ask spread Q&A information would comprise approximately 20% of a typical 4-page summary prospectus. Inclusion of the proposed one-page Q&A section largely devoted to bid-ask spread information would subsume other more important information in the summary prospectus. Therefore, instead of a Q&A format, we propose that ETFs be required to include concise bid-ask spread disclosure in the narrative explanation of fund expenses relating to the expense example.

Specifically, we recommend modifying instruction 1(e) of Item 3 of Form N-1A to require ETFs to disclose: (i) that investors will pay costs attributable to bid-ask spread on their purchases and sales of ETF shares, which are not reflected in the expense example, (ii) that bid-ask spread is the difference between the highest price a buyer is willing to pay to purchase ETF shares (bid) and the lowest price a seller is willing to accept for ETF shares (ask), and (iii) that the ETF's website includes bid-ask spread data. We believe this approach would provide concise disclosure informing investors of ETF bid-ask spread costs while also directing them to the fund's website to obtain additional bid-ask spread information.

We also believe this approach would advance the SEC's disclosure policy articulated in the 2009 adopting release for the summary prospectus rule,[14] and more recently in the Request for Comment on the Fund Retail Experience and Disclosure where the SEC recognized that a "modern fund disclosure system should provide investors streamlined and user-friendly information that is material to an investment decision, while providing them the ability to access additional, more in-depth information on demand."[15]

b. *Website Disclosure*

Similar to quantitative premium/discount information that the SEC has deemed should be disclosed on a fund's website rather than in the prospectus, we believe it would be more appropriate to include up-to-date bid-ask spread data on a fund's website side-by-side with other ETF trading data, such as bid/ask size, high/low prices, volume, and premium/discount.

We suggest however that instead of the proposed fiscal year-end calculation in Q&As 3-5, ETFs should disclose the median bid-ask spread over the prior rolling 30 days on their website. We believe that a rolling 30-day median bid-ask spread is a better indicator of recent spreads, and more representative of the current market environment, than historical median bid-ask

[14] *Enhanced Disclosure and new Prospectus Delivery Option for Registered Open-End Management Investment Companies,* 1940 Act. Rel. No. 28584 (Jan. 13, 2009) ("[t]he foundation of the improved disclosure framework is the provision to all investors of streamlined and user-friendly information that is key to an investment decision.").
[15] *Request for Comment on Fund Retail Investor Experience and Disclosure*, 1940 Act Rel. No. 33113 (June 5, 2018) at 6. The SEC also notes that "[s]ome have criticized fund prospectuses and other required disclosure documents for containing long narratives; generic, redundant, and even at times irrelevant disclosures; legalese; and extensive disclosure that may serve more to protect funds from liability rather than to inform investors." *Id.*

spread for the ETF's most recent fiscal year or the round-trip hypotheticals based on fiscal year end data.

Bid-ask spread is fluid and will vary for each investor depending on factors beyond the number of round trips, including time of trade, liquidity, creation and redemption volume, size of fund, the market environment, and other factors. Requiring ETFs to provide the median bid-ask spread for a prior full fiscal year would not be indicative of what the spread may be at or near the time of trade, which is likely most useful to investors.

Rather than requiring bid-ask spread calculations based on 25 round-trip trades, we believe disclosure of a single round trip spread cost would more easily allow investors to "do the math" themselves to customize costs for their particular trading situation. We also suggest removing the requirement to calculate a high-end spread cost since these most frequently occur near the opening and closing of the trading session when volume is at its lowest and spreads are higher. Based on our experience, most executions do not occur during these timeframes. We do not believe disclosure of these calculations would be representative of the majority of actual trade executions, and, as such, would be less useful to retail investors.

4. Interactive Calculator

We believe there are challenges with obtaining and calculating bid-ask spread, including those described above relating to access, accuracy and verification, and standardization of data. Should the SEC require ETFs to provide an interactive calculator on their website, we recommend a simplified version that still provides investors the ability to customize hypothetical calculations of their approximate bid-ask spread costs for their specific investing situation.

We suggest an interactive calculator that will approximate the cost in dollars for a single trade based on the median bid-ask spread over the most recent 30 calendar days (20 business days). The calculator would use bid-ask spread information provided by a third-party data provider that is consistent with the suggested website disclosure described above and would only require one investor input – the investment amount. This modified calculator would provide more up-to-date and simplified bid-ask spread information that is specifically tailored to the individual investor's proposed trade. To illustrate, for a $10,000 trade with a median bid-ask spread of .03% over the past 30 calendar days (20 business days), the investor's bid-ask spread cost for the trade would be $3.

C. The SEC Should Retain Its Master-Feeder Relief

The SEC has issued exemptive orders permitting ETFs to operate as feeder funds in a master-feeder structure. The Proposal seeks to rescind this master-feeder relief for ETFs that do not rely on the relief as of the date of the Proposal (June 28, 2018).

We respectfully request that the SEC reconsider rescinding its previously issued ETF master-feeder relief. Fidelity, and perhaps others, have spent significant time and resources exploring various approaches to an ETF master-feeder structure, including models that would address the SEC's concerns with ETF and mutual fund feeders equally bearing costs associated with cash transactions. We believe that ETF master-feeder structures could be a source of innovation in the fund industry and the SEC should not preclude ETF sponsors from developing these types of structures.

As the SEC concedes in the Proposal "an ETF share class that transacts with authorized participants on an in-kind basis and a mutual fund share class that transacts with shareholders on a cash basis may give rise to differing costs to the portfolio…while certain of these costs may result from the features of one class or another, all shareholders would generally bear these portfolio costs."[16] With respect to master-feeder arrangements, the Proposal provides: "[w]e are concerned … that if an ETF feeder fund transacts with a master fund on an in-kind basis, but non-ETF feeder funds transact with the master fund on a cash basis, all feeder fund shareholders would bear costs associated with the cash transactions."[17] Rather than rescinding the relief, Fidelity recommends that the SEC seek to mitigate the potential conflicts it views in a master-feeder structure by requiring that each feeder fund transact with the master fund consistently to rely on the relief.

We also believe that establishing a retroactive cut-off date (the June 28 ETF proposal date) for reliance on the SEC's master-feeder relief offers an insufficient notice period for ETFs interested in pursuing the master-feeder structure. If, however, the SEC rescinds the master-feeder relief, we would suggest a sunset provision of at least 3 years from the effective date of the final rule to allow ETFs that have been developing this structure sufficient time to test and implement it.

D. Section 17 Relief Should be Expanded in Limited Circumstances

Consistent with existing exemptive orders, proposed rule 6c-11 would provide exemptions from sections 17(a)(1) and (a)(2) of the 1940 Act with regard to the deposit and receipt of baskets to a person who is an affiliated person of an ETF (or who is an affiliated person of such a person) solely by reason of: (i) holding with the power to vote 5% or more of an ETF's shares; or (ii) holding with the power to vote 5% or more of any investment company that is an affiliated person of the ETF.

We recommend that the SEC expand section 17 relief to allow the adviser or its affiliates to transact with the ETF to provide in-kind seed capital to the fund. Currently, affiliates can seed an ETF prior to launch on a cash basis only, thereby incurring trading costs immediately in the ETF. The ETF must purchase the basket after the cash seed capital comes in and prior to launch. This adds complications, especially in a foreign ETF attempting to bring in securities in a timely manner to maintain a target launch date. Moreover, obtaining seed capital from authorized participants has become more challenging in recent years and expanding this exemption would facilitate seeding of ETFs without raising the overreaching concerns Section 17 was designed to prevent.

[16] *Release* at 37367.
[17] *Id.* at 37368.

E. The Section 22(e) Sunset Provision Should Be Removed

Consistent with existing exemptive orders, the Proposal would provide an exemption from section 22(e) of the 1940 Act to permit an ETF to delay satisfaction of a redemption request for more than seven days in circumstances where local market holidays and/or extended delivery cycles for transferring foreign investments to redeeming authorized participants prevents timely delivery of the foreign investment included in the ETF's basket. The proposed exemption includes a "sunset provision" providing for its expiration 10 years from the rule's effective date. This provision was included because the SEC expects that technological advancements and "changes in market infrastructures and operations" will result in additional shortening of settlement cycles.[18]

While we concur with the SEC that settlement cycles may further shorten in the future, as the Commission concedes, such developments may be gradual, in which case it would be speculative and premature to impose a sunset provision. Moreover, while settlement cycles may shorten, holiday schedules are unlikely to change in the future, which would continue to necessitate the need for such relief. Accordingly, we recommend that the SEC remove the proposed sunset provision relating to relief from section 22(e) and take action when appropriate.

F. Modify Presentation of Portfolio Holdings

The proposed rule would require that ETFs disclose portfolio holdings information on their websites in the manner prescribed within Article 12 of Regulation S-X. While we are supportive of the SEC's efforts to drive consistency in the presentation of holdings disclosure across ETF sponsors, we believe that this could be accomplished by using the disclosure framework under existing exchange listing standards.

We believe that the requirements of Article 12 of Regulation S-X are more extensive than necessary for daily portfolio holdings disclosure.[19] For example, we believe that the description of security type is sufficient, and that further categorization by security type and classification of the holdings into the industry, country or geographic region would not be helpful to value the basket or portfolio. We also do not believe the required footnote disclosures would be useful to investors for valuation or hedging purposes. Moreover, financial reporting information required by Article 12 of Regulation S-X is currently either not applied daily or separately tracked in accounting or compliance systems that do not interface daily with systems used to produce financial statements and, as such, would require costly systems changes. Therefore, we do not believe that applying the financial statement disclosures required by Article 12 of Regulation S-X would enhance the utility of portfolio holdings information for market makers or fund shareholders and would be operationally cumbersome to implement without any corresponding benefit.

As the SEC recognizes in the Proposal, actively managed ETFs must present website disclosure of portfolio holdings in compliance with generic listing standards. Much of the key

[18] *Release* at 37346.
[19] Note 220 of the Release provides that ETFs should include in the portfolio and basket disclosures the data elements required by the notes to the description columns in the Article 12 schedules.

information required under Article 12 of Regulation S-X is already provided by actively managed ETFs to comply with exchange listing rules, including among others, the identifier and description of the holding, quantity of each security, maturity date, coupon rate, market value and percentage weight of the portfolio holding.[20] This framework is already used by many ETF sponsors and is recognized in the marketplace. Accordingly, we would recommend that the SEC standardize the presentation format for portfolio holdings disclosure for all ETFs to follow, or be substantially similar to, the website disclosure required by the generic listing standards for actively managed ETFs. Absent this approach, ETFs would be required to comply with two separate standardized schedules under Regulation S-X, as well as current exchange listing rules, which would be costly and redundant.

III. MODIFICATIONS TO EXCHANGE ACT RELIEF

In the Release, the SEC seeks comment on whether it should provide additional relief from provisions of the Exchange Act. We recommend that the SEC take this opportunity to provide additional guidance or modifications with respect to existing no-action relief from provisions of the Exchange Act and the listing approval process as detailed below.

A. Update Section 13(d) and Section 16 Reporting No-Action Relief

Section 13(d) of the Exchange Act requires any person acquiring beneficial ownership of more than five percent of a class of equity securities that is registered under section 12 of the Exchange Act ("substantial shareholders") to disclose its beneficial ownership of such securities using Schedule 13D or 13G. Section 16(a) of the Exchange Act requires that officers, directors and persons who beneficially own more than ten percent of a class of equity security registered under section 12 of the Exchange Act ("insiders") disclose their beneficial ownership of and transactions in the issuer's securities in publicly available reports.

A substantial shareholder or an insider of an ETF could be subject to the requirements of section 13(d) or section 16 of the Exchange Act, respectively, because the ETF's shares are registered under section 12 of the Exchange Act. However, in *PDR Services Corporation*,[21] the SEC staff indicated that, where an ETF's shares trade at a price that does not "materially" deviate from NAV, then the ETF's substantial shareholders are not required to file reports under section 13(d). In the letter, the staff acknowledged that, given the tight link between an ETF's NAV and its market price, large shareholders lack an incentive to seek to assume control of the ETF and, accordingly, there is no reason to require section 13(d) filings for ETFs under normal circumstances. Similarly, in *Select Sector SPDR Trust*,[22] the SEC staff stated that if the ETF's shares trade at a price that does not deviate "materially" from NAV, then insiders are not required to file reports under section 16(a). The letter highlights the requestor's statement that

[20] *See, e.g.*, NYSE Arca Rule 8.600-E(c)(2).
[21] SEC No-Action Letter (pub. avail. December 14, 1998).
[22] SEC No-Action Letter (pub. avail. May 6, 1999).

the tight correlation between the trading price and NAV leaves no room for insiders to "engage in the type of abuse that section 16 is designed to prevent."[23]

We recommend that the SEC eliminate the conditions in the *PDR Services Corporation* and *Select Sector SPDR Trust* no-action letters relating to a material deviation for section 13(d) and section 16 reporting purposes. Given the daily portfolio holdings disclosure currently required for actively managed ETFs and generally provided by passive ETFs today, and as proposed under rule 6c-11, ETF substantial shareholders lack the incentive to seek control of the ETF and ETF insiders are unable to benefit from insider information about the ETF to realize profits on short-swing transactions. In addition, we understand that such reports are typically not filed by substantial shareholders and are very rarely filed by insiders of ETFs. Presumably, such substantial shareholders and insiders would be required to file section 13(d) and/or section 16 reports if a material deviation between trading price and NAV were to occur. Not only does this place a significant monitoring burden on ETF substantial shareholders and insiders with respect to facts that are outside their control; it is also unclear how they would have timely access to the NAV information needed to implement any monitoring in the first place.[24] Therefore, we recommend that the SEC clarify that all qualifying ETFs under rule 6c-11 that section 13(d) and section 16 reporting is not required with respect to the securities of such ETFs regardless of whether there is a material deviation between the ETF's secondary market price and NAV.

B. Clarify or Update Class No-Action Relief

The SEC has issued class no-action relief for most types of ETFs that meet certain conditions with respect to section 11(d)(1) of the Exchange Act, and rules 10b-10, 10b-17, 11d1-2, 14e-5, 15c1-5, and 15c1-6 thereunder, and rules 101 and 102 of Regulation M.[25] As noted in the Release, the conditions include minimum creation unit sizes, dissemination of the intraday indicative value, restrictions on the payment of certain cash compensation or economic incentives, minimum levels of diversification in the ETF's basket, and whether the ETF tracks an index.[26]

The Proposal provides ETFs with certain desirable operational flexibility, such as allowing ETFs to set their own creation unit sizes and removing the requirement to disseminate the intraday indicative value; however, absent further SEC guidance, ETFs would be unable to benefit from this flexibility because they would still be required to comply with the conditions of the class no-action relief. For example, the class relief requires that ETF shares must be issued or redeemed in creation unit aggregations of 50,000 shares or such other amount where the value is at least $1 million.[27] The SEC addressed the need for class no-action relief in the Proposal to

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[23] SEC No-Action Letter (pub. avail. May 6, 1999).
[24] This could have the odd result of requiring compliance with section 13(d) and section 16 reporting requirements after a substantial shareholder and insider is out of compliance if the ETF experiences a material deviation between its NAV and secondary market price.
[25] *See, e.g.,* Class Relief for Exchange Traded Index Funds (pub. avail. Oct. 24, 2006).
[26] *Release* at 37342.
[27] *Class Relief for Exchange Traded Index Funds*, *supra* note 25.

some extent by classifying ETFs as redeemable securities, thereby making them eligible for the "redeemable securities" exceptions in rules 101 and 102 of Regulation M and rule 10b-17 and the "registered open-end investment company" exemption in rule 11d1-2 under the Exchange Act.[28] However, the Proposal does not address relief from section 11(d)(1) of the Exchange Act and rules 10b-10, 15c1-5, 15c1-6, and 14e-5 thereunder. Accordingly, we request that the SEC clarify or update, as needed, the class no-action relief to appropriately reflect the Proposal.

C. Modify the Listing Approval Process

ETFs that are unable to meet an exchange's generic listing standards must file with the SEC's Division of Trading and Markets, pursuant to section 19(b)(1) of the Exchange Act and rule 19b-4 thereunder, a proposed rule change seeking an order to permit the ETF to list and trade its shares on the exchange. As is the case with exemptive orders, the current listing approval process has resulted in similar ETFs having orders with varying and inconsistent terms and conditions. In addition, the listing process for products that do not satisfy the generic listing standards is lengthy and inefficient and unnecessarily slows the launch of such products. Therefore, we recommend that the Commission modify the listing approval process to apply uniform standards to treat similar products consistently and streamline the process to make it more efficient.

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Fidelity would be pleased to provide further information, participate in any direct outreach efforts the Commission undertakes, or respond to questions the Commission may have about our comments.

Sincerely,

cc: The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson Jr., Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Kara M. Stein, Commissioner

Dalia Blass, Director, Division of Investment Management

[28] *Release* at 37342.