

available publicly. All submissions should refer to File Number SR–NASDAQ–2016–141 and should be submitted on or before November 22, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Brent J. Fields,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79165; File Nos. SR–DTC–2016–007; SR–FICC–2016–005; SR–NSCC–2016–003]

Self-Regulatory Organizations; The Depository Trust Company; Fixed Income Clearing Corporation; National Securities Clearing Corporation; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Changes Relating to Clearing Agency Investment Policy

October 26, 2016.

On August 25, 2016, The Depository Trust Company (“DTC”), Fixed Income Clearing Corporation (“FICC”), and National Securities Clearing Corporation (“NSCC”, and together with DTC and FICC, the “Clearing Agencies”) filed with the Securities and Exchange Commission (“Commission”) proposed rule changes SR–DTC–2016–007, SR–FICC–2016–005, and SR–NSCC–2016–003 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b–4 thereunder,² to adopt the Clearing Agency Investment Policy, which governs the investment of funds of the Clearing Agencies. The proposed rule changes were published for comment in the **Federal Register** on September 13, 2016.³ To date, the Commission has not received any comments on the proposed rule changes.

Section 19(b)(2) of the Act⁴ provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents,

the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for these proposed rule changes is October 28, 2016. The Commission is extending this 45-day time period.

In order to provide the Commission with sufficient time to consider the proposed rule changes, the Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule changes. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,⁵ designates December 12, 2016 as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes (File Nos. SR–DTC–2016–007; SR–FICC–2016–005; SR–NSCC–2016–003).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Brent J. Fields,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79159; File No. TP 16–14]

Order Granting Limited Exemptions From Exchange Act Rule 10b–17 and Rules 101 and 102 of Regulation M to Premise Capital Frontier Advantage Diversified Tactical ETF Pursuant to Exchange Act Rule 10b–17(b)(2) and Rules 101(d) and 102(e) of Regulation M

October 26, 2016.

By letter dated October 26, 2016 (the “Letter”), as supplemented by conversations with the staff of the Division of Trading and Markets, counsel for ETF Series Solutions (the “Trust”), on behalf of the Trust, Premise Capital Frontier Advantage Diversified Tactical ETF (the “Fund”), any national securities exchange on or through which shares of the Fund (“Shares”) are listed and may subsequently trade, Quasar Distributors, LLC (the “Distributor”), and persons engaging in transactions in Shares (collectively, the “Requestors”), requested exemptions, or interpretive or no-action relief, from Rule 10b–17 of the Securities Exchange Act of 1934, as

amended (“Exchange Act”), and Rules 101 and 102 of Regulation M, in connection with secondary market transactions in Shares and the creation or redemption of aggregations of Shares of 50,000 shares (“Creation Units”).

The Trust is registered with the Securities and Exchange Commission (“Commission”) under the Investment Company Act of 1940, as amended (“1940 Act”), as an open-end management investment company. The Fund seeks to track the performance of an underlying index, the Premise Capital Frontier Advantage Diversified Tactical Index (the “Underlying Index”). The Underlying Index seeks to provide exposure to major U.S. and non-U.S. equity and fixed income asset classes.

The Fund will seek to track the performance of its Underlying Index by normally investing at least 80% of its total assets in the ETFs that comprise the Underlying Index.¹ Except for the fact that the Fund will operate as an ETF of ETFs, the Fund will operate in a manner identical to the underlying ETFs.

The Requestors represent, among other things, the following:

- Shares of the Fund will be issued by the Trust, an open-end management investment company that is registered with the Commission;
- Creation Units will be continuously redeemable at the net asset value (“NAV”) next determined after receipt of a request for redemption by the Fund, and the secondary market price of the Shares should not vary substantially from the NAV of such Shares;
- Shares of the Fund will be listed and traded on BATS Exchange, Inc., or another exchange in accordance with exchange listing standards that are, or will become, effective pursuant to Section 19(b) of the Exchange Act (the “Listing Exchange”);²
- All ETFs in which the Fund is invested will meet all conditions set forth in one or more class relief letters, will have received individual relief from the Commission, will be able to rely upon individual relief even though they are not named parties, or will be able to

¹ The remaining 20% of the Fund’s total assets may be invested in securities (including other underlying funds) not included in the Underlying Index and in cash, money market instruments, or funds that invest exclusively in money market instruments, subject to applicable limitations under the 1940 Act.

² Further, Requestors represent in the Letter that should the Shares also trade on a market pursuant to unlisted trading privileges, such trading will be conducted pursuant to self-regulatory organization rules that are, or will become, effective pursuant to Section 19(b) of the Exchange Act.

¹² 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 78778 (September 7, 2016), 81 FR 62963 (September 13, 2016) (SR–DTC–2016–007; SR–FICC–2016–005; SR–NSCC–2016–003).

⁴ 15 U.S.C. 78s(b)(2).

⁵ *Id.*

⁶ 17 CFR 200.30–3(a)(31).

rely on applicable class relief for actively-managed ETFs;

- At least 70% of the Fund is comprised of component securities that will meet the minimum public float and minimum average daily trading volume thresholds under the “actively-traded securities” definition found in Regulation M for excepted securities during each of the previous two months of trading prior to formation of the Fund;

- The Fund seeks to track the performance of the Underlying Index, all of the components of which will have publicly available last sale trade information;

- The intraday proxy value of the Fund per share and the value of the Index will be publicly disseminated by a major market data vendor throughout the trading day;

- On each business day before the opening of business on the Listing Exchange, the Fund will cause to be published through the National Securities Clearing Corporation the list of the names and the quantities of securities and other assets of the Fund’s portfolio that will be applicable that day to creation and redemption requests;

- The Listing Exchange will disseminate continuously every 15 seconds throughout the trading day, through the facilities of the Consolidated Tape Association, the market value of a Share;

- The Listing Exchange, market data vendors, or other information providers will disseminate, every 15 seconds throughout the trading day, a calculation of the intraday indicative value of a Share;

- The Fund will invest in securities that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges;

- The arbitrage mechanism will be facilitated by the transparency of the Fund’s portfolio and the availability of the intraday indicative value, the liquidity of securities held by the Fund, the ability to acquire such securities, as well as arbitrageurs’ ability to create workable hedges;

- The Fund will invest solely in liquid securities;

- The Trust believes that arbitrageurs are expected to take advantage of price variations between the Fund’s market price and its NAV; and

- A close alignment between the market price of Shares and the Fund’s NAV is expected.

Regulation M

While redeemable securities issued by an open-end management investment company are excepted from the

provisions of Rules 101 and 102 of Regulation M, the Requestors may not rely upon those exceptions for the Shares.³ However, we find that it is appropriate in the public interest and is consistent with the protection of investors to grant a conditional exemption from Rules 101 and 102 to persons who may be deemed to be participating in a distribution of Shares of the Fund as described in more detail below.

Rule 101 of Regulation M

Generally, Rule 101 of Regulation M is an anti-manipulation rule that, subject to certain exceptions, prohibits any “distribution participant” and its “affiliated purchasers” from bidding for, purchasing, or attempting to induce any person to bid for or purchase any security that is the subject of a distribution until after the applicable restricted period, except as specifically permitted in the Rule. 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. 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. The Shares are in a continuous distribution, and, as such, the restricted period in which distribution participants and their affiliated purchasers are prohibited from bidding for, purchasing, or attempting to induce others to bid for or purchase extends indefinitely.

Based on the representations and facts presented in the Letter, particularly that the Trust is a registered open-end management investment company, that Creation Unit size aggregations of the Shares of the Fund will be continuously redeemable at the NAV next determined after receipt of a request for redemption by the Fund, and that a close alignment between the market price of Shares and the Fund’s NAV is expected, the Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant the Trust an exemption under paragraph (d) of Rule 101 of Regulation M with respect to the Fund, thus permitting persons participating in a distribution of Shares of the Fund to bid for or

purchase such Shares during their participation in such distribution.⁴

Rule 102 of Regulation M

Rule 102 of Regulation M prohibits issuers, selling security holders, and 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.

Based on the representations and facts presented in the Letter, particularly that the Trust is a registered open-end management investment company, that Creation Unit size aggregations of the Shares of the Fund will be continuously redeemable at the NAV next determined after receipt of a request for redemption by the Fund, and that a close alignment between the market price of Shares and the Fund’s NAV is expected, the Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant the Trust an exemption under paragraph (e) of Rule 102 of Regulation M with respect to the Fund, thus permitting the Fund to redeem Shares of the Fund during the continuous offering of such Shares.

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) relating to such class of securities in accordance with Rule 10b–17(b). Based on the representations and facts in the Letter, and subject to the conditions below, the Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant the Trust a conditional exemption from Rule 10b–17 because market participants will receive timely notification of the existence and timing of a pending distribution, and thus the concerns that the Commission raised in adopting Rule 10b–17 will not be implicated.⁵

⁴ Additionally, we confirm the interpretation that a redemption of Creation Unit size aggregations of Shares of the Fund and the receipt of securities in exchange by a participant in a distribution of Shares of the Fund 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 Rule 101 of Regulation M and therefore would not violate that rule.

⁵ We also note that timely compliance with Rule 10b–17(b)(1)(v)(a) and (b) would be impractical in light of the nature of the Fund. This is because it is not possible for the Fund to accurately project ten days in advance what dividend, if any, would be

³ While ETFs operate under exemptions from the definitions of “open-end company” under Section 5(a)(1) of the 1940 Act and “redeemable security” under Section 2(a)(32) of the 1940 Act, the Fund and its securities do not meet those definitions.

Conclusion

It is hereby ordered, pursuant to Rule 101(d) of Regulation M, that the Trust, based on the representations and facts presented in the Letter, is exempt from the requirements of Rule 101 with respect to the Fund, thus permitting persons who may be deemed to be participating in a distribution of Shares of the Fund to bid for or purchase such Shares during their participation in such distribution.

It is further ordered, pursuant to Rule 102(e) of Regulation M, that the Trust, based on the representations and the facts presented in the Letter, is exempt from the requirements of Rule 102 with respect to the Fund, thus permitting the Fund to redeem Shares of the Fund during the continuous offering of such Shares.

It is further ordered, pursuant to Rule 10b-17(b)(2), that the Trust, based on the representations and the facts presented in the Letter and subject to the conditions below, is exempt from the requirements of Rule 10b-17 with respect to transactions in the shares of the Fund.

This exemptive relief is subject to the following conditions:

- The Trust will comply with Rule 10b-17, except for Rule 10b-17(b)(1)(v)(a) and (b); and
- The Trust will provide the information required by Rule 10b-17(b)(1)(v)(a) and (b) to the Listing Exchange as soon as practicable before trading begins on the ex-dividend date, but in no event later than the time when the Listing Exchange last accepts information relating to distributions on the day before the ex-dividend date.

This exemptive relief is subject to modification or revocation at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. This exemption is based on the facts presented and the representations made in the Letter. Any different facts or representations may require a different response. Persons relying upon this exemptive relief shall discontinue transactions involving the Shares of the Fund, pending presentation of the facts for the Commission's consideration, in the event that any material change occurs with respect to any of the facts or representations made by the Requestors, and, as is the case with all preceding

paid on a particular record date. Further, the Commission finds, based upon the representations of the Requestors in the Letter, that the provision of the notices as described in the Letter and subject to the conditions of this Order would not constitute a manipulative or deceptive device or contrivance comprehended within the purpose of Rule 10b-17.

letters, particularly with respect to the close alignment between the market price of Shares and the Fund's NAV. In addition, persons relying on this exemption 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 any other applicable provisions of the federal securities laws must rest with the persons relying on this exemption. This Order should not be considered a view with respect to any other question that the proposed transactions may raise, including, but not limited to, the adequacy of the disclosure concerning, and the applicability of other federal or state laws to, the proposed transactions.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Brent J. Fields,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79172; File No. SR-OCC-2016-014]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Related to Compliance With Section 871(m) of the Internal Revenue Code

October 27, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 18, 2016, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of this proposed rule change is to amend OCC's By-Laws and Rules to address the implementation of Section 871(m) of the Internal Revenue Code of 1986, as amended ("I.R.C."),³

and the Treasury Regulations thereunder as they will apply to listed options transactions. The proposed amendments to OCC's By-Laws and Rules can be found on OCC's public Web site.⁴ All capitalized terms not defined herein have the same meaning as set forth in OCC's By-Laws and Rules.⁵

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

Background

OCC is proposing to modify its By-Laws and Rules to address the application of I.R.C. Section 871(m) ("Section 871(m)")⁶ to listed options transactions commencing on January 1, 2017. The proposed modifications are designed to ensure that OCC will not be liable for U.S. withholding tax with respect to certain options transactions entered into by OCC's Clearing Members that are treated as non-U.S. persons for federal income tax purposes.

Section 871(m), which was enacted in 2010, imposes a 30% withholding tax on "dividend equivalent" payments that are made or deemed to be made to non-U.S. persons with respect to certain derivatives (such as total return swaps) that reference equity of a U.S. issuer. In enacting Section 871(m), Congress was attempting to address the ability of foreign persons to obtain the economics of owning dividend-paying stock through a derivative while avoiding the withholding tax that would apply to dividends paid on the stock if the foreign person owned the stock directly.⁷

In September 2015, the Treasury Department adopted final regulations (the "Final Section 871(m)

⁴ OCC's By-Laws and Rules can be found on OCC's public Web site: <http://optionsclearing.com/about/publications/bylaws.jsp>.

⁵ *Id.*

⁶ 26 U.S.C. 871(m).

⁷ See 26 U.S.C. 871(a)(1)(A) (30% tax on dividends paid to non-resident aliens).

⁶ 17 CFR 200.30-3(a)(6) and (9).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 26 U.S.C. 871(m).