

general, protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.³⁸

The Commission has granted the Funds appropriate relief under various Sections of the 1940 Act, including sections 6(c) and 17(b), so that each Fund may register under the 1940 Act as an open-end fund and issue shares that are redeemable in Creation Units, shares of the Funds may trade in the secondary market at negotiated prices, and certain persons affiliated with a Fund by reason of owning 5% or more, and in some cases more than 25%, of its outstanding securities may do in-kind purchases and redemptions of Creation Units.³⁹

The Commission notes that the Funds will operate in substantially the same manner as the funds that were the subject of the Previous Approval Order. The Commission notes one difference is that with respect to the Aggregate Bond Fund, approximately 35% of its assets will be invested in TBA transactions, which is a purchase or sale of a pass-through security for future settlement at an agreed upon date. The Exchange represented that the use of TBA transactions is not intended to help the Aggregate Bond Fund outperform its Underlying Index, but rather to increase pricing efficiency while at the same time maintaining the Aggregate Bond Fund's exposure to its Underlying Index. Since the intra-day prices of TBA agreements are more readily available than intra-day prices on specific mortgage pools and because mortgage pools tend to be less liquid than TBA agreements, the Commission agrees that the use of TBA agreements should help maintain the efficiency of the Aggregate Bond Fund's arbitrage mechanism.

For the reasons stated in the Notice, above, the Commission finds that adequate rules and procedures exist to govern the trading of ICUs, including the Funds. For the reasons stated in the Notice, above, the Commission finds that because of the nature of the particular fixed income securities to be included in the portfolios of the Funds (*i.e.*, U.S. Government securities,

investment grade corporate bonds, and TBA transactions), the pricing information should be available. However, the Commission notes that differences in the degree of price transparency in the debt and equity markets could lead to larger discounts and premiums for the Funds than have been experienced by Equity ETFs because arbitrators may wait for greater premiums or discounts to develop in the market price of the ETF shares before engaging in arbitrage transactions. The Commission expects the Exchange to contact Commission staff if the tracking error for these Funds exceeds the represented 5%.

The Commission has also granted the issuer, Barclays, exemptive relief from Section 24(d) of the 1940 Act so that dealers may effect secondary market transaction in ETF shares without delivery a prospectus to the purchaser.⁴⁰ Instead, under the exemption and under NYSE's listing standards, sales in the secondary market must be accompanied by a "product description," describing the ETF and its shares.⁴¹ The Commission believes a product description, which not only highlights the basic characteristics of the product and the manner in which the ETF shares trade in the secondary market, but also highlights the differences of the Funds from existing equity ETFs and notes the unique characteristics and risks of this product, should provide market participants with adequate notice of the salient features of the product.

The Commission also notes that upon the initial listing of any EFT under section 703.16 of the NYSE Listed Company Manual the Exchange issues a circular to its members explaining the unique characteristics and risks of the security; in this instance, fixed income ETFs. In particular, the circular should include, among other things, a discussion of the risks that may be associated with the Funds, in addition to details on the composition of the fixed income indices upon which they are based and how each Fund would use a representative sampling strategy to track its index. The circular also should

note Exchange members' responsibilities under Exchange Rule 405 ("know your customer rule") regarding transactions in such fixed income ETFs. Exchange Rule 405 generally requires that members use due diligence to learn the essential facts relative to every customer when a transaction in the Fund shares is recommended and determine that such shares are suitable for such customer.⁴² The circular also will address members' prospectus delivery requirements as well as highlight the characteristics of purchases in Funds, including that they only are redeemable in Creation Unit size aggregations. Based on these factors, the Commission finds that the proposal to trade the Funds is consistent with section 6(b)(5) of the Act.⁴³

The Commission also notes that certain concerns are raised when a broker-dealer, such as Lehman, is involved in the development, maintenance, and calculation of an index upon which an ETF is based. Lehman has represented that it has procedures in place to prevent the misuse of material, non-public information relating to the index.⁴⁴ The Commission believes that these provisions should help to address concerns raised by Lehman's involvement in the management of the indices. The Commission believes that this should act to further minimize the possibility of manipulation.

The Commission also believes that the NYSE has appropriate surveillance procedures in place to detect and deter potential manipulation for similar index-linked products. By applying these procedures to Funds, the Commission believes that the potential for manipulation should be minimized, while protecting investors and the public interest.

NYSE has requested that the Commission find good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Funds will trade on the Exchange in the same manner as the funds that were the subject of the Previous Approval Order and the proposed rule change. The proposed rule change raises no novel issues. Based on the above, the Commission finds good cause to accelerate approval of the proposed rule change.

⁴² NYSE Rule 405.

⁴³ 15 U.S.C. 78f(b)(f).

⁴⁴ The Commission expects that the procedures implemented by Lehman will monitor and prevent the misuse of material, non-public information as it relates to the development, maintenance and calculation of the indices.

³⁸ Pursuant to section 6(b)(5) of the Act, the Commission must predicate approval of exchange trading for new products upon a finding that the introduction of the product is in the public interest. Such a finding would be difficult with respect to a product that served no investment, hedging or other economic functions, because any benefits that might be derived by market participants would likely be outweighed by the potential for manipulation, diminished public confidence in the integrity of the markets, and other valid regulatory concerns.

³⁹ Investment Company Act Release No. 25622 (June 25, 2002).

⁴⁰ See Investment Company Act Release Nos. 25595 (May 29, 2002) (notice) and 25623 (June 25, 2002) (order).

⁴¹ Nasdaq listing standards for ETFs clarify that NASD members trading equity ETFs through electronic communication networks ("ECNs") would be subject to NASD Rules 4420(i)(2) and 4420(j)(2) requiring the delivery of product descriptions in connection with sales of ETF shares. See Securities Exchange Act Release No. 45920 (May 13, 2002), 67 FR 35605 (May 20, 2002). The Commission expects NASD members to observe the same standards for the secondary market trading of Funds.