

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state (a) that secondary market trading in Shares will not cause dilution for owners of Shares because such transactions do not directly involve Fund assets, and (b) to the extent different prices exist during a given trading day, or from day to day, these variances occur as a result of third-party market forces, such as supply and demand and not as a result of unjust or discriminatory manipulation. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because competitive forces in the marketplace will ensure that the difference between the market price of Shares and their NAV remains narrow.

#### *Section 24(d) of the Act*

7. Section 24(d) of the Act provides, in relevant part, that the prospectus delivery exemption provided to dealer transactions by section 4(3) of the Securities Act does not apply to any transaction in a redeemable security issued by an open-end investment company. Applicants request an exemption from section 24(d) to permit dealers selling Shares to rely on the prospectus delivery exemption provided by section 4(3) of the Securities Act.<sup>7</sup>

<sup>7</sup> Applicants do not seek relief from the prospectus delivery requirement for non-secondary market transactions, such as purchases of shares from the Fund or an underwriter. Applicants state that a Fund's prospectus will caution persons purchasing Creation Units that some activities on their part may, depending on the circumstances,

8. Applicants state that Shares will be listed on a Listing Market and will be traded in a manner similar to other equity securities. Applicants note that dealers selling shares of closed-end investment companies in the secondary market generally are not required to deliver a prospectus to the purchaser.

9. Applicants contend that Shares, as a listed security, merit a reduction in the compliance costs and regulatory burdens resulting from the imposition of prospectus delivery obligations in the secondary market. Because Shares will be listed on a Listing Market, prospective investors will have access to several types of market information about Shares. Applicants state that information regarding market price and volume will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's price and volume information for Shares also will be published daily in the financial section of newspapers. In addition, the Trust (or the Listing Market) also intends to maintain a website that includes quantitative information updated on a daily basis, including, for each Fund, daily trading volume, the closing NAV and the reported closing price. The website for the Trust will also include, for each Fund, on a per Share basis, (a) a calculation of the premium or discount of the closing price against NAV, and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price against NAV, within appropriate ranges, for each of the four previous calendar quarters.

10. Investors also will receive a product description ("Product Description") describing a Fund and its Shares. Applicants state that, while not intended as a substitute for a Prospectus, the Product Description will

result in their being deemed statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. For example, a broker-dealer firm and/or its client may be deemed a statutory underwriter if it purchases Creation Units from a Fund, breaks them down into the constituent Shares, and sells those Shares directly to customers, or if it chooses to couple the creation of a supply of new Shares with an active selling effort involving solicitation of secondary market demand for Shares. Each Fund's prospectus will state that whether a person is an underwriter depends upon all the facts and circumstances pertaining to that person's activities. Each Fund's prospectus also will caution dealers who are not "underwriters" but are participating in a distribution (as contrasted to ordinary secondary market trading transactions), and thus dealing with Shares that are part of an "unsold allotment" within the meaning of section 4(3)(C) of the Securities Act, that they would be unable to take advantage of the prospectus delivery exemption provided by section 4(3) of the Securities Act.

contain information about Shares that is tailored to meet the needs of investors purchasing Shares in the secondary market.

#### *Sections 17(a)(1) and (2) of the Act*

11. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person, from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines "affiliated person" to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns 25% or more of another person's voting securities. Applicants state that with respect to one or more Funds and the Trust, a large institutional investor, including a Market Maker, could own 5% or more or in excess of 25% of the outstanding Shares of a Fund or the Trust, making that investor an affiliated person of the Fund or Trust. Applicants request an exemption from section 17(a) under sections 6(c) and 17(b), to permit persons that are affiliated persons of a Fund or the Trust solely by virtue of a 5% or more or in excess of a 25% ownership interest (and affiliated persons of such affiliated persons that are not otherwise affiliated with such Fund or Trust) to purchase and redeem Creation Units through in-kind transactions.

12. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Applicants contend that no useful purpose would be served by prohibiting the affiliated persons of a Fund or the Trust described above from purchasing or redeeming Creation Units through in-kind transactions. The deposit procedure for in-kind purchases and the redemption procedure for in-kind redemptions will be the same for all purchases and redemptions. Deposit Securities and Redemption Securities will be valued in the same manner as the securities in the Fund's portfolio. Therefore, applicants state that in-kind