



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

DIVISION OF  
MARKET REGULATION

October 24, 2006

Stuart M. Strauss, Esq.  
Clifford Chance US LLP  
31 West 52nd Street  
New York, NY 10019

Re: Class Relief for Exchange Traded Index Funds  
File No. TP 07-07

Dear Mr. Strauss:

In your letter dated October 23, 2006, as supplemented by conversations with the staff of the Division of Market Regulation ("Staff"), the PowerShares Exchange-Traded Fund Trust (the "Trust") on behalf of itself, the PowerShares Listed Private Equity Portfolio, the PowerShares Financial Preferred Portfolio (collectively the "Funds" and each a "Fund"), the American Stock Exchange and any other national securities exchange or national securities association on or through which shares of the Funds ("Shares") may subsequently trade, and persons or entities engaging in transactions in Shares, requests no-action advice, interpretive, or exemptive relief with respect to specified rules. Specifically, the Trust requests exemptions from, or no-action or interpretive advice regarding, Rules 10a-1, 10b-17, and 14e-5 under the Securities Exchange Act of 1934 ("Exchange Act"), Rules 101 and 102 of Regulation M, and Rule 200(g) of Regulation SHO in connection with secondary market transactions in Shares and the creation and redemption of Shares.

As you note in your letter, the Securities and Exchange Commission ("Commission") or the Staff has granted relief similar to that requested by the Trust with respect to secondary market transactions in Shares and the creation and redemption of Shares in connection with other exchange-traded funds ("ETFs")<sup>1</sup> on numerous occasions, including prior class relief for ETF products that meet certain criteria.<sup>2</sup>

<sup>1</sup> ETFs are investment companies registered under the Investment Company Act of 1940 (the "Investment Company Act") either as unit investment trusts or as open-end investment companies. Shares of ETFs are traded by both institutional and retail investors on securities exchanges and in the over-the-counter markets at negotiated prices. ETFs are designed to replicate the holdings or correspond to the performance and yield of a reference securities index or a highly correlated subset of the securities underlying the index.

<sup>2</sup> See Letter from James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to Claire P. McGrath, Esq., Vice President and Special Counsel, The American Stock Exchange, dated August 17, 2001 (re: Exemptive Relief for Exchange Traded Index Funds) ("2001 Class Letter"). See also Letter from James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated January 3, 2005 (re: No-action Relief From Rule 200(g) of Regulation SHO).

Since the issuance of the 2001 Class Letter, we have continued to provide relief to ETFs that failed to meet one or more of the conditions specified in the 2001 Class Letter. With the additional experience we have gained in this area, we believe that it is appropriate to expand the scope of the relief provided in the 2001 Class Letter.<sup>3</sup>

Response:

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

ETFs meeting the following criteria are granted exemptive and/or no-action or interpretive advice, as more fully described below, with respect to Rules 10a-1, 10b-17, and 14e-5 under the Exchange Act, Rules 101 and 102 of Regulation M and Rule 200(g) of Regulation SHO, provided that the following conditions are satisfied:

1. The ETF shares are issued by an open-end investment company or unit investment trust registered with the Commission under the Investment Company Act;
2. The ETF consists of a basket of twenty or more Component Securities,<sup>4</sup> with no one Component Security constituting more than 25% of the total value of the ETF;<sup>5</sup>
3. At least 70% of the ETF must be comprised of Component Securities that meet the minimum public float and minimum average daily trading volume thresholds under the "actively-traded securities" definition found in Regulation M for excepted securities during each of the previous two months of trading prior to formation of the relevant ETF; provided, however,

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<sup>3</sup> The Commission has also recently provided expanded class relief for ETFs with respect to Section 11(d)(1) of the Exchange Act and Rules 10b-10, 11d1-2, 15c1-5, and 15c1-6 under the Exchange Act. *See* Letter from Catherine McGuire, Esq., Chief Counsel, Division of Market Regulation, to the Securities Industry Association Derivative Products Committee, dated November 21, 2005.

<sup>4</sup> For purposes of our response, "Component Securities" are individual securities that comprise the ETF basket, *e.g.*, securities that are assembled to replicate the particular index that the ETF tracks.

<sup>5</sup> For purposes of our response, whether any one Component Security constitutes more than 25% of the total value of the ETF shall be determined as of the most recent rebalancing of the ETF's reference securities index.

that if the ETF has 200 or more Component Securities, then 50% of the Component Securities must meet the actively-traded securities thresholds;

4. ETF shares are to be issued and redeemed in Creation Unit aggregations of 50,000 shares or such other amount where the value of a Creation Unit is at least \$1 million at the time of issuance; and
5. The ETF must be managed to track a particular index all of the components of which have publicly available last sale trade information. The intra-day proxy value of the ETF per share and the value of the "benchmark" index must be publicly disseminated by a major market data vendor throughout the trading day.

This relief is further subject to "rule-specific" terms described below.

#### Regulation M

Redeemable securities issued by an open-end management investment company are excepted from the provisions of Rules 101 and 102 of Regulation M. As described above, ETFs must register as an open-end management investment company or a unit investment trust under the Investment Company Act to issue shares that are redeemable only in Creation Units.

#### Rule 101 of Regulation M

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

With respect to an ETF that is a registered open-end management investment company that will continuously redeem at net asset value Creation Unit size aggregations of shares, and where the secondary market price of shares of the ETF do not vary substantially from the net asset value of such shares (which will be based on the value of the Component Securities in the underlying index and will be computed on a daily basis), the Commission hereby confirms that the ETF will be excepted under paragraph (c)(4) of Rule 101 of Regulation M thus permitting

persons who may be deemed to be participating in a distribution of ETF shares to bid for or purchase shares during their participation in such distribution.<sup>6</sup>

The Commission also confirms the interpretation of Rule 101 of Regulation M that the redemption of Creation Unit size aggregations of ETF shares and the receipt of Component Securities in exchange therefor by a participant in a distribution of ETF shares would not constitute an "attempt to induce any person to bid for or purchase a covered security, during the applicable restricted period"<sup>7</sup> within the meaning of Regulation M, and therefore would not violate Regulation M.

#### Rule 102 of Regulation M

Rule 102 of Regulation M prohibits issuers, selling security holders, or any affiliated purchaser of such person from bidding for, purchasing, or attempting to induce any person to bid for or purchase a covered security during the applicable restricted period in connection with a distribution of securities effected by or on behalf of an issuer or selling security holder.

With respect to an ETF that is a registered open-end management investment company that will redeem at net asset value Creation Units of ETF shares, the Commission hereby confirms that the ETF is excepted under paragraph (d)(4) of Rule 102 of Regulation M, thus permitting the ETF to redeem shares during the continuous offering of the shares.

#### Rule 10a-1

Rule 200 of Regulation SHO defines "short sale" and Rule 10a-1 under the Exchange Act governs short sales generally. Paragraph (a) of Rule 10a-1 covers transactions in any security registered on a national securities exchange, if trades in such security are reported in the consolidated transaction reporting system, and prohibits short sales with respect to these securities unless such sales occur on a "plus tick," (that is, a price above the price at which the immediately preceding sale was effected), or "zero-plus tick," (that is, at the last sale price if it was higher than the last different price). Rule 10a-1 is designed to prevent the market price of a stock or other "reported security," as defined in Rule 11Aa3-1(a)(4) under the Exchange Act, from being manipulated downward by unrestricted short selling.

<sup>6</sup> We note that Regulation M does not prohibit a distribution participant and its affiliated purchasers from bidding for and purchasing Component Securities in accordance with the exceptions contained in paragraphs (b)(6) and (c)(1) of Rule 101. Rule 101 (b)(6)(i) excepts basket transactions in which bids or purchases are made in the ordinary course of business in connection with a basket of 20 or more securities in which a covered security does not comprise more than 5% of the value of the basket purchased. Rule 101(b)(6)(ii) excepts adjustments to such a basket made in the ordinary course of business as a result of a change in the composition of a standardized index. Also, Rule 101(c)(1) excepts transactions in "actively-traded securities."

<sup>7</sup> 17 CFR 242.101

Where the composite and derivative nature of an ETF is such that it would not appear that trading in the ETF's shares would be susceptible to the practices that Rule 10a-1 is designed to prevent, the Commission hereby grants an exemption from Rule 10a-1 to permit sales of ETF shares without regard to the "tick" requirements of Rule 10a-1.<sup>8</sup>

We note that the exemption from Rule 10a-1 would not apply to secondary market portfolio sales made in connection with the redemption of ETF shares.

#### Rule 200(g) of Regulation SHO

Rule 200(g) of Regulation SHO provides that a broker-dealer must mark all sell orders of any equity security as "long," "short," or "short exempt." Rule 200(g)(2) requires that a short sale order must be marked "short exempt" if the seller is relying on an exception from the tick test of Rule 10a-1 of the Exchange Act or any short sale price test of any exchange or national securities association.

Accordingly, in conjunction with the exemption granted above to permit sales of ETF shares without regard to the "tick" requirements of Rule 10a-1, the Staff will not recommend to the Commission enforcement action under Rule 200(g) of Regulation SHO if a broker-dealer marks "short," rather than "short exempt," a short sale that is effected in ETF shares subject to the following conditions:

- i. For each exempt short sale, the various market centers that execute such sales have instituted procedures to "mask" the short sale character of the transaction so that they are executed as short exempt;
- ii. Such market centers monitor on a regular basis to confirm that any such product or transaction continues to meet the conditions for the exemptive relief and re-institute the price test for any product or transaction that fails to satisfy such conditions;
- iii. A broker-dealer executing exempt short sales will mark such sales as "short," and in no event will such sales be marked "long;" and
- iv. The market centers will maintain an audit trail of all such trade executions, which is capable of being produced and subject to review upon request by the Commission and other appropriate regulatory authorities.

#### Rule 10b-17

Rule 10b-17, with certain exceptions, requires an issuer of a class of publicly traded securities to give notice of certain specified actions (for example, a dividend distribution, stock split, or rights offering) relating to such class of securities in accordance with Rule 10b-17(b).

<sup>8</sup> The market value of eligible ETF shares must rise or fall based primarily on changes in the net asset value of the Component Securities of the particular underlying index.

With respect to an ETF that is registered under the Investment Company Act as an open-end management investment company, the Commission hereby grants an exemption from the requirements of Rule 10b-17 to such ETFs with respect to transactions in ETF shares.<sup>9</sup>

#### Rule 14e-5

Rule 14e-5 under the Exchange Act, among other things, prohibits any covered person in connection with a tender offer for equity securities from, directly or indirectly, purchasing or arranging to purchase any subject or related securities except as part of the offer, from the time the offer is publicly announced until its expiration.

Rule 14e-5 explicitly includes dealer-managers of a tender offer within the rule's definition of covered person. Accordingly, while acting as dealer-manager of a tender offer for a Component Security, a dealer-manager is prohibited from purchasing or arranging to purchase that Component Security until the expiration of the offer.

Where purchases or redemptions of ETF shares do not appear to result in the abuses at which Rule 14e-5 is directed and so long as any bids or purchases by dealer-managers are not effected for the purpose of facilitating a tender offer, the Commission hereby grants an exemption from Rule 14e-5 to permit any person acting as dealer-manager of a tender offer for a Component Security to: (1) redeem ETF shares in Creation Unit size aggregations for Component Securities that may include a security subject to the tender offer; and (2) purchase ETF shares during such offer.<sup>10</sup>

The foregoing exemptions from Rules 10a-1, 10b-17, and 14e-5, interpretive guidance with respect to Rules 101 and 102 of Regulation M, and no-action position taken under Rule 200(g) of Regulation SHO, are strictly limited to the application of those rules to transactions involving ETF shares under the circumstances described above. Such transactions should be discontinued, pending presentation of the facts for our consideration, in the event that any material change occurs with respect to any of those facts or representations. Moreover, the foregoing exemptions from Rules 10a-1, 10b-17, and 14e-5, interpretive guidance with respect to Rules 101 and 102 of Regulation M, and no-action position taken under Rule 200(g) of Regulation SHO are subject to the condition that such transactions in ETF shares, any Component Security, or any related securities are not made for the purpose of creating actual, or

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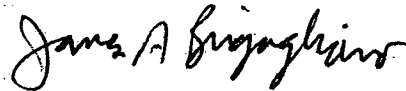
<sup>9</sup> We also note that compliance with Rule 10b-17 would be impractical in light of the nature of ETFs. This is because it is not possible for ETFs to accurately project ten days in advance what dividend, if any, would be paid on a particular record date.

<sup>10</sup> The Staff also confirms its no-action position under Rule 14e-5 when a broker-dealer acting as a dealer-manager of a tender offer for a Component Security purchases such Component Security in the secondary market for the purpose of tendering them to purchase a Creation Unit size aggregation of ETF shares, if such transactions are effected as adjustments to such a basket in the ordinary course of business as a result of a change in the composition of the relevant index.

apparent, active trading in or raising or otherwise affecting the price of such securities. Finally, requests for relief for products not meeting the above criteria will continue to be considered upon request on a case-by-case basis.<sup>11</sup>

These exemptions and interpretive advice and no-action positions are subject to modification or revocation if at any time the Commission or Staff determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, persons relying on these exemptions and no-action positions are directed to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Sections 9(a), 10(b), and Rule 10b-5 thereunder. Responsibility for compliance with these and other provisions of the federal or state securities laws must rest with persons relying on these exemptions and no-action positions. The Staff expresses no view with respect to other questions that the proposed transactions may raise, including, but not limited to, the adequacy of disclosure concerning, and the applicability of other federal and state laws to, the proposed transactions.

For the Commission, by the Division of Market  
Regulation, pursuant to delegated authority,



James A. Brigagliano  
Acting Associate Director

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<sup>11</sup> For example, the relief does not apply to transactions in securities issued by entities not registered as investment companies under the Investment Company Act. *See, e.g.*, Letters from James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to David Yeres, Esq., Clifford Chance US LLP, dated January 27, 2005 (iShares COMEX Gold Trust) and to George T. Simon, Esq., Foley & Lardner LLP, dated December 5, 2005 (Euro Currency Trust); and Letter from James A. Brigagliano, Esq., Acting Associate Director, Division of Market Regulation, to James M. Cain, Esq., Sutherland, Asbill & Brennan LLP, dated April 7, 2005 (U.S. Oil Fund). We also note that separate relief has been provided by the Staff for certain commodity-based investment vehicles with respect to Rules 101 and 102 of Regulation M and Rule 200(g) of Regulation SHO. *See* Letter from Racquel L. Russell, Esq., Branch Chief, Division of Market Regulation, to George T. Simon, Esq. Foley & Lardner LLP, dated June 21, 2006.

**C L I F F O R D  
C H A N C E**

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Mr. James A. Brigagliano  
Acting Associate Director  
Office of Trading Practices and Processing  
Division of Market Regulation  
Securities and Exchange Commission  
100 F Street, NE, Mail Stop 10-1  
Washington, DC 20549

SECURITIES AND EXCHANGE COMMISSION  
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DIVISION OF MARKET REGULATION

Re: Request for Exemptive, Interpretive or No-Action Relief from Rules 10a-1; 10b-17; and 14e-5; Rules 101 and 102 of Regulation M and Rule 200(g) of Regulation SHO promulgated under the Securities Exchange Act of 1934.

Dear Mr. Brigagliano:

PowerShares Exchange-Traded Fund Trust (the "Trust") is an open-end management investment company which was organized on June 9, 2000 as a Massachusetts business trust. The Trust currently offers 62 separate investment series.<sup>1</sup> The Trust plans to add additional series to the

<sup>1</sup> These include the PowerShares Aerospace & Defense Portfolio, PowerShares Dividend Achievers™ Portfolio, PowerShares Dynamic Biotechnology & Genome Portfolio, PowerShares Dynamic Building & Construction Portfolio, PowerShares Dynamic Energy Exploration & Production Portfolio, PowerShares Dynamic Food & Beverage Portfolio, PowerShares Dynamic Hardware & Consumer Electronics Portfolio, PowerShares Dynamic Insurance Portfolio, PowerShares Dynamic Large Cap Growth Portfolio, PowerShares Dynamic Large Cap Value Portfolio, PowerShares Dynamic Leisure and Entertainment Portfolio, PowerShares Dynamic Market Portfolio, PowerShares Dynamic Media Portfolio, PowerShares Dynamic Mid Cap Growth Portfolio, PowerShares Dynamic Mid Cap Value Portfolio, PowerShares Dynamic Networking Portfolio, PowerShares Dynamic Oil & Gas Services Portfolio, PowerShares Dynamic OTC Portfolio, PowerShares Dynamic Pharmaceuticals Portfolio, PowerShares Dynamic Retail Portfolio, PowerShares Dynamic Semiconductors Portfolio, PowerShares Dynamic Small Cap Growth Portfolio, PowerShares Dynamic Small Cap Value Portfolio, PowerShares Dynamic Software Portfolio, PowerShares Dynamic Telecommunications & Wireless Portfolio, PowerShares Dynamic Utilities Portfolio, PowerShares FTSE RAFI US 1000 Portfolio, PowerShares Golden Dragon Halter USX China Portfolio, PowerShares High Growth Rate Dividend Achievers™ Portfolio, PowerShares High Yield Equity Dividend Achievers™ Portfolio, PowerShares International Dividend Achievers™ Portfolio, PowerShares Lux Nanotech Portfolio, PowerShares Value Line



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Timeliness™ Select Portfolio, PowerShares Water Resources Portfolio, PowerShares WilderHill Clean Energy Portfolio, PowerShares Zacks Micro Cap Portfolio, PowerShares Zacks Small Cap Portfolio, PowerShares FTSE RAFI US 1500 Small-Mid Portfolio, PowerShares FTSE RAFI Energy Sector Portfolio, PowerShares FTSE RAFI Basic Materials Sector Portfolio, PowerShares FTSE RAFI Industrials Sector Portfolio, PowerShares FTSE RAFI Consumer Goods Sector Portfolio, PowerShares FTSE RAFI Health Care Sector Portfolio, PowerShares FTSE RAFI Consumer Services Sector Portfolio, PowerShares FTSE RAFI Telecommunications & Technology Sector Portfolio, PowerShares FTSE RAFI Utilities Sector Portfolio, PowerShares FTSE RAFI Financials Sector Portfolio, PowerShares Dynamic Basic Materials Sector Portfolio, PowerShares Dynamic Consumer Discretionary Sector Portfolio, PowerShares Dynamic Consumer Staples Sector Portfolio, PowerShares Dynamic Energy Sector Portfolio, PowerShares Dynamic Financial Sector Portfolio, PowerShares Dynamic Industrials Sector Portfolio, PowerShares Dynamic Healthcare Sector Portfolio, PowerShares Dynamic Technology Sector Portfolio, PowerShares Dynamic Banking Portfolio, PowerShares Dynamic Healthcare Services Portfolio, PowerShares Dynamic MagniQuant Portfolio, PowerShares Cleantech™ Portfolio, PowerShares Financial Preferred Portfolio, PowerShares Listed Private Equity Portfolio and PowerShares WilderHill Progressive Energy Portfolio (collectively, the "Current Funds"). The Trust's registration statements on Form N-1A were declared effective by the Securities and Exchange Commission on April 17, 2003 (with respect to the PowerShares Dynamic Market Portfolio and the PowerShares Dynamic OTC Portfolio), on December 9, 2004 (with respect to the PowerShares Golden Dragon Halter USX China Portfolio and the PowerShares High Yield Equity Dividend Achievers™ Portfolio), on March 3, 2005 (with respect to the PowerShares WilderHill Clean Energy Portfolio, PowerShares Dynamic Large Cap Growth Portfolio, PowerShares Dynamic Large Cap Value Portfolio, PowerShares Dynamic Mid Cap Growth Portfolio, PowerShares Dynamic Mid Cap Value Portfolio, PowerShares Dynamic Small Cap Growth Portfolio and PowerShares Dynamic Small Cap Value Portfolio), on June 23, 2005 (with respect to the PowerShares Dynamic Biotechnology & Genome Portfolio, PowerShares Dynamic Food & Beverage Portfolio, PowerShares Dynamic Leisure and Entertainment Portfolio, PowerShares Dynamic Media Portfolio, PowerShares Dynamic Networking Portfolio, PowerShares Dynamic Pharmaceuticals Portfolio, PowerShares Dynamic Semiconductors Portfolio and PowerShares Dynamic Software Portfolio), on August 18, 2005 (with respect to the PowerShares Zacks Micro Cap Portfolio), on September 15, 2005 (with respect to the PowerShares Dividend Achievers™ Portfolio, PowerShares High Growth Rate Dividend Achievers™ Portfolio and PowerShares International Dividend Achievers™ Portfolio), on October 26, 2005 (with respect to the PowerShares Aerospace & Defense Portfolio, PowerShares Dynamic Building & Construction Portfolio, PowerShares Dynamic Energy Exploration & Production Portfolio, PowerShares Dynamic Insurance Portfolio, PowerShares Dynamic Oil & Gas Services Portfolio, PowerShares Dynamic Retail Portfolio, PowerShares Dynamic Utilities Portfolio and PowerShares Lux Nanotech Portfolio), on December 6, 2005 (with respect to the PowerShares Dynamic Hardware & Consumer Electronics Portfolio, PowerShares Dynamic Telecommunications & Wireless Portfolio, PowerShares Value Line Timeliness™ Select Portfolio and PowerShares Water Resources Portfolio), on December 19, 2005 (with respect to the PowerShares FTSE RAFI US 1000 Portfolio), on September 20, 2006 (with respect to the PowerShares FTSE RAFI US 1500 Small-Mid Portfolio, PowerShares FTSE RAFI Energy Sector Portfolio, PowerShares FTSE RAFI Basic Materials Sector Portfolio, PowerShares FTSE RAFI Industrials Sector Portfolio, PowerShares FTSE RAFI Consumer Goods Sector Portfolio, PowerShares FTSE RAFI Health Care Sector Portfolio, PowerShares FTSE RAFI Consumer Services Sector Portfolio, PowerShares FTSE RAFI Telecommunications & Technology Sector Portfolio, PowerShares FTSE RAFI Utilities Sector Portfolio and PowerShares FTSE RAFI

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Trust (the "New Funds").<sup>2</sup> This letter requests relief only with respect to the PowerShares Listed Private Equity Portfolio and the PowerShares Financial Preferred Portfolio (the "Funds"), two series of the Trust. The Funds' shares have been approved for listing on the American Stock Exchange (the "AmEx"), subject to notice of issuance. The AmEx is expected to rely on Rule 19b-4(e) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to list and trade shares of the Funds ("Shares").

The PowerShares Listed Private Equity Portfolio will invest in common stocks specifically consisting of the component securities of the Red Rocks Listed Private Equity Index (the "Listed Private Equity Index"). The PowerShares Financial Preferred Portfolio will invest in preferred stocks specifically consisting of the component securities of the Wachovia Hybrid & Preferred Securities Financial Index (the "WHPS(SM) Financial Index" and, together with the Listed Private Equity Index, are referred to as the "Indexes"). The Trust will issue and redeem Shares only in aggregations of 100,000 Shares (referred to as "Creation Units").<sup>3</sup>

The Trust, on behalf of itself, the Funds, the AmEx and any other national securities exchange or national securities association on or through which the Shares may subsequently trade (with each such market being a "Market"), and persons or entities engaging in transactions in Shares, as the case may be, requests that the Securities and Exchange Commission (the "Commission") grant exemptive,

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Financials Sector Portfolio), on October 12, 2006 (with respect to the PowerShares Dynamic Basic Materials Sector Portfolio, PowerShares Dynamic Consumer Discretionary Sector Portfolio, PowerShares Dynamic Consumer Staples Sector Portfolio, PowerShares Dynamic Energy Sector Portfolio, PowerShares Dynamic Financial Sector Portfolio, PowerShares Dynamic Industrials Sector Portfolio, PowerShares Dynamic Healthcare Sector Portfolio, PowerShares Dynamic Technology Sector Portfolio, PowerShares Dynamic Banking Portfolio, PowerShares Dynamic Healthcare Services Portfolio and PowerShares Dynamic MagniQuant Portfolio) and on October 24, 2006 (with respect to PowerShares Cleantech™ Portfolio, PowerShares Financial Preferred Portfolio, PowerShares Listed Private Equity Portfolio and PowerShares WilderHill Progressive Energy Portfolio) (Securities Act File No. 333-100228, Investment Company Act File No. 811-21265).

<sup>2</sup> The New Funds of the Trust that are not yet effective, but have filed registration statements with the Securities and Exchange Commission include the PowerShares Dynamic Large Cap Portfolio, PowerShares Dynamic Mid Cap Portfolio, PowerShares Dynamic Small Cap Portfolio, PowerShares Dynamic Deep Value Portfolio, PowerShares Dynamic Aggressive Growth Portfolio, PowerShares Buyback Achievers™ Portfolio, PowerShares NASDAQ® Dividend Achievers™ Portfolio, PowerShares India Tiger Portfolio, PowerShares Autonomic Allocation Research Affiliates Portfolio, PowerShares REIT Preferred Portfolio, PowerShares DWA Technical Leaders™ Portfolio, PowerShares Value Line 400 Portfolio, PowerShares Value Line Industry Rotation Portfolio, PowerShares Dynamic Brand Name Products Portfolio and PowerShares NASDAQ® Internet Portfolio.

<sup>3</sup> On March 28, 2003, the Commission granted the Trust and its co-applicants exemptions from the provisions of sections 2(a)(32) and 5(a)(1) of the 1940 Act in order to permit the Trust to maintain its registration as an open-end investment company and to issue shares that are redeemable only in Creation Unit size aggregations of Shares with respect to the initial two portfolios of the Trust, the PowerShares Dynamic Market Portfolio and the PowerShares Dynamic OTC Portfolio, and other funds issued by the Trust in the future that meet the stated criteria, which include the Funds.

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interpretive or no-action relief from Rules 10a-1, 10b-17 and 14e-5 under the Exchange Act, Rules 101 and 102 of Regulation M and Rule 200(g) of Regulation SHO under the Exchange Act in connection with secondary market transactions in Shares and the creation or redemption of Creation Units of Shares, as discussed below. The relief requested in this letter is substantially similar to the relief granted by the Commission in a letter from James A. Brigagliano, Assistant Director, Division of Market Regulation to Stuart M. Strauss, Clifford Chance US LLP dated March 2, 2005, with respect to the trading of the PowerShares WilderHill Clean Energy Portfolio and a letter from James A. Brigagliano, Assistant Director, Division of Market Regulation to Stuart M. Strauss, Clifford Chance US LLP dated October 25, 2005, with respect to the trading of the PowerShares Lux Nanotech Portfolio.

The AmEx has previously received relief<sup>4</sup> (the "AmEx Letter") with respect to those Exchange Act provisions and rules thereunder. Exchange-traded funds ("ETFs") listed and traded on the AmEx may rely upon the relief granted in the AmEx Letter if such ETFs meet certain conditions, including the following: (a) at least 85% of the ETF must be comprised of component stocks that have a minimum average daily trading volume (ADTV) of at least \$1 million during each of the previous two (2) months of trading prior to formation of the relevant ETF and (b) at least 85% of the ETF must be comprised of component stocks that have a minimum public float value of at least \$150 million; provided, however, if the ETF has 200 or more component stocks, then 75% of the component stocks must meet the \$1 million ADTV and \$150 million public float thresholds. The Current Funds and the New Funds other than the Funds meet all relevant conditions of the AmEx Letter, and they accordingly are relying on the AmEx Letter with respect to the aforementioned Exchange Act provisions and rules.<sup>5</sup> However, the PowerShares Listed Private Equity Portfolio and the PowerShares Financial Preferred Portfolio currently do not meet the minimum average daily trading volume criteria of the AmEx Letter set forth above, the Trust therefore requests relief with respect to the Funds from the aforementioned Exchange Act provisions and rules.<sup>6</sup>

The Trust notes that its proposal—the creation and issuance by an investment company of shares that individually trade on the AmEx or another market, but that in large aggregations can be purchased from and redeemed with the issuing investment company—is no longer novel. The Commission has in the past thirteen years considered and approved many proposals similar to this proposal. Some of these products have been trading publicly for years, and the Trust is not aware of

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<sup>4</sup> Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Claire P. McGrath, Vice President and Special Counsel, AmEx, dated August 17, 2001.

<sup>5</sup> The PowerShares WilderHill Clean Energy Portfolio did not meet the two criteria of the AmEx Letter discussed above and was granted relief by the Commission on March 2, 2005 substantively similar to the relief requested by this letter. The PowerShares Lux Nanotech Portfolio did not meet one criteria of the AmEx Letter discussed above and was granted relief by the Commission on October 25, 2005 substantively similar to the relief requested by this letter.

<sup>6</sup> Except for the minimum average daily trading volume criteria of the AmEx Letter set forth above, the PowerShares Listed Private Equity Portfolio and the PowerShares Financial Preferred Portfolio meet all conditions of the AmEx Letter, including the minimum public float requirements.

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any abuses associated with them. Indeed, several of the products have been so embraced by investors that they routinely are among the highest volume securities on the exchanges on which they trade.

**The Funds.** The Funds are separate investment portfolios of the Trust. The investment objective of each Fund is to provide investment results that, before fees and expenses, correspond generally to the price and yield of its respective Index. Each Fund's investment objective is not a fundamental policy and can be changed by the Board of Trustees without shareholder approval.

The Funds intend to maintain the required level of diversification and otherwise conduct its operations so as to qualify as a "regulated investment company" for purposes of the Internal Revenue Code.

**The Listed Private Equity Index.** The Index is comprised of approximately 40 stocks and American Depository Receipts ("ADRs") of U.S. publicly listed private equity companies, including business development companies ("BDC") and other financial institutions or vehicles whose principal business is to invest in and lend capital to privately-held companies (collectively "listed private equity companies"). The listed private equity companies that comprise the Listed Private Equity Index will be selected based upon reputation, valuation metrics, management, financial data, historical performance and the need for diversification within the portfolio. The Listed Private Equity Index uses a modified equal dollar weighting.

*Index Construction.*

1. For a stock to be considered for inclusion in the Listed Private Equity Index, it must have a majority of its assets invested or exposed to private companies or have as its stated intention to have a majority of its assets invested in or exposed to private companies. The underlying assets may be domestic or foreign and be listed on a U.S. exchange.
2. The Listed Private Equity Index is composed of a diversified mix of listed private equity companies. The listed private equity companies that will comprise the Listed Private Equity Index will be selected based upon reputation, valuation metrics, management, financial data, historical performance and the need for diversification within the portfolio. Diversification for the Listed Private Equity Index is viewed from three different perspectives: a) stage of investment; b) capitalization structure (e.g., equity, debt, mezzanine); and c) industry focus.
3. Each listed private equity company must have market capitalization of at least \$50 million and a closing price above \$1.00 per share for the trailing six months if not currently in the Listed Private Equity Index.
4. The Listed Private Equity Index uses a modified equal dollar weighting. No single stock may exceed 10% of the Index weight at the time of rebalancing.

**The WHPS(SM) Financial Index.** The Index is comprised of preferred stocks of approximately 18 financial institutions that have received an industrial sector classification of

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"financial" from the Bloomberg Professional Service(R). Stocks in the WHPS(SM) Financial Index will be selected by Wachovia Securities ("Wachovia") pursuant to a proprietary selection methodology. Preferred stocks are a class of equity security that have a payment priority over common stock in the payment of specified dividends and in the event of an issuer's liquidation. Dividends are paid on a fixed or variable rate percentage of the fixed par value at which the preferred stock is issued, and preferred stocks generally have a liquidation value that equals the original purchase price of the stock at the time of issuance. The WHPS(SM) Financial Index tracks the performance of preferred stocks issued exclusively by financial institutions and listed on the New York Stock Exchange or AmEx or quoted on NASDAQ, which meet certain criteria.

*Index Construction.*

1. Eligible securities that will be included in the WHPS(SM) Financial Index must meet the following criteria: preferred stocks that are issued exclusively by financial institutions; an industrial sector classification of "financial" from the Bloomberg Professional Service(R); U.S. dollar-denominated and publicly issued in the U.S. domestic market; par amount of at least \$25; perpetual preferred securities or depositary preferred securities; maintain a minimum of ten million shares outstanding; and fixed for life dividends.

2. The WHPS(SM) Financial Index does not include convertible preferred stocks, monthly income notes, senior notes or trust preferred securities.

3. The WHPS(SM) Financial Index is calculated using a market capitalization weighting methodology applied in conjunction with the monthly adjustments. The weight of any component stock may not account for more than 20% of the total value of the WHPS(SM) Financial Index. Component stocks greater than 20% of the WHPS(SM) Financial Index are reduced to individually represent 20% of the value of the WHPS(SM) Financial Index. The aggregate amount by which all components over 20% is reduced is redistributed proportionately across the remaining components that represent less than 20% of the WHPS(SM) Financial Index value. After this redistribution, if any other component exceeds 20%, the component is set to 20% of the WHPS(SM) Financial Index value and the redistribution is repeated.

4. The WHPS(SM) Financial Index is subject to monthly rebalancing adjustments. All outstanding preferred stocks are tested for suitability based on eligibility criteria. Stocks that are deemed qualified are added to the WHPS(SM) Financial Index as constituents whereas those that are deemed inappropriate are excluded from the reconstitution of the WHPS(SM) Financial Index. Recalibrations can occur following specific events such as redemption, merger or acquisition, bankruptcy or delisting affecting existing stocks included or excluded from the WHPS(SM) Financial Index. These events will require a daily adjustment or directly influence the next monthly adjustments.

**Method of Purchase.** AIM Distributors, Inc. (the "Distributor") will act on an agency basis and will be each Fund's "principal underwriter" as defined in Section 2(a)(29) of the Investment

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Company Act of 1940, as amended ("1940 Act"). Shares are issued and sold by the Funds only in Creation Units on a continuous basis through the Distributor at their net asset value next determined after receipt of an order in proper form. The Creation Units of the Funds each consist of 100,000 Shares. Creation Units of Shares may be purchased only by or through a DTC Participant that has entered into an agreement with the Trust, the Distributor and the transfer agent, with respect to creations and redemptions of Creation Units ("Authorized Participant"). The Distributor will deliver the Trust's Prospectus (and, upon request, each Fund's Statement of Additional Information) to each person purchasing Creation Units.

The consideration for purchase of a Creation Unit generally consists of the deposit of a designated portfolio of equity securities constituting a substantial replication, or representation, of a Fund's benchmark Index (the "Deposit Securities") and an amount of cash computed as described below (the "Balancing Amount"). Together, the Deposit Securities and the Balancing Amount constitute the "Portfolio Deposit," which represents the minimum investment amount for the purchase of Shares from the Trust. The Balancing Amount represents the difference between the net asset value of a Creation Unit and the market value of the Deposit Securities.

Creation Units of each Fund may be created in advance of receipt by the Trust of all or a portion of the applicable Deposit Securities as described below. In these circumstances, the initial deposit will have a value greater than the net asset value of the Shares on the date the order is placed in proper form since in addition to available Deposit Securities, cash must be deposited in an amount equal to the sum of (i) the Cash Component, plus (ii) 115% of the market value of the undelivered Deposit Securities (the "Additional Cash Deposit"). An additional amount of cash shall be required to be deposited with the Trust, pending delivery of the missing Deposit Securities to the extent necessary to maintain the Additional Cash Deposit with the Trust in an amount at least equal to 115% of the daily marked to market value of the missing Deposit Securities. The Participant Agreement will permit the Trust to buy the missing Deposit Securities at any time. Authorized Participants will be liable to the Trust for the costs incurred by the Trust in connection with any such purchases. These costs will be deemed to include the amount by which the actual purchase price of the Deposit Securities exceeds the market value of such Deposit Securities on the day the purchase order was deemed received by the Distributor plus the brokerage and related transaction costs associated with such purchases. The Trust will return any unused portion of the Additional Cash Deposit once all of the missing Deposit Securities have been properly received by the custodian or purchased by the Trust and deposited into the Trust. In addition, a transaction fee of \$500 will be charged in all cases, plus an additional fee of up to four times the transaction fee may be charged in certain cases as described below. All transaction fees and additional fees will be fully disclosed in the Trust's Prospectus or each Fund's Statement of Additional Information.

All standard orders to purchase Creation Units must be received by the Distributor no later than the closing time of the regular trading session on the AmEx, ordinarily 4:00 p.m., New York time ("Closing Time") on the date such order is placed in order for the purchase of Creation Units to be effected based on the net asset value of Shares as next determined on such date after receipt of the

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order in proper form. In the case of Custom Orders (as described below), the Distributor must receive the order no later than 3:00 p.m. New York time.

Any order that is not in proper form will be rejected. After a Fund has accepted a purchase order and received delivery of the Deposit Securities and any accompanying cash payment, the Depositary Trust Company will instruct it to initiate "delivery" of the appropriate number of Shares to the book-entry account specified by the Authorized Participant. The delivery of Creation Units of a Fund so created will occur no later than the third Business Day following the day on which the purchase order is deemed received by the Distributor.

The Trust reserves the right to offer a "cash" option for sales and redemptions of Shares (subject to applicable legal requirements), although it has no current intention of doing so. As described above, Shares may be issued in advance of receipt of Deposit Securities subject to various conditions including a requirement to maintain on deposit with the Trust cash at least equal to 115% of the market value of the missing Deposit Securities. The Funds may allow an in-kind purchaser to substitute cash, or the Funds may substitute cash in the case of a redemption, in lieu of such purchaser or redeemer depositing or receiving one or more of the requisite Deposit Securities. In each instance of such cash sales or redemptions, the Trust may impose transaction fees that will be higher than the transaction fees associated with in-kind purchases or redemptions. In all cases, such fees will be limited in accordance with the requirements of the Commission applicable to management investment companies offering redeemable securities, and will be fully disclosed in each Fund's Prospectus or the Trust's Statement of Additional Information.

The Adviser (as defined below) makes available through the National Securities Clearing Corporation ("NSCC") on each Business Day, immediately prior to the opening of business on the AmEx (currently 9:30 a.m., New York time), the list of the names and the required number of such shares of each Deposit Security to be included in the current Portfolio Deposit (based on information at the end of the previous Business Day) for each Fund. Such Portfolio Deposit is applicable, subject to any adjustments as described below, to effect creations of Creation Units of the Funds until such time as the next-announced composition of the Deposit Securities is made available.

The identity and number of shares constituting the Deposit Securities required for a Portfolio Deposit for each Fund changes as rebalancing adjustments and corporate action events are reflected from time to time by PowerShares Capital Management LLC, as the adviser to the Funds (the "Adviser"), with a view to remain consistent with the investment objective of each Fund. The composition of the Deposit Securities may also change in response to adjustments to the weighting or composition of the securities constituting the Index. In addition, the Trust reserves the right to permit or require the substitution of an amount of cash (*i.e.*, a "cash in lieu" amount) to be added to the Balancing Amount to replace any Deposit Securities which may not be available in sufficient quantity for delivery or which may not be eligible for transfer through the DTC or which may not be eligible for trading by an Authorized Participant or the investor for which the Authorized Participant is acting (described in the Statement of Additional Information) ("Custom Order").

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The estimated value of a Creation Unit of Shares of each Fund as of August 31, 2006 was \$2.5 million (assuming the inclusion of all stocks in the Index in their exact weighting). Due to the value of a Creation Unit in each Fund, it is expected that, generally, only institutions will purchase Creation Units from the Funds.

**Distributor.** The Distributor will not distribute Shares in less than Creation Units, and it will not maintain a secondary market in the Shares. The Distributor may enter into selected dealer agreements with other broker-dealers or other qualified financial institutions for the sale of Creation Units of Shares ("Soliciting Dealers"). Such Soliciting Dealers may also be a participant in DTC. The Board of Trustees of the Trust has adopted a services and distribution plan pursuant to Rule 12b-1 under the 1940 Act for the Funds. In accordance with its Rule 12b-1 plan, the Funds are authorized to pay up to 0.25% of its average daily net assets each year for certain distribution-related activities. No 12b-1 fees are currently paid by the Funds and there are no plans to impose these fees.

**Redemption of Shares.** Creation Units of the Funds are redeemable only in Creation Unit Share aggregations through The Bank of New York, in its capacity as each Fund's transfer agent ("Transfer Agent"). Orders to redeem Creation Units of the Funds may only be effected by or through an Authorized Participant.

Consistent with Section 22(e) of the 1940 Act and Rule 22e-2 thereunder, the right to redeem Shares directly from a Fund will not be suspended, nor payment upon redemption delayed, except (i) for any period during which the New York Stock Exchange is closed (other than customary weekend and holiday closings); (ii) for any period during which trading on the New York Stock Exchange is suspended or restricted; (iii) for any period during which an emergency exists as a result of which disposal of the Shares or determination of the Shares' net asset value is not reasonably practicable; or (iv) in such other circumstance as is permitted by the Commission. Subject to the foregoing, Creation Unit size aggregations of Shares are redeemable on any Business Day, principally in exchange for Fund Securities (as described below).

The Custodian, through the NSCC, makes available immediately prior to the opening of business on the AmEx (currently 9:30 a.m., New York time) on each day that the AmEx is open for business the list of names and the number of shares of each Fund's portfolio securities that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form (as defined below) on that day ("Fund Securities"). Unless cash redemptions are available or specified for a Fund, the redemption proceeds for a Creation Unit generally consist of Fund Securities as announced by the Custodian on the Business Day of the request for redemption, plus cash in an amount equal to the difference between the net asset value of the Shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Fund Securities, less the redemption transaction fee. In the event that the Fund Securities have a value greater than the net asset value of the Shares, a compensating cash payment to the Trust equal to the differential will be required to be arranged for, by or on behalf of the redeeming investor, by the Authorized Participant. An Authorized Participant or an investor for which it is acting subject to a legal restriction with



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respect to a particular stock included in the Fund Securities applicable to the redemption of a Creation Unit may be paid an equivalent amount of cash.

If redemptions are effected in cash the redemption proceeds will be equal to the net asset value of each Fund's Shares based on the net asset value of the Fund next determined after the redemption request is received in proper form by the Transfer Agent, minus a redemption transaction fee specified for cash redemptions in the Trust's Prospectus (such fee would be equal to the fee for in-kind redemptions plus an additional fee because of the extra costs incurred by the Funds in connection with a cash redemption).

As with purchases, redemptions of Shares will be effected through NSCC and DTC. In addition, settlement will occur no later than the third business day following the day on which a redemption order is deemed received.

**The Depository Trust Corporation.** DTC serves as securities depository for the Shares. (The Shares may be held only in book-entry form; stock certificates will not be issued.) DTC, or its nominee, is the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or its participants (i.e., securities brokers and dealers, banks, trust companies, clearing corporations and certain other organizations, some of whom (and/or their representatives) own DTC. Beneficial owners of Shares are not entitled to have Shares registered in their names, and will not receive or be entitled to receive physical delivery of certificates.

Accordingly, to exercise any rights of a holder of Shares, each beneficial owner must rely on the procedures of (i) DTC; (ii) DTC Participants; and (iii) brokers, dealers, banks and trust companies that clear through or maintain a custodial relationship with a DTC Participant, either directly or indirectly, through which such beneficial owner holds its interests.

**Management of the Fund.** The Trust's Board of Trustees has responsibility for the overall management of the Funds. The Adviser, subject to the supervision of the Board of Trustees of the Trust, is responsible for the investment management of the Funds. As described in each Fund's Prospectus, the Funds are not managed according to traditional methods of "active" investment management, which involve the buying and selling of securities based upon economic, financial and market analysis and investment judgment. Instead, each Fund, utilizing a "passive" or indexing investment approach, attempts to approximate the investment performance of its benchmark Index by investing in a portfolio of stocks that seeks to replicate the Index through the use of quantitative analytical procedures. Each Fund, which has a policy to remain as fully invested as practicable in a pool of equity securities, normally invests at least 90% of its total assets in component stocks that comprise its respective Index. Each Fund may invest its remaining assets in money market instruments or funds which reinvest exclusively in money market instruments (subject to applicable limitations under the 1940 Act), in repurchase agreements, in stocks that are in the relevant market but not its respective Index, in convertible securities, structured notes, exchange traded stock index futures, exchange traded options on futures, stock or stock indexes, as well as options on the Shares.

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The Adviser anticipates that, generally, each Fund will hold all of the securities which comprise its respective Index. There may, however, be instances where a stock in an Index is not held or is not held in the same weighting as in that Index. In certain instances, the Adviser may choose to overweight another stock in an Index, purchase securities not included within the Index that the Adviser believes appropriate to substitute for the Index securities or utilize various combinations of other available investment techniques in seeking to track accurately that Index. To the extent that each Fund does not invest in every component stock of its respective Index in the proportions dictated by its Index, it may not track its respective Index with the same degree of accuracy as a vehicle which does. The Adviser expects that, over time, the "tracking error" of each Fund relative to the performance of its respective Index (adjusted for the effect of Fund expenses) will be less than 5%.

**The Trading Market.** The Shares will be listed and traded on the AmEx. Shares will be freely tradeable on the AmEx throughout the trading session. The price of Shares trading on the AmEx will be based on a current bid/offer market. The trading market on the AmEx affords investors the opportunity to assume and liquidate positions in Shares at their discretion, permitting them to take advantage of prices at any time of the trading day. This combination of intra-day liquidity with the Creation Unit purchase and redemption features creates potential arbitrage opportunities that, in turn, should mitigate pricing inefficiencies. The structural characteristics of the Shares are believed to provide investors with a liquid, price-efficient security that closely tracks their respective Index.

By offering investors the ability to buy, in effect, a very small amount of a portfolio of equity securities of companies comprising a particular securities index, the Funds allow index-based investing without a major investment of capital or the restrictions of an index-based, non-exchange traded, open-end fund. As noted above, the Shares are designed to provide investors with a highly liquid, price-efficient security that will closely track their respective Index.

**Comparison of the Fund to Other Funds Which Have Sought Similar Commission Action.**

As mentioned above (see, *supra*, footnote 8), the Commission has granted relief similar to the relief requested herein, except for the relief requested herein with respect to Rule 200(g) of Regulation SHO, to: (i) iShares Trust, (ii) Select Sector SPDR Trust, (iii) the SPDR Trust, the MIDCAP SPDR Trust and the DIAMONDS Trust (referred to collectively as the "PDR Trusts"), (iv) Nasdaq 100 Trust, (v) streetTRACKS Series®, (vi) Fresco<sup>SM</sup> Index Shares Fund and (vii) PowerShares Exchange-Traded Fund Trust, which is substantially similar to that requested for the Trust.<sup>7</sup> The Commission has recently granted identical relief to that requested herein with regard to Rule 200(g) of Regulation SHO

<sup>7</sup> Select Sector SPDRs(R), "SPDRs"(R) and "MIDCAP SPDRs"(R), are trademarks of The McGraw-Hill Companies, Inc. DIAMONDS (SM), is a service mark of Dow Jones & Company, Inc. "WEBS" (SM) is a service mark of Morgan Stanley Dean Witter & Co. Fresco<sup>SM</sup> is a service mark of UBS AG.

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to two other portfolios of the Trust, the PowerShares WilderHill Clean Energy Portfolio and the PowerShares Lux Nanotech Portfolio and to Vanguard International Equity Index Funds.<sup>8</sup>

#### **Rule 10a-1**

Rule 10a-1(a)(1)(i) provides that a short sale of an exchange traded security may not be effected below the last regular-way sale price, or at such price unless such price is above the next preceding price at which a sale was reported. The Trust believes that relief from the application of Rule 10a-1 to secondary market transactions in Shares is appropriate insofar as Shares are derivative securities based on a stock index. Application of Rule 10a-1 to Share transactions would not further the Rule's purposes, and exempting such transactions from the Rule would not be inconsistent with such Rule.

A primary purpose of Rule 10a-1 is to prevent the market price of a stock from being manipulated downward by unrestricted short selling. The market prices of Shares will fluctuate in accordance with changes in net asset value and supply and demand on the AmEx. Price differences may be due, in large part, to the fact that supply and demand forces at work in the secondary trading market for Shares will be closely related to, but not identical to, the same forces influencing the prices of the component securities of the Index trading individually or in the aggregate at any point in time. Any temporary disparities in market value between Shares and the relevant component securities would tend to be corrected immediately by arbitrage activity. Moreover, Shares in Creation Unit aggregations or multiples thereof may be redeemed through the Trust on any Business Day principally for a distribution of shares of Fund Securities. Under these circumstances, it would appear to be economically futile for short sales in Shares to be utilized to depress Share prices. Moreover, it would similarly be economically futile for short sales in Shares to be utilized to depress particular stocks in their respective Index.

Each Index is large enough that it would be economically futile to attempt to use short sales to depress particular index stocks. Currently, no single stock comprises more than 10% of each of the Listed Private Equity Index and the WHPS(SM) Financial Index. Therefore, a short seller with manipulative intent must spend at least \$10 for every \$1 of market impact. The economic impracticality of such a strategy is apparent.

The trading market for Shares would be adversely affected if Rule 10a-1 operated to prevent dealers or exchange specialists from making short sales of Shares to satisfy customer demand in the absence of an uptick. Requiring an investor to utilize another means to achieve such investor's investment goals would be detrimental to the market for Shares and contrary to the public interest in liquid, efficient securities markets.

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<sup>8</sup> See, Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation to Kathleen Moriarty, Carter, Ledyard & Milburn dated March 9, 2005 with respect to the trading of the VIPER shares of the Vanguard International Equity Index Funds.

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The Trust notes that it is not requesting relief from Rule 10a-1 for secondary market portfolio sales which may be made in connection with redemptions of Shares. The short sale rule will apply (or not apply) to such transactions as to any other portfolio trade.

For the reasons set forth above, the Trust requests that the Commission or the Staff grant exemptive, interpretive or no-action relief from Rule 10a-1 to permit sales of the Shares without regard to the "tick" requirements.

### **Rule 200(g) of Regulation SHO**

Rule 200(g) of Regulation SHO provides that a broker-dealer must mark all sell orders of any equity security as "long," "short," or "short exempt." Rule 200(g)(2) requires that a short sale order must be marked "short exempt" if the seller is relying on an exception from the tick test of Rule 10a-1 of the Exchange Act or any short sale price test of any exchange or national securities association. Under Regulation SHO, as of January 3, 2005, broker-dealers ordinarily would be required to mark "short exempt" all short sales effected in any class of products, or during certain specified periods of time, that have been granted an exemption from a price test, such as that requested by the Trust in connection with the Shares. The Securities Industry Association received no-action relief<sup>9</sup> in this regard (the letter granting such relief being the "SIA Letter"), allowing broker-dealers to mark such short sales as "short" rather than "short exempt" under certain circumstances. If the Commission grants the requested relief with respect to Rule 10a-1, the Trust hereby requests that the relief granted in the SIA Letter be extended to cover transactions in the Shares. The requested relief is subject to the following conditions:

- i. For each exempt short sale, the various market centers that execute such sales have instituted procedures to "mask" the short sale character of the transaction so that they are executed as short exempt;
- ii. Such market centers monitor on a regular basis to confirm that any such product or transaction continues to meet the conditions for the exemptive relief and re-institute the price test for any product or transaction that fails to satisfy such conditions;
- iii. A broker-dealer executing exempt short sales will mark such sales as "short," and in no event will such sales be marked "long;" and
- iv. The market centers will maintain an audit trail of all such trade executions, which is capable of being produced and subject to review upon request by the Securities and Exchange Commission and other appropriate regulatory authorities.

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<sup>9</sup> Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated January 3, 2005.

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### Rule 101 of Regulation M

Subject to certain enumerated exceptions, Rule 101 of Regulation M prohibits a "distribution participant," in connection with a distribution of securities, from bidding for or purchasing or from attempting to induce any person to bid for or purchase, a "covered security" during the applicable restricted period. "Distribution participant" is defined in Rule 100(b) to include an underwriter or prospective underwriter in a particular distribution of securities, or any broker, dealer or other person who has agreed to participate or is participating in such distribution. We note that Rule 100(b) of Regulation M defines "distribution" for purposes of such Rule as an offering of securities, whether or not subject to registration under the Securities Act of 1933, as amended, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.

We understand that while broker-dealers that tender Deposit Securities to the Trust through the Distributor in return for Creation Unit(s) of Shares generally will not be part of a syndicate or selling group, and no broker-dealer will receive fees, commissions or other remuneration from the Trust or the Distributor for the sale of Creation Units, under certain circumstances they could be deemed to be an "underwriter" or "distribution participant" as those terms are defined in Rule 100(b).

The Trust respectfully requests that the Commission or Staff grant exemptive, interpretive or no-action relief from Rule 101, as discussed below, to permit persons participating in a distribution of Shares to bid for or purchase, or engage in other secondary market transactions in, such Shares during their participation in such distribution.

Paragraph (c)(4) of Rule 101 exempts from its application, *inter alia*, redeemable securities issued by an open-end management investment company (as such terms are used in the 1940 Act). The Trust is registered as an open-end management investment company under the 1940 Act. However, the individual Shares are not redeemable except in Creation Unit size aggregations. Due to the redeemability of the Shares in Creation Unit size aggregations, there should be little disparity between the Shares' market price and their net asset value per Share. Accordingly, the rationale for exempting redeemable securities of open-end management investment companies from the application of Rule 101 is equally applicable to the Shares. Although redemption is subject to the minimum condition of tendering 100,000 Shares, the Trust is intended to function like any other open-end fund continuously offering its shares. It is in recognition of the special nature of such offerings that open-end management investment company and unit investment company securities are exempted under paragraph (c)(4). Without such an exemption, they could not operate as intended. In view of the foregoing, the Trust requests that the Staff confirm that as a result of registration of the Trust as an open-end management investment company and the redeemable nature of the Shares in Creation Unit Size aggregations, transactions in the Shares would be exempted from Rule 101 on the basis of the exception contained in (c)(4) of such Rule.

The purpose of Rule 101 is to prevent persons from conditioning the market to facilitate a distribution. Creation Unit size aggregations of Shares may be created, and Shares in Creation Unit

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size aggregations may be redeemed in kind at net asset value, on any Business Day. Holders of Shares also have the benefit of intra-day secondary market liquidity by virtue of the AmEx listing. Thus, the secondary market price of Shares should not vary substantially from the net asset value of Shares of the Funds. Because of the redeemability of Shares in Creation Unit size aggregations, coupled with the open-ended nature of the Funds, any significant disparity between the market price of the Shares and net asset value should be eliminated by arbitrage activity. Because their net asset value is largely determined based on the market value of the portfolio securities, neither the creation nor redemption of Shares, nor purchases or sales of Shares in the secondary market, will impact the net asset value, and such transactions should not have a significant impact on the market value of Shares.

The Trust also respectfully requests relief from the provisions of Rule 101 to the extent necessary to permit persons or entities that may be deemed to be participating in the distribution of the Shares or a portfolio security of the Funds to tender Shares for redemption in Creation Unit size aggregations and to receive as part of redemption proceeds the Fund Securities of each Fund.

The Trust requests, in this regard, that the Staff confirm that the tender of the Shares to the Trust for redemption and the receipt of Fund Securities upon redemption does not constitute a bid for or purchase of any of such securities for the purposes of Rule 101, or alternatively, that the Commission or Staff grant exemptive or no-action relief to the extent necessary to permit redemptions of Shares for Fund Securities as described above. Redemption entails no separate bid for any of the Fund Securities. Absent unusual circumstances, the Trust will not purchase Fund Securities in the secondary market to fulfill a redemption request. Therefore, redemptions of Shares cannot be expected to affect the market price of the Fund Securities. The Trust believes that the purchase of Fund Securities, while engaged in a distribution with respect to such stock, for the purpose of acquiring a Creation Unit Aggregation of Shares should not be exempted from Rule 101. The purpose of Rule 101 is to prevent persons from conditioning the market to facilitate a distribution. Application of Rule 101 in this context would not further the anti-manipulative purposes underlying the Rule.

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

For the reasons set forth above, the Trust requests that the Commission or the Staff grant exemptive, interpretive or no-action relief from Rule 101 to permit persons participating in a distribution of Shares to bid for or purchase, or engage in other secondary market transactions in, such Shares during their participation in such distribution.

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### **Rule 102 of Regulation M**

The Trust also requests that the Commission confirm that as a result of registration of the Trust as an open-end management investment company and the redeemable nature of the Shares in Creation Unit size aggregations that, for the reasons previously stated under our request with respect to the exemption under Rule 101(c)(4), transactions in the Shares would be exempted from Rule 102 on the basis of the exception contained in (d)(4) of such Rule.

Alternatively, the Trust respectfully requests that the Commission grant an exemption under paragraph (e) of Rule 102 to such effect. Application of Rule 102 in this context would not further the antimanipulative purposes underlying the Rule.

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

For the reasons set forth above, the Trust requests that the Commission or the Staff grant exemptive, interpretive or no-action relief from paragraph (e) of Rule 102.

### **Rule 10b-17**

Rule 10b-17 requires an issuer of a class of publicly traded securities to give notice of certain specified actions (e.g., dividends, stock splits, rights offerings) relating to such class of securities in accordance with Rule 10b-17(b). Paragraph (c) of the Rule, however, states that the Rule shall not apply to redeemable securities issued by open-end investment companies and unit investment trusts registered under the 1940 Act. Except for the fact that redemption is subject to the minimum condition of tendering 100,000 Shares, the Trust is intended to function like any other open-end fund continuously offering its shares. It is in recognition of the foregoing, that the Division of Investment Management issued an order permitting the Trust to issue shares with limited redeemability while still treating the Trust like any other open-end investment company.<sup>10</sup> Therefore, the exemption under paragraph (c) of Rule 10b-17, which covers open-end investment companies with fully redeemable shares, should be applicable to the Trust.

For the reasons set forth above, the Trust requests that the Commission or the Staff grant exemptive, interpretive or no-action relief from Rule 10b-17.

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<sup>10</sup> See *supra* note 3.

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**Rule 14e-5**

Rule 14e-5 prohibits a person who makes a cash tender offer or exchange offer for any equity security from directly or indirectly purchasing such security (or a security immediately convertible into or exchangeable for such security) otherwise than pursuant to such tender offer or exchange offer. The Rule also applies to the dealer-manager of a tender or exchange offer, its affiliates and to advisers thereto ("Covered Persons").

The Trust respectfully requests that the Commission grant an exemption from Rule 14e-5 to permit any Covered Person (including a member or member organization of the AmEx or other Market), during the existence of such offer, to (1) redeem Shares in Creation Unit size aggregations for the Fund Securities that may include a security subject to the tender or exchange offer; and (2) engage in secondary market transactions in Shares during such offer.

The acquisition of individual Fund Securities by means of redemptions of Shares would be impractical and extremely inefficient in view of the requirement that a minimum of 100,000 Shares be redeemed. In addition, as discussed in the relief requested under Regulation M, application of the Rule's prohibition would impede the valid and useful market and arbitrage activity which would assist secondary market trading and improve Share pricing efficiency. In no case would redemptions of Shares or secondary market transactions by Covered Persons be effected for the purpose of facilitating a tender offer. Accordingly, purchases and redemptions of Shares in the circumstances described would not appear to result in the abuses at which Rule 14e-5 is directed.

In addition, the Trust requests that the Staff take a no-action position under Rule 14e-5 if a broker-dealer (including a member or member organization of the AmEx or other Market) acting as a dealer-manager of a tender offer for a Fund Security purchases such securities in the secondary market for the purpose of tendering such securities to purchase one or more Creation Unit Aggregations of Shares, if made in conformance with the following: (i) such bids or purchases are effected in the ordinary course of business, in connection with a basket of 20 or more securities in which any security that is the subject of a distribution, or any reference security, does not comprise more than 5% of the value of the basket purchased; or (ii) purchases are effected as adjustments to such basket in the ordinary course of business as a result of a change in the composition of the Index; and (iii) such bids or purchases are not effected for the purpose of facilitating such tender offer.

For the reasons set forth above, the Trust requests that the Commission or the Staff grant exemptive, interpretive or no-action relief from Rule 14e-5 to permit any Covered Person (including a member or member organization of the AmEx or other Market), during the existence of such offer, to (1) redeem Shares in Creation Unit size aggregations for the Fund Securities that may include a security subject to the tender or exchange offer; and (2) engage in secondary market transactions in Shares during such offer.

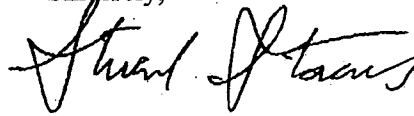


Mr. James A. Brigagliano  
October 24, 2006  
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**Conclusion**

Based on the foregoing, we respectfully request that the Commission and the Staff grant the relief requested herein. Should you have any questions please call me at (212) 878-4931 or Allison M. Harlow at (212) 878-4988.

Sincerely,

A handwritten signature in black ink, appearing to read "Stuart M. Strauss". The signature is fluid and cursive, with a large initial "S" and "M".

Stuart M. Strauss

cc: Racquel Russell