



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

DIVISION OF
MARKET REGULATION

March 8, 2007

Domenick Pugliese, Esq.
Paul, Hastings, Janofsky & Walker LLP
75 E. 55th Street
New York, NY 10022

Re: HealthShares Composite Exchange-Traded Fund
File No. TP 07-49

Dear Mr. Pugliese:

In your letter dated March 7, 2007,¹ as supplemented by conversations with the staff of the Division of Market Regulation (the "Staff"), HealthShares, Inc. (the "Company") on behalf of itself, the HealthShares Composite Exchange-Traded Fund (the "Fund"), the New York Stock Exchange, and any other Exchange on which HealthShares may subsequently trade, and persons or entities engaging in transactions in HealthShares, requests exemptive, interpretive, or no-action advice regarding Rules 10a-1, 10b-17, and 14e-5 under the Securities Exchange Act of 1934 (the "Exchange Act"), Rules 101 and 102 of Regulation M, and Rule 200(g) of Regulation SHO, in connection with secondary market transactions in HealthShares on the New York Stock Exchange or on any other Exchange on which HealthShares may subsequently trade, and the creation and redemption of Creation Unit Aggregations of the Fund.

The Company is an open-end management investment company that was organized as a Maryland corporation on February 8, 2006. The Company's registration statement for the Fund has been declared effective by the Commission.² The Fund will invest at least 90% of its assets in the common stocks of companies in the Underlying Index (or in American Depositary Receipts or Global Depositary Receipts based on securities of international companies in the Underlying Index). The Fund will attempt to replicate the Underlying Index by matching the weighting of securities in its portfolio with such securities' weightings in the Underlying Index. The investment objective of the Fund is to provide investment results that, before expenses, correspond generally to the total return of the Underlying Index.³

¹ We have enclosed a photocopy of your letter. Each defined term in this letter has the same meaning as defined in your letter, unless we note otherwise.

² File Nos. 333-131842 and 811-21855.

³ The HealthShares Composite Exchange-Traded Fund tracks the performance of the HealthShares Composite Index.

Response:

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.

On the basis of your representations and the facts presented, in particular the composite and derivative nature of HealthShares, it would not appear that trading in HealthShares would be susceptible to the practices that Rule 10a-1 is designed to prevent. In particular, the Company anticipates that the market value of HealthShares will rise or fall based on changes in the net asset value of the component securities of the Underlying Index and supply and demand. Accordingly, the Commission hereby grants an exemption from Rule 10a-1 to permit sales of HealthShares without regard to the "tick" requirements of Rule 10a-1.

We note that the exemption from Rule 10a-1 would not apply to secondary market portfolio sales of component securities made in connection with the redemption of HealthShares. In addition, this exemption is contingent upon the Fund maintaining at least 20 component stocks.

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 HealthShares without regard to the "tick" requirements of Rule 10a-1, on the basis of your representations and the facts presented, and without necessarily concurring in your analysis, 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 HealthShares, 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.

Regulation M

Redeemable securities issued by an open-end management investment company are excepted from the provisions of Rule 101 and 102 of Regulation M. The Commission granted the Company exemptions from certain provisions of the Investment Company Act of 1940 in order to permit the Company to register as an open-end investment company and to issue shares that are redeemable only in Creation Unit Aggregations of HealthShares.

Rule 101 of Regulation M

Generally, Rule 101 of Regulation M is an anti-manipulation regulation that, subject to certain exemptions, prohibits any “distribution participant” and its “affiliated purchasers” from bidding for, purchasing, or attempting to induce any person to bid for or purchase any security which is the subject of a distribution until after the applicable restricted period, except as specifically permitted in the Regulation.⁴ 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.

On the basis of your representations and the facts presented, particularly that the Company is a registered open-end management investment company that will continuously redeem at net asset value Creation Unit Aggregations of HealthShares; and that the secondary market price of HealthShares should not vary substantially from the net asset value of such HealthShares, which is based on the value of the component securities in the Underlying Index and will be computed on a daily basis, the Staff hereby confirms that the Company is excepted under paragraph (c)(4) of Rule 101 of Regulation M, thus permitting persons who may be

⁴ 17 CFR 242.101.

deemed to be participating in a distribution of HealthShares to bid for or purchase HealthShares during their participation in such distribution.⁵

The Staff also confirms the interpretation of Rule 101 of Regulation M that a redemption of Creation Unit Aggregations of HealthShares and the receipt of component securities in exchange therefor by a participant in a distribution of HealthShares would not constitute an "attempt to induce any person to bid for or purchase a covered security, during the applicable restricted period" 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. Rule 100 of Regulation M defines "distribution" to mean any offering of securities that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.

On the basis of your representations and the facts presented, particularly that the Company is a registered open-end management investment company that will redeem at net asset value Creation Unit Aggregations of HealthShares, the Staff hereby confirms that the Company is excepted under paragraph (d)(4) of Rule 102 of Regulation M, thus permitting the Fund to redeem HealthShares during the continuous offering of HealthShares.

Rule 14e-5

Rule 14e-5 under the Exchange Act, among other things, prohibits a person making a tender offer or exchange offer for any equity security from directly or indirectly purchasing or

⁵ We note that Regulation M does not prohibit a distribution participant and its affiliated purchasers from bidding for and purchasing component stocks 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, that is, securities that have an average daily trading volume value of at least \$1 million and are issued by an issuer whose common equity securities have a public float value of at least \$150 million; provided however, that such securities are not issued by the distribution participant or an affiliate of the distribution participant.

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 within the rule's definition of "covered person." Accordingly, while acting as dealer-manager of a tender offer for a component stock, a dealer-manager is prohibited from purchasing or arranging to purchase that component stock until the expiration of the offer.

On the basis of your representations and the facts presented, particularly that purchases or redemptions of HealthShares would not appear to result in the abuses at which Rule 14e-5 is directed, and that any bids or purchases by dealer-managers would not be 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 stock to: (1) redeem HealthShares in Creation Unit Aggregations to the Company for component stocks that may include a security subject to the tender offer; and (2) purchase HealthShares during such offer.⁶

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).

On the basis of your representations and the facts presented, particularly that the Commission has determined to grant an exemption from the Investment Company Act of 1940 to register the Company as an open-end management investment company notwithstanding the fact that it issues HealthShares with limited redeemability, the Commission hereby grants an exemption from the requirements of Rule 10b-17 to the Company with respect to transactions in HealthShares.⁷

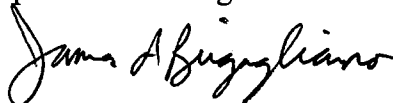
⁶ The Staff also confirms its no-action position under Rule 14e-5 when a broker-dealer (including a member or member organization of the AmEx or other national securities exchange), acting as a dealer-manager of a tender offer for a component stock, purchases such component stock in the secondary market for the purpose of tendering them to purchase a Creation Unit Aggregation of 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 Underlying Index.

⁷ We also note that compliance with Rule 10b-17 would be impractical in light of the nature of the Fund. This is because it is not possible for the Company to accurately project ten days in advance what dividend, if any, would be paid on a particular record date.

The foregoing exemptions from Rules 10a-1, 10b-17, and 14e-5 under the Exchange Act, interpretations of Rules 101 and 102 of Regulation M, and no-action positions taken under Regulation SHO are based solely on your representations and the facts presented to the Staff, and are strictly limited to the application of those rules to transactions involving HealthShares under the circumstances described above and in your letter. 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 under the Exchange Act, interpretations of Rules 101 and 102 of Regulation M and no-action positions taken under Regulation SHO are subject to the condition that such transactions in HealthShares, any component security, or any related securities are not made for the purpose of creating actual, or apparent, active trading in or raising or otherwise affecting the price of such securities.

These exemptions, interpretations, 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, interpretations, 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, interpretations, 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
Associate Director

Attachment

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March 7, 2007

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VIA UPS NEXT DAY AIR

Mr. James A. Brigagliano
Associate Director
Office of Trading Practices and Processing
Division of Market Regulation
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1001

SECURITIES AND EXCHANGE COMMISSION
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DIVISION OF MARKET REGULATION

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

Dear Mr. Brigagliano:

HealthShares™, Inc. (the "Company") is an open-end management investment company that was organized as a Maryland corporation on February 8, 2006. The Company has registered 20 investment series ("Funds") and plans to offer more series in the future. This letter is submitted on behalf of the following HealthShares™ fund portfolio: HealthShares™ Composite Exchange-Traded Fund (the "Fund"). The shares of the Fund are referred to herein as "HealthShares™".

The Company has an effective registration statement for the Fund¹ which was previously filed with the Commission in order to register the Fund and its HealthShares™ under the 1940 Act and the Securities Act of 1933, as amended ("Securities Act"). The Company

¹ The Company is registered under the Investment Company Act of 1940, as amended (the "1940 Act"). On February 14, 2006, the Company filed with the Securities and Exchange Commission (the "Commission") a Registration Statement for the Funds on Form N-1A under the Securities Act of 1933, as amended, and under the 1940 Act relating to the Funds (File Nos. 333-131842 and 811-21855) (the "Registration Statement"). The Registration Statement was declared effective by the Commission on January 12, 2007.

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intends to list the HealthShares™ of the Fund on the New York Stock Exchange (the “NYSE”) in accordance with NYSE Rules 703.16² and 1100³.

On March 1, 2006 the Company filed with the Commission an application under Section 6(c) of the 1940 Act and on August 23, 2006 the Company filed with the Commission an Amended and Restated application under Section 6(c) of the 1940 Act, for an exemption from Sections 2(a)(32), 5(a)(1), 22(d) and 24(d) of the 1940 Act and Rule 22c-1 under the 1940 Act, and under Sections 6(c) and 17(b) of the 1940 Act for an exemption from Sections 17(a)(1) and (a)(2) of the 1940 Act, File No. 812-13264 (the “Application”). An order (the “Order”) granting the relief requested in the application was issued by the Commission on December 7, 2006 (IC-27549). The Order permits the Company to offer the Funds. On May 2, 2006, the Company filed with the Commission a second application under 6(c) of the 1940 Act, on February 12, 2007 the Company filed with the Commission an Amended and Restated application under 6(c) of the 1940 Act, for an exemption from Section 12(d)(1)(A) and (B) of the 1940 Act, and under 6(c) and 17(b) of the 1940 Act for an exemption from Sections 17(a)(1) and (2) of the 1940 act, File No. 812-13288 (the “Second Application,” and together with the Application, the “Applications”). The Second Application will permit (i) registered open-end management investment companies and unit investment trusts (“Purchasing Funds”) that are not part of the same “group of investment companies” as the Company within the meaning of Section 12(d)(1)(G)(ii) of the 1940 Act, and that are not sponsored or advised by the Advisor (defined herein) or an entity controlling, controlled by or under common control with the Advisor to acquire, and the Company, principal underwriter and certain broker-dealers to sell, HealthShares™ beyond the limits of Sections 12(d)(1)(A) and (B) of the 1940 Act, and (ii) Purchasing Funds to engage in certain purchase and redemption transactions in Creation Unit Aggregations (defined herein) directly with a Fund that might otherwise be prohibited by Section 17(a) of the 1940 Act.

The market prices of exchange-traded HealthShares™ are expected to vary from their net asset values (“NAVs”). The Fund will issue and redeem HealthShares™ at their NAVs only in aggregations of a specified number of HealthShares™, as further discussed below. Given the opportunities for arbitrage, it is not anticipated that any deviation between market price and NAV will be material.

² The Fund meets the listing standards of Rule 703.16 of the NYSE Listed Company Manual, as amended, See SEC Rel. 34-55113.

³ If HealthShares™ also trade on a national securities exchange (an “Exchange”) registered with the Commission or the Nasdaq Stock Market, Inc. (the “Nasdaq”) pursuant to unlisted trading privileges, such trading will be conducted pursuant to self-regulatory organization rules that have become effective pursuant to Exchange Act Section 19(b).

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In connection with the secondary market trading of those HealthShares™ to be offered by the Company, the Company, on behalf of itself, the NYSE, and persons or entities engaging in transactions in HealthShares™ (collectively, the “Applicants”), as the case may be, hereby request that the Commission and its staff (the “Staff”) grant the appropriate exemptive, interpretive and no-action relief from Rules 10a-1, 10b-17 and 14e-5 under the Exchange Act, and Rules 101 and 102 of Regulation M, and Rule 200(g) of Regulation SHO (“Regulation SHO”) under the Exchange Act, in connection with secondary market transactions in HealthShares™ on the NYSE, or any other Exchange on which the HealthShares™ may subsequently trade, and the creation or redemption of Creation Unit Aggregations (as defined below in Part II.A) of HealthShares™. The Commission and Staff have previously granted such relief to other exchange-traded funds (“ETFs”) not related to the Company through a series of letters.⁴ The Commission has also granted

⁴ See Letters from James A. Brigagliano, Division of Market Regulation to: (1) Jack P. Drogin, dated August 4, 2005, File No. TP05-88, for iShares MSCI EAFE Growth Index Fund and iShares MSCI EAFE Value Index Fund (relief identical to the relief requested by this letter); (2) Stuart M. Strauss, dated October 25, 2005, File No. TP 06-07, for the PowerShares Lux Nanotech Portfolio; (3) Kathleen H. Moriarty, dated March 9, 2005, File No. TP04-19, for the Vanguard Emerging Markets Stock Index Fund, Vanguard European Stock Index Fund and Vanguard Pacific Stock Index Fund; (4) Stuart M. Strauss, dated March 2, 2005, File No. TP05-15, with respect to PowerShares WilderHill Clean Energy Portfolio Fund; (5) Ira Hammerman, dated January 3, 2005, File No. TP-05-11 (for letters (2) through (5), relief granted from Regulation SHO (identical to the relief from Regulation SHO requested by this letter) with regard to exchange-traded funds that had previously been granted an exemption from a price test); (6) Jack P. Drogin, dated October 8, 2004, File No. TP04-33, for the iShares FTSE/Xinhua China 25 Index Funds (for letters (6) through (16), relief is substantially similar to the relief requested by this letter); (7) Jack P. Drogin, dated September 25, 2003, File No. TP03-118, for the iShares Lehman U.S. Treasury Inflation Protected Securities Fund and iShares Lehman U.S. Aggregate Bond Fund (this letter did not seek relief under Rule 14e-5); (8) W. John McGuire, dated July 25, 2002, File No. TP02-81, for the iShares 1-3 Year Treasury Index Fund, i-Shares 7-10 Year Treasury Index Fund, iShares 20+ Year Treasury Index Fund, iShares Treasury Index Fund, iShares Government/Credit Index Fund, iShares Lehman Corporate Bond Fund and iShares Goldman Sachs InvesTop Corporate Bond Fund (this letter did not seek relief under Rule 14e-5); (9) Donald R. Crawshaw; dated October 26, 2001, File No. TPO1-236, for the iShares, Inc. MSCI Index Funds (ACFE, ACW, EMF, EMLA, Europe, Pacific, and Israel); (10) W. John McGuire, dated October 19, 2001, File No. TP02-07, for the iShares S&P Latin America 40 Index Fund and the iShares S&P/Tokyo Stock Price Index (“TOPIX”) Index Fund; (11) W. John McGuire, dated August 15, 2001, File No. TP01-160, for the iShares MSCI EAFE Index Fund; (12) W. John McGuire, dated July 10, 2001, File No. TP01-161, for the iShares Goldman

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such relief to two other portfolios of the Company; HealthShares™ Emerging Cancer Exchange-Traded Fund and HealthShares™ Cardio Devices Exchange-Traded Fund.⁵

On October 24, 2006, in a letter issued to PowerShares Exchange-Traded Fund Trust⁶ (the “PowerShares Letter”), the Commission granted relief⁷ with respect to the aforementioned Exchange Act provisions and rules thereunder. This relief supercedes relief that had been previously granted to the American Stock Exchange, LLC (“AMEX”). ETFs listed and traded on an Exchange may rely upon the relief granted in the PowerShares Letter without the submission of a 1934 Act exemptive/no-action request if such ETFs meet certain conditions, including the following: (a) at least 70% 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 months of trading prior to formation of the relevant ETF and, at least 70% 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 50% of the component stocks must meet the \$1 million ADTV and \$150 million public float thresholds.⁸ Although the Fund

Sachs Technology Industry Multimedia Networking, Goldman Sachs Technology Industry Semiconductor, Goldman Sachs Technology Industry Software, Russell Midcap, Russell Midcap Growth, and Russell Midcap Value Index Funds; (13) Liza M. Ray, dated March 13, 2001, File No. TP01-106, for the iShares Goldman Sachs Technology Index Fund; (14) James T. McHale, dated February 1, 2001, File No. TP01-60, for the iShares Cohen & Steers Realty Majors and the Nasdaq Biotechnology Index Funds; (15) Mary Joan Hoene, dated September 5, 2000, File No. TP00-135 and December 1, 2000, File No. TP01-16, respectively for the iShares S&P 100 and S&P Global 100 Index Funds; and (16) Kathleen H. Moriarty, dated May 16, 2000, File No. TP00-39 for 35 iShares Funds.

⁵ See, Letter from James A. Brigagliano, Division of Market Regulation to Domenick Pugliese, dated January 22, 2007, File No. TP07-31 for the HealthShares™ Emerging Cancer Exchange-Traded Fund and the HealthShares™ Cardio Devices Exchange-Traded Fund.

⁶ See, Letter from James A. Brigagliano, Assistant Director of Market Regulation, to Stuart M. Strauss, Esq., dated October 24, 2006.

⁷ 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 (the “AMEX Letter”).

⁸ The Commission has granted class relief with respect to Section 11 (d)(1) and Rules 10b-10, 11d1-2, 15c1-5 and 15c1-6 of the Exchange Act to certain “Qualifying ETFs”. See, letter from Catherine McGuire, Chief Counsel, Division of Market Regulation, to the Securities Industry Association, dated November 21, 2005. The Funds meet the require-
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will be listed on the NYSE, the Fund does not meet the requirements of the PowerShares Letter set forth above, as the Fund will not meet the average daily trading volume and public float criteria.⁹ Therefore, the Fund cannot rely on the relief provided in the PowerShares Letter with respect to Rules 10a-1, 10b-17 and 14e-5 of the Exchange Act and Rules 101 and 102 of Regulation M and Rule 200(g) of Regulation SHO promulgated under the Exchange Act and the Company, on behalf of the Fund, hereby requests relief from the aforementioned Exchange Act rules.

The Company notes the creation and issuance by an investment company of shares or units that individually trade on an Exchange, but that in large aggregations can be purchased from and redeemed with the issuing investment company, is no longer novel. The Commission has for more than a decade considered and approved many such proposals. Some of these exchange-traded products have been trading publicly for years, and the Company is not aware of 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.

I. Parties

A. The Fund

The Fund seeks to track the performance, before fees and expenses, of a particular benchmark index.¹⁰ The Fund intends to qualify as a “regulated investment company” for purposes of the Internal Revenue Code.

The Fund will invest at least 90% of its assets in the common stocks of companies in the Underlying Index, or in American Depositary Receipts (“ADRs”) or Global Depositary Receipts (“GDRs”) based on securities of international companies in the Underlying In-

ments of “Qualifying ETFs” under this letter and are therefore relying on this letter with respect to these provisions.

⁹ Except for the minimum average daily trading volume and public float criteria of the PowerShares Letter set forth above, the Fund meets all other conditions of the PowerShares Letter. With respect to the minimum average daily trading volume and public float tests, the Fund satisfies this test with respect to more than 21% of its portfolio. As noted in Notes 4 and 5 above, the relief requested herein is substantially similar to the relief granted to other ETFs including other portfolios of the Company.

¹⁰ The HealthShares™ Composite Exchange-Traded Fund tracks the performance of the HealthShares™ Composite Index (an “Underlying Index”).

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dex. The Fund may also invest up to 10% of its assets in futures contracts, options on futures contracts, options, swaps on securities of companies in the Underlying Index, as well as cash and cash equivalents, such as money market instruments (subject to the applicable limitations of the 1940 Act). The Fund will attempt to replicate the Underlying Index by matching the weighting of securities in its portfolio with such securities' weightings in the Underlying Index. The Fund may also sample, rather than replicate, the Underlying Index in terms of key characteristics, such as price/earnings ratio, earnings growth, and dividend yield. If the Fund pursues a sampling strategy, as just described, it will continue to invest at least 90% of its assets in the common stocks, ADRs or GDRs of the companies in the Underlying Index.¹¹ The Fund will consist of approximately 80 securities, matching the Underlying Index as described below.

1. Underlying Index Description and Methodology

The Underlying Index is an index of U.S. and foreign common stocks of healthcare, life sciences or biotechnology companies that have been included in the HealthShares™ Autoimmune-Inflammation Index, the HealthShares™ Cancer Index, the HealthShares™ Cardio Devices Index, HealthShares™ Cardiology Index, the HealthShares™ Dermatology and Wound Care Index, the HealthShares™ Diagnostics Index, the HealthShares™ Emerging Cancer Index, the HealthShares™ Enabling Technologies Index, the HealthShares™ GI/Gender Health Index, the HealthShares™ Infectious Disease Index, the HealthShares™ Metabolic-Endocrine Disorders Index, the HealthShares™ Neuroscience Index, the HealthShares™ Ophthalmology Index, the HealthShares™ Orthopedic Repair Index, the HealthShares™ Patient Care Services Index and the HealthShares™ Respiratory/Pulmonary Index (collectively, the "Composite Eligible Indexes") by the Index Administrator and therefore are included in the HealthShares™ Composite Index.

XShares Group LLC (the "Index Creator"), the parent of the Funds' investment adviser, XShares Advisors LLC, is the creator of the Underlying Index and each Composite Eligible Index and has created each Composite Eligible Index using an investment approach known as "vertical" investing. "Vertical" investing seeks to categorize companies within a particular healthcare, life sciences or biotechnology index by focusing on each company with regard to the diagnosis of diseases, the developments of drugs, treatments, therapies and delivery systems, and the development of enabling/research tools and technologies for use in the healthcare, life sciences or biotechnology sectors.

The Index Creator, based on its own proprietary intellectual model, has established specific, objective inclusion/exclusion criteria (the "Index Composition Methodology") that

¹¹ HealthShares™ of one Fund may not be exchanged for HealthShares™ of another Fund.

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an issuer must meet in order to be included in a Composite Eligible Index or in the Underlying Index. The Underlying Index, and each Composite Eligible Index, will be administered by Standard & Poor's (the "Index Administrator"), which will employ these criteria to determine the composition of each Index. The Advisor has engaged BNY Investment Advisors as a Sub-Advisor to be responsible for the day-to day management of the Fund's portfolio, which involves principally reconfiguring the portfolio of the Fund, typically quarterly, to reflect any reconfiguration in the Underlying Index by the Index Administrator.

When determining the composition of the Underlying Index and each Composite Eligible Index, the Index Administrator relies on many sources of information, including information obtained from the BioCentury and MedTrack databases. The BioCentury and MedTrack databases are independent, generally available databases that provide a vast amount of data for healthcare, life sciences and biotechnology companies, including information regarding products, clinical trials, pipeline development, patent and other information.

For each Composite Eligible Index, the Index Administrator will screen companies to eliminate those that fall outside of the market capitalization ranges applicable to that Index. The Index Administrator will then employ the remainder of the Index Composition Methodology for each Composite Eligible Index to identify the companies that satisfy these criteria. Typically, the largest of these companies (determined by market capitalization) are included in a Composite Eligible Index, with a minimum of 22 companies in each Composite Eligible Index. The initial companies selected for inclusion are weighted equally at inception, and are thereafter weighted based upon the individual company's market value relative to the overall portfolio market value of the relevant Composite Eligible Index (*i.e.*, price weighted). Maximum weighting for any security in a Composite Eligible Index is typically 15%. When a company's weighting exceeds 15% of the overall Index portfolio, the Index Administrator will reduce such company's weighting to 10%, with the 5% "excess" applied equally to all remaining component securities in the Composite Eligible Index. Minimum weighting for a security in a Composite Eligible Index is 2.5%. When a security's weighting falls below 2.5%, the Index Administrator will increase the security's weighting to its initial weighting or 5%, whichever is less, with the required increment taken equally from all the remaining component securities.¹² The Underlying Index consists of stocks of the 80 largest companies by market capitalization taken from the top five companies in market capitalization from each of the Composite Eligible Indexes, arranged in alphabetical order. Information about the Underlying Index, including the component securities in Underlying Index and the value of the securities in the Under-

¹² The minimum weighting for a security may fall below 2.5% in the event a rebalancing would require the ETF relying on such Index to make filings under Section 13(g) of the Exchange Act.

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lying Index, is posted throughout the trading day every 15 seconds and is available through Reuters.

i. HealthShares™ Composite Index

The HealthShares™ Composite Index is an index of U.S. and foreign common stocks of healthcare, life sciences or biotechnology companies that have been included in the Composite Eligible Indexes.

As of **January 31, 2007** the HealthShares™ Composite Index component securities had a float-adjusted market capitalization of approximately \$329.96 billion. The average float-adjusted market capitalization was approximately \$4.12 billion. The ten largest constituents represented approximately 31% of the index weight. The five highest weighted securities represented 19% of the index weight.

HealthShares™ Composite Index as of January 31, 2007:

Index Composition	Total Index Size (Float-Adjusted Billions)	329.96
Concentration	Number of Components	80
	Percent in Ten Largest Components	31%
Size of Companies -	Market Cap. – Median	3.57
Float-Adjusted	Market Cap. - Arithmetic Average	4.12
\$ Billions	Market Cap. - Smallest Stock Held	0.33
	Market Cap. - Largest Stock Held	20.16
	Market Cap. - \$ -Weighted Average	6.54
Index		
Characteristics	Portfolio P/E	47.9
	Portfolio P/E Excluding Negative Earnings	N/A
	Port. P/E - I/B/E/S 1 yr Forecast EPS	53.76
	Portfolio P/E - Normalized Earnings	N/A
	Portfolio Price/Book	7.84
	Dividend Yield	0.18

Index Constituents

Name	Index Weight
Health Net, Inc.	6.11
Davita Inc	3.82
SCHWARZ PHARMA AG	3.39
Manor Care Inc.	3.04
Endo Pharmaceuticals Hldg	2.84
Kyphon Inc	2.71
Amylin Pharmaceuticals	2.61
LCA Vision Inc.	2.16
Dade Behring Hldgs Inc	2.14

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United Therapeutics Corp	2.07
Bard (C.R.) Inc.	2.07
Respironics Inc	2.03
Edwards Lifesciences Corp.	1.96
Solvay SA	1.94
FIELMANN AG	1.93
St Jude Medical	1.93
Pharmion Corp	1.91
Varian Medical Systems	1.86
Theravance Inc	1.83
GENMAB A/S	1.71
Conor Medsystems Inc	1.63
The Cooper Companies	1.62
Advanced Medical Optics, Inc.	1.53
Smith & Nephew PLC (ADR)	1.53
Dentsply International	1.51
ACTELION LTD-REG	1.47
Human Genome Sciences	1.45
Cephalon Inc	1.36
Thoratec Corp	1.35
ArthroCare Corp.	1.32
Sigma-Aldrich	1.30
Biomarin Pharmaceutical Inc	1.28
EV3	1.23
GEDEON RICHTER RT	1.21
Mylan Laboratories	1.20
Abraxis BioScience Inc	1.18
Progenics Pharmaceuticals Inc	1.15
Laboratory Corp. of America Hold- ing	1.13
IPSEN	1.13
Pall Corp.	1.12
Biomet, Inc.	1.04
Barr Pharmaceuticals, Inc.	1.01
Beckman Coulter Inc.	1.00
Zymogenetics Inc	0.96
AXCAN PHARMA INC	0.96
Elan Corporation plc (ADR)	0.95
Millipore Corp.	0.93
Lincare Holdings	0.92
Triad Hospitals	0.92
Shire PLC (ADR)	0.90

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Cytec Corp.	0.87
Medicis Pharmaceutical	0.78
Bausch & Lomb	0.77
H LUNDBECK A/S	0.74
Keryx Biopharmaceuticals	0.71
Community Health Systems	0.71
Altana AG (ADR)	0.67
Isis Pharmaceuticals	0.66
Brookdale Senior Living Inc.	0.66
Salix Pharmaceuticals Ltd	0.64
Health Management Assoc.	0.58
ANGIOTECH	
PHARMACEUTICALS IN	0.54
Sepracor Inc.	0.46
MedImmune Inc.	0.44
Waters Corporation	0.43
Valeant Pharmaceuticals Int'l	0.38
Watson Pharmaceuticals	0.38
ALIZYME PLC	0.36
Biovail Corp. (US)	0.35
Osi Pharmaceuticals Inc	0.34
King Pharmaceuticals	0.30
Alkermes Inc	0.29
Vertex Pharmaceuticals	0.29
PDL BioPharma, Inc.	0.29
New River Pharmaceuticals	0.26
Applera Corp-Applied Biosystems Group	0.23
Medarex Inc	0.17
Adolor Corporation	0.16
Nektar Therapeutics	0.15
Millennium Pharmaceuticals	0.10

B. The Advisor

XShares Advisors LLC serves as the investment adviser to the Fund (the "Advisor") with overall responsibility for the general management and administration of the Fund, subject to the supervision of the Fund's Board of Directors (the "Board"). Pursuant to an investment advisory agreement between the Company and the Advisor, the Advisor is authorized to engage one or more sub-advisers to perform any of the services contemplated to be performed by the Advisor under the investment advisory agreement. The Advisor is

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located at 420 Lexington Avenue, New York, New York 10170. The Advisor's parent company, XShares Group LLC, is the creator of the Underlying Indexes.

C. The Sub-Advisor

BNY Investment Advisors, a separate identifiable division of the Bank of New York, serves as investment sub-adviser to the Fund (the "Sub-Advisor"). Pursuant to a sub-advisory agreement between the Advisor and the Sub-Advisor, the Sub-Advisor will be responsible for the day-to-day management of the Fund, subject to the supervision of the Advisor and the Board.

D. The Distributor

ALPS Distributors, Inc. serves as the distributor of Creation Unit Aggregations for the Fund on an agency basis (the "Distributor"). The Distributor has entered into an agreement with the Company pursuant to which it will distribute HealthShares™ of the Fund. This agreement will continue for two years from its effective date and will be renewable annually thereafter. HealthShares™ will be continuously offered for sale by the Distributor only in Creation Unit Aggregations, as described in the Company's prospectus. The Distributor will deliver the Company's prospectus, and upon request, the statement of additional information ("SAI") to persons purchasing Creation Unit Aggregations and will maintain records of both orders placed with it and confirmations of acceptance furnished by it. The Distributor is a broker-dealer registered under the Exchange Act and a member of the NASD, Inc. The Distributor has no role in determining the investment policies of the Fund or which securities are to be purchased or sold by the Fund.

E. Management - Indexing Approach

The Company's Board has responsibility for the overall management of the Fund. The Advisor, subject to the supervision of the Board, will be responsible for the investment management of the Fund. The Sub-Advisor will be responsible for the day-to-day management of the Fund, subject to the supervision of the Advisor and the Board. As described in the Company's prospectus, the Fund is not actively managed and the actions of the Advisor and Sub-Advisor will not result in the active management of the Fund. Instead, the Advisor uses a passive, or indexing, approach in managing the Fund to track the performance, before fees and expenses, of the Underlying Index. Unlike many mutual funds, the Fund does not seek to outperform any particular market sector and will not assume temporary defensive positions when markets decline or appear overvalued.

Wherever practicable, the Fund will replicate its Underlying Index, meaning that it will hold the same securities as those in the Underlying Index and in approximately the same proportions (the securities owned by the Fund are hereinafter referred to as "Fund Securities"). The Fund may also sample its Underlying Index by holding securities that, in the

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aggregate, are intended to approximate the Underlying Index in terms of key characteristics, such as price/earnings ratio, earnings growth, and dividend yield. Typically, the Fund will use a sampling strategy if regulatory constraints or other considerations prevent it from replicating its Underlying Index.

II. Proposal

A. Reason for This Request

It is currently expected that the Fund will issue and redeem HealthShares™ only in aggregations of 100,000 HealthShares™ or multiples thereof (“Creation Unit Aggregations”) and that purchasers of Creation Unit Aggregations will be able to separate the Creation Unit Aggregations of the Fund into 100,000 individual HealthShares™. The number of HealthShares™ in a Creation Unit Aggregation will not change (except in the event of a stock split or similar revaluation).

The Company will list HealthShares™ of the Fund on the NYSE. It is not expected that the Distributor or any other entity will maintain a secondary market in individual HealthShares™. One or more NYSE member firms will act as designated specialists and maintain a market for the HealthShares™ that trade on the NYSE. HealthShares™ of the Fund will trade on the NYSE in a manner similar to the way other ETFs currently trade on the NYSE and other Exchanges.

As stated earlier, the Company has registered the Funds with the Commission pursuant to a registration statement on Form N-1A to permit the Company to offer and sell HealthShares™ of the Funds¹³ under the 1940 Act and the Securities Act. The various disclosure documents and marketing materials will describe the significant features of HealthShares™.

HealthShares™ are registered in book-entry form only; the Fund will not issue individual share certificates for HealthShares™. The Depository Trust Company (“DTC”), or its nominee, will be the record or registered owner of all outstanding HealthShares™. Beneficial ownership of HealthShares™ will be shown on the records of DTC or a broker-dealer that is a participant in DTC (a “DTC Participant”).

Beneficial owners of HealthShares™ (“Beneficial Owners”) will receive all of the statements, notices, and reports required under the 1940 Act and other applicable laws. They will receive, for example, annual and semi-annual reports, written statements accompanying dividend payments, proxy statements, annual notifications detailing the tax status of

¹³ See footnote 1, *supra*.

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distributions, IRS Form 1099-DIVs, etc. Because the Company's records reflect ownership of HealthShares™ by DTC only, the Company will furnish applicable statements, notices and reports to the DTC Participants who, in turn, will be responsible for distributing them to the Beneficial Owners. This arrangement is identical to that of the other ETFs already listed on Exchanges, and is similar to that used by ETFs whose shares are owned through mutual funds supermarket intermediaries.

B. Purchasing HealthShares™

The Fund will issue HealthShares™ only in Creation Unit Aggregations and generally, only in exchange for an in-kind deposit of securities by the purchaser, together with a deposit of a specified cash payment described more fully below. The in-kind deposit will consist of a basket of securities (the "Deposit Securities") selected by the Advisor to replicate (or sample) the securities in the Underlying Index (as described above in Part I.E). The identities and amounts of the Deposit Securities will be determined by the Advisor and made publicly available on the National Securities Clearing Corporation ("NSCC") bulletin board. By requiring that purchase (and redemption) transactions involving HealthShares™ be in-kind, rather than in cash, the Company can minimize portfolio turnover, brokerage expenses, and other transaction costs.

The Fund will offer and sell HealthShares™ in Creation Unit Aggregations through the Distributor on a continuous basis, without a sales load, at the NAV per share next determined after receipt of an order in proper form. The Fund will not issue fractional Creation Unit Aggregations. The NAV of HealthShares™ will be determined as of the close of regular trading on the NYSE on each day that the NYSE is open (a "Business Day").

Individual HealthShares™ of the Fund will be listed on the NYSE and traded in the secondary market in the same manner as other securities. The price of HealthShares™ trading on the NYSE will be based on a current bid/offer market and may vary from NAV. No secondary sales will be made to brokers or dealers at a concession by the Distributor or by the Fund. Transactions involving the sale of HealthShares™ on the NYSE, which will be between purchasers and sellers and will not involve the Fund, will be subject to customary brokerage commissions or mark-ups and charges.

The pricing of HealthShares™ of the Fund by means of bids and offers on the NYSE in the secondary market is not novel. As noted above, other ETFs are listed and traded on the NYSE and other Exchanges as well. This is the method by which the shares of closed-end investment companies are priced and sold after initial issuance. Applicants have been informed that other ETFs have traded at, or very close to, their respective NAVs since their trading commenced. Like those products, the price at which HealthShares™ of the Fund trade on the NYSE will be disciplined by arbitrage opportunities created by the ability to purchase or redeem Creation Unit Aggregations at NAV, which

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should ensure that HealthShares™ similarly do not trade at a material premium or discount in relation to NAV.

C. Placement of Orders to Purchase Creation Unit Aggregations

All orders to purchase Creation Unit Aggregations of HealthShares™ of the Fund must be placed with the Distributor by or through a “Participating Organization.” A Participating Organization must be either a “Participating Party” (*i.e.*, a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the NSCC), a clearing agency registered with the Commission pursuant to Exchange Act Section 17A, or a DTC Participant, and in each case, must enter into a participant agreement with the Company or its Distributor. The Fund will recoup the costs of issuing a Creation Unit Aggregation by imposing a “Transaction Fee” on investors purchasing or redeeming Creation Unit Aggregations. The purpose of the Transaction Fee is to impose the costs associated with the purchase and redemption of Creation Unit Aggregations on those purchasing and redeeming.¹⁴

All orders to purchase Creation Unit Aggregations must be received by the Distributor prior to the close of regular trading on the NYSE (“Closing Time”) on the date the order is placed (the “Transmittal Date”), and all other procedures set forth in the agreement with the Participating Organization must be followed, in order for the purchaser to receive the NAV determined on the Transmittal Date. The Distributor will maintain a record of Creation Unit Aggregation purchases.

The Distributor will transmit all purchase orders to the Fund. Any order that is not in proper form will be rejected. After the Fund has accepted a purchase order and received delivery of the Deposit Securities and any accompanying cash payment, DTC will instruct it to initiate “delivery” of the appropriate number of Creation Unit Aggregations of HealthShares™ to the book-entry account specified by the purchaser. The Distributor will furnish a prospectus and a confirmation to those placing purchase orders.

¹⁴ The Prospectus and SAI for the Fund will provide complete disclosure about the Transaction Fee. An additional charge of up to five (5) times the fixed Transaction Fee (expressed as a percentage of the value of the Deposit Securities) may be imposed for (i) creations effected outside the Clearing Process; and (ii) cash creations (to offset the Company’s brokerage and other transaction costs associated with using cash to purchase the requisite Deposit Securities). Investors are responsible for the costs of transferring the securities constituting the Deposit Securities to the account of the Company.

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D. Payment for Creation Unit Aggregations

Persons purchasing Creation Unit Aggregations from the Fund generally must make an in-kind deposit of Deposit Securities together with an amount of cash specified by the Advisor (the “Balancing Amount”) and the Transaction Fee (together with the Balancing Amount, the “Cash Component”). The Deposit Securities and the Cash Component collectively are referred to as the “Fund Deposit.” As noted above, the Deposit Securities replicate (or sample) the Fund Securities of the Fund. The Balancing Amount is a cash payment designed to ensure that the NAV of a Fund Deposit (not including the Transaction Fee) is identical to the NAV of the Creation Unit it is used to purchase. If the Balancing Amount is a positive number (*i.e.*, the NAV per Creation Unit exceeds the market value of the Deposit Securities), then that amount will be paid by the purchaser to the Fund in cash. If the Balancing Amount is a negative number (*i.e.*, the NAV per Creation Unit is less than the market value of the Deposit Securities), then that amount will be paid by the Fund to the purchaser in cash.

The Advisor will make available through NSCC on each business day, prior to the opening of trading on the NYSE, a list of the names and the required number of units of each Deposit Security to be included in the Fund Deposit.¹⁵ The Advisor also will make available on a daily basis the information about the previous day’s Balancing Amount. In addition, the following information will be disseminated: (i) continuously throughout the trading day through the facilities of the consolidated tape, the market price of a HealthShareTM, and (ii) every 15 seconds throughout the trading day, as calculated by Bloomberg, the estimated NAV of a HealthShareTM (which estimate is expected to be accurate to within a few basis points). Comparing these two figures allows an investor to determine whether, and to what extent, HealthSharesTM of the Fund are selling at a premium or a discount to NAV.

In addition, the Company 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 Cash Component to replace any Deposit Security that may not be available in sufficient quantity for delivery, may not be eligible for transfer through the Clearing Process¹⁶, or may not be eligible for trading by a Participating Organization or the investor for which a Participating Organization is acting. In these circumstances, the Fund may use this “cash in lieu” amount to ac-

¹⁵ The identity and number of units of the Deposit Securities required for a Fund Deposit may change to reflect rebalancing adjustments and corporate actions by the Fund, or in response to adjustments to the weighting or composition of the component stocks of the Underlying Index.

¹⁶ It is rare that a security likely to be a Deposit Security is ineligible for transfer.

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quire the Deposit Securities that could not be delivered by the purchaser to the Fund. Brokerage commissions incurred by the Fund in connection with acquisition of such Deposit Securities are expected to be immaterial and will be an expense of the Fund. However, the Advisor, subject to the approval of the Board of Directors, may adjust the Transaction Fee (described below) to protect existing shareholders from this expense.

E. Redemption of HealthShares™

Just as HealthShares™ can be *purchased* from the Fund only in Creation Unit size aggregations, such shares or units similarly may be *redeemed* only if tendered in Creation Unit size aggregations (except in the event the Fund is liquidated). As required by law, redemption requests in good order will receive the NAV next determined after the request is made. Except in unusual circumstances, HealthShares™ will generally be redeemed in-kind, together with a small cash payment, as described more fully below.

HealthShares™ in Creation Unit Aggregations of the Fund will be redeemable on any day on which the NYSE is open in exchange for a basket of securities (“Redemption Securities”) and a cash payment. The Redemption Securities received by a redeeming investor will be those Fund Securities available on the NSCC bulleting board on the Business Day that the request for redemption is received in final form. Depending on whether the NAV of a Creation Unit Aggregation is higher or lower than the market value of the Redemption Securities, the redeemer of a Creation Unit Aggregation will either receive from or pay to the Fund a cash amount equal to the Balancing Amount.

The Fund may make redemptions partly in cash in lieu of transferring one or more Redemption Securities to a redeeming investor if the Fund determines, in its discretion, that such alternative is warranted. For example, this could happen if the redeeming investor is unable, by law or policy, to own a particular Redemption Security.

As with purchases, redemptions of HealthShares™ in Creation Unit Aggregations will include a Transaction Fee.

F. Dividend Reinvestment Service

The Company will not make the DTC book-entry Dividend Reinvestment Service (the “Service”) available for use by Beneficial Owners for reinvestment of their cash proceeds, but certain brokerage firms may make the Service available to their clients. The Company’s disclosure documents will inform investors of this fact and direct interested investors to contact such investor’s broker to ascertain the availability and a description of the Service through such broker. The Company’s disclosure documents will also caution interested Beneficial Owners that they should note that each broker may require investors to adhere to specific procedures and timetables in order to participate in the Service and such investors should ascertain from their broker such necessary details. HealthShares™ ac-

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quired pursuant to the Service will be held by the Beneficial Owners in the same manner, and subject to the same terms and conditions, as for original ownership of HealthShares™. No Balancing Amount will be required in connection with acquiring these HealthShares™ because such acquisition is a secondary market transaction and not a creation of HealthShares™ at current NAV. Brokerage commissions, if any, incurred in purchasing HealthShares™ with the cash from the distributions will be an expense borne by the Beneficial Owners participating in reinvestment through the Service.

G. Disclosure Documents

The purchase of HealthShares™ in Creation Unit Aggregations or in secondary market transactions will be accompanied or preceded by a statutory prospectus or product description.¹⁷

The Distributor will coordinate the production and distribution of prospectuses and product descriptions to broker-dealers. It will be the responsibility of the broker-dealers to ensure that a prospectus or product description (if the Application is granted) is provided to each secondary market purchaser of HealthShares™.

H. Comparison of the Company to the Other Funds That Have Sought Similar Commission Action

The relief requested in this letter is identical or substantially similar to the relief previously granted by the Commission to the other portfolios of the Company and to ETFs not related to the Company.¹⁸

III. Requests for Relief

A. 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 Company believes that relief

¹⁷ The Company has obtained an exemption from Section 24(d) of the 1940 Act in the Order (as described above in Part I). The exemption is conditioned on an undertaking that investors purchasing HealthShares™ from or through dealers in the secondary market will receive a short "Product Description" or other similar disclosure document in lieu of the lengthier statutory prospectus. The Product Description will provide a plain english description of the Fund and the HealthShares™ it issues.

¹⁸ See footnotes 4 and 5 *supra*.

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from the application of Rule 10a-1 to secondary market transactions in HealthShares™ of the Fund is appropriate insofar as HealthShares™ are derivative securities based on a stock index. Application of Rule 10a-1 to transactions of the Fund's HealthShares™ would not further the rule's purposes, and exempting such transactions 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 HealthShares™ of the Fund will fluctuate in accordance with changes in NAV and supply and demand on the NYSE. Price differences may be due, in large part, to the fact that supply and demand forces at work in the secondary trading market for HealthShares™ will be closely related to, but not identical to, the same forces influencing the prices of the component securities of the Underlying Index trading individually or in the aggregate at any point in time. Any temporary disparities in market value between HealthShares™ and the relevant component securities would tend to be corrected immediately by arbitrage activity. Moreover, HealthShares™ in Creation Unit Aggregations, or multiples thereof, may be redeemed on any Business Day. Under these circumstances, it would appear to be economically futile for short sales in HealthShares™ to be utilized to depress HealthShare™ prices. Moreover, it would similarly be economically futile for short sales in HealthShares™ to be utilized to depress particular stocks in the Underlying Indexes.

Because the Fund will qualify as a "regulated investment company" under the Internal Revenue Code, the Fund cannot invest more than 25% of its assets in a single stock. Therefore, even if an issuer represents a large portion of the index, a short seller with manipulative intent must spend at least \$4 for every \$1 of market impact. The economic impracticality of such a strategy is apparent. Moreover, a ratio as favorable to the potential manipulator as 4:1 would exist only in the case of extremely large issuers. It is unlikely that even unrestricted short sales would have significant market impact on the stock of such issuers.

Furthermore, the maximum weighting for any security in the Underlying Index is typically 15% and when a company's weighting exceeds 15% of the overall Index portfolio, the Index Administrator will reduce such company's weighting to 10%. Thus, it is highly unlikely that 25% of a Fund's assets will be in a single stock and the 4:1 ratio is much more likely to be 6.7:1 for the Fund.

The trading market for HealthShares™ of the Fund would be adversely affected if Rule 10a-1 operated to prevent dealers or the specialist from making short sales of HealthShares™ 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 HealthShares™ and contrary to the public interest in liquid, efficient securities markets.

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The Company notes that it is not requesting relief from Rule 10a-1 for secondary market portfolio sales that may be made by the Fund in connection with redemptions of Creation Unit Aggregations of HealthShares™ or otherwise. 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 Company requests that the Commission grant an exemption from Rule 10a-1 to permit sales of HealthShares™ of the Fund without regard to the “tick” requirements of Rule 10a-1.

B. Rule 200(g) of Regulation SHO

Rule 200(g) of Regulation SHO (“Rule 200(g)”) 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 uptick requirements of Rule 10a-1 of the Exchange Act or any short sale price test of any exchange or national securities association. As of January 3, 2005, under Regulation SHO, broker-dealers are generally 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 Company in connection with the Funds. The Commission Staff has provided no-action relief¹⁹ to the Securities Industry Association (the “SIA Letter”) that, subject to certain conditions, permits broker-dealers to mark short sales as “short” rather than “short exempt” for, among other things, short sales effected in ETFs that had been granted an exemption from a price test at the time of the letter.

If the Commission grants the requested relief with respect to Rule 10a-1, the Company hereby requests that the Staff not recommend that the Commission take 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 the Fund in the same manner as those ETFs listed in Appendix A of the SIA Letter, and that the relief granted to such ETFs in the SIA Letter be extended to cover transactions in the HealthShares™. 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;

¹⁹ See, footnote 4, *supra*, letter from Ira Hammerman, to James A. Brigagliano, Division of Market Regulation, dated January 3, 2005.

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(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.

C. Rule 101 of Regulation M

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

We understand that while broker-dealers that: (i) tender Deposit Securities through the Distributor in return for Creation Unit Aggregation(s) or (ii) redeem Creation Unit Aggregations generally will not be part of a syndicate or selling group, and while no broker-dealer will receive fees, commissions or other remuneration from the Company or the Distributor for the sale of Creation Unit Aggregations, under certain circumstances such broker-dealers could be deemed to be “underwriters” or “distribution participants” as those terms are defined in Rule 100(b).

The Company respectfully requests that the Commission grant an exemption from Rule 101, as discussed below, to permit persons participating in a distribution of HealthShares™ of the Fund to bid for or purchase, redeem or engage in other secondary market transactions in such HealthShares™ during their participation in such distribution.

Paragraph (c)(4) of Rule 101 exempts from its application, among other things, redeemable securities issued by an open-end management investment company (as such terms are used in the 1940 Act). The Company is registered as an open-end management investment company under the 1940 Act. HealthShares™, however, are not redeemable except in Creation Unit Aggregations. Due to the redeemability of the HealthShares™ in Creation Unit Aggregations, however, there should be little disparity between the HealthShares™ market price and their NAV per HealthShare™. Accordingly, the rationale for exempting redeemable securities of open-end management investment companies from the application of Rule 101 is equally applicable to HealthShares™. Although redemption

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is subject to the condition of tendering sufficient HealthShares™ in Creation Unit Aggregations, the Company otherwise will function as an open-end fund continuously offering its shares. It is in recognition of the special nature of such offerings that open-end management investment company and unit investment trust securities are exempted under paragraph (c)(4). Without such an exemption, they could not operate as intended. In view of the foregoing, the Company requests that the Commission confirm that as a result of registration of the Company as an open-end management investment company and the redeemable nature of the HealthShares™ in Creation Unit Aggregations, transactions in the HealthShares™ of the Fund 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 Aggregations of HealthShares™ may be created, and HealthShares™ in Creation Unit Aggregations may be redeemed in-kind at NAV, on any Business Day. Holders of HealthShares™ also have the benefit of intra-day secondary market liquidity by virtue of the Exchange listing. Thus, the secondary market price of HealthShares™ should not vary substantially from their NAV. Because of the redeemability of HealthShares™ in Creation Unit Aggregations, any significant disparity between the market price of HealthShares™ and NAV should be eliminated by arbitrage activity. Because the NAV of HealthShares™ is based on the market value of the Fund's portfolio, transactions involving HealthShares™ (creations from and redemptions with the Fund, purchases and sales in the secondary market) will not affect NAV. Similarly, such transactions should not have a significant effect on the market value of HealthShares™.

The Company 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 shares of Fund Securities: (i) to purchase Fund Securities for the purpose of purchasing Creation Unit Aggregations of HealthShares™, and (ii) to tender HealthShares™ for redemption in Creation Unit Aggregations and to receive Fund Securities as part of the redemption proceeds.

The Company requests that the Commission clarify that the tender of HealthShares™ to the Fund for redemption and the receipt of Fund Securities upon redemption does not constitute a bid for or purchase of any of such securities, or an "attempt to induce any person to bid for or purchase a covered security, during the applicable restricted period" for the purposes of Rule 101. Redemption entails no separate bid for any of the Fund Securities. Absent unusual circumstances, the Fund will not purchase Fund Securities in the secondary market to fulfill a redemption request. Therefore, redemptions of HealthShares™ cannot be expected to affect the market price of the Fund Securities. As indicated above, the Distributor will not engage in any secondary market transactions in HealthShares™, either for its own account or for investors. In addition, the Company 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 Health-

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SharesTM should 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 HealthSharesTM, combined with a predictable lack of any meaningful potential for the issuance and the secondary market trading of HealthSharesTM to affect significantly HealthSharesTM pricing, application of Rule 101 to a broker-dealer or other person who may be participating in a distribution of HealthSharesTM or Fund Securities is unnecessary and inappropriate, and could unnecessarily hinder broker-dealers or other persons in their creation and redemption activities, in their day-to-day ordinary business of buying and selling securities and HealthSharesTM and thus undermine the potential beneficial market effect of HealthSharesTM trading.

D. Rule 102 of Regulation M

The Company also requests that the Commission confirm that, as a result of registration of the Company as an open-end management investment company and the redeemable nature of HealthSharesTM in Creation Unit Aggregations, for the reasons previously stated under the request with respect to relief under Rule 101(c)(4), transactions in HealthSharesTM of the Fund would be exempted from Rule 102 on the basis of the exception contained in paragraph (d)(4) of such rule. Application of Rule 102 in this context would not further the anti-manipulative purposes 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. The Company respectfully requests that the Commission grant an exemption under paragraph (e) of Rule 102 to allow the Fund to redeem HealthSharesTM in Creation Unit Aggregations during the continuous offering of HealthSharesTM. The Company respectfully submits that the redemptions described in this letter do not constitute a manipulative or deceptive practice within the purpose of Rule 102 and are eligible for an exemption from the provisions of Rule 102 to allow the Fund to redeem HealthSharesTM in Creation Unit Aggregations during the continuous offering of HealthSharesTM.

For the reasons described in connection with the requested Rule 101 relief, redemption transactions and secondary market transactions in the Fund's HealthSharesTM are not viable means to manipulate the price of a Fund Security during a distribution of such security. The Company will redeem the Creation Unit Aggregations of HealthSharesTM at the NAV of the HealthSharesTM. Although HealthSharesTM are traded on the secondary market, HealthSharesTM may only be redeemed in Creation Unit Aggregations. Thus, the Company believes that the redemption of HealthSharesTM at NAV in consideration prin-

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cipally for Fund Securities does not involve the abuses that Rule 102 was intended to prevent.

E. Rule 14e-5

Rule 14e-5 prohibits a “covered person” from directly or indirectly purchasing or arranging to purchase any subject securities of a tender offer (or a related security), except as part of such tender offer. The dealer-manager of a tender offer is a “covered person” and therefore subject to the Rule. The Company respectfully requests that the Commission grant an exemption from Rule 14e-5 to permit any person (including a member or member organization of an Exchange) acting as a dealer-manager of a tender offer for a Fund Security: (1) to redeem HealthShares™ in one or more Creation Unit Aggregations to the Company for Fund Securities that may include a security subject to such tender offer, and (2) to purchase HealthShares™ during such tender offer which may include the delivery of securities subject to such tender offer. The acquisition of individual Fund Securities by means of redemptions to the Company would be impractical and extremely inefficient in view of the requirement that a minimum of 100,000 HealthShares™ be redeemed. Also, 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 HealthShare™ pricing efficiency. In no case would redemptions of HealthShares™ or secondary market transactions by Covered Persons be effected for the purpose of facilitating a tender offer. Accordingly, purchases and redemptions of HealthShares™ in the circumstances described would not appear to result in the abuses at which Rule 14e-5 is directed.

In addition, the Company requests that the Staff take a no-action position under Rule 14e-5 if a broker-dealer (including a member or member of the NYSE or other Exchange) 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 HealthShares™, 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 Underlying Index; and (iii) such bids or purchases are not effected for the purpose of facilitating such tender offer.

F. 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), however, states that the

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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 HealthShares™ must be redeemed in Creation Unit-size aggregations, HealthShares™ are redeemable securities issued by open-end investment companies.²⁰ For the reasons discussed above in connection with the relief requested under Regulation M, we request that the exemption under paragraph (c) of Rule 10b-17 be applicable to the Fund.

IV. Conclusion

Based on the foregoing, we respectfully request that the Commission and the Staff grant the relief requested herein. The forms of relief requested are virtually identical to those actions that the Commission and the Staff have taken in similar circumstances for other ETFs and for other portfolios of the Company. Should you have any questions regarding the foregoing, please call the undersigned at (212) 318-6295.

Very truly yours,



Domenick Pugliese

cc: Racquel Russell (SEC)
Branch Chief Division of Market Regulation

²⁰ As discussed in Note 1 above, the Company is registered under the 1940 Act.