



DIVISION OF  
TRADING AND MARKETS

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

October 30, 2008

Francine J. Rosenberger  
K&L Gates LLP  
1601 K Street, N.W.  
Washington, D.C. 20006

Re: **Direxion Shares ETF Trust**  
**File No. TP 08-87**

Dear Ms. Rosenberger:

In your letter dated October 30, 2008, as supplemented by conversations with the staff of the Division of Trading and Markets ("Staff"), Direxion Shares ETF Trust (the "Trust") on behalf of itself, NYSE Arca, Inc. ("NYSE Arca") or any other national securities exchange or national securities association on or through which the exchange traded shares of the Trust ("Shares"), may subsequently trade, Foreside Fund Services, LLC, and persons or entities engaging in transactions in Shares, requests from the Staff or from the Commission, exemptions from, or interpretive or no-action advice regarding Rules 14e-5 and 10b-17 under the Securities Exchange Act of 1934 as amended ("Exchange Act"), and Rules 101 and 102 of Regulation M. 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.

The Trust was organized on April 23, 2008, as a Delaware statutory trust. The Trust is registered with the Commission under the Investment Company Act of 1940 (as amended "1940 Act") as an open-end management investment company. The Trust currently consists of 32 separate Funds, eight of which are the subject of this request for relief: Large Cap Bull 3X Shares, Small Cap Bull 3X Shares, Energy Bull 3X Shares, Financial Bull 3X Shares (collectively, "Bull Funds"), Large Cap Bear 3X Shares, Small Cap Bear 3X Shares, Energy Bear 3X Shares, and Financial Bear 3X Shares (collectively, "Bear Funds"). Each Fund has a distinct investment objective which is different than that of the other Funds. Each of the Funds attempts to achieve its investment objective by corresponding to a specified multiple of the daily performance, or the inverse daily performance, of a particular Underlying Index. The Funds are indexed funds employing the same types of investment strategies as conventional index funds.

Rather than holding positions intended to create exposure to 100% of the daily performance of an Underlying Index, the Bull Funds hold positions designed to create exposure equal to three times (300%), before fees and expenses, the daily performance of its Underlying Index. To accomplish this goal, each Bull Fund holds 80% to 100% of its total assets in the component securities that comprise its Underlying Index and the remainder of its assets is devoted to Financial Instruments and Money Market Instruments that are intended to create the additional exposure needed to such Underlying Index necessary to pursue its investment objectives.

The Bear Funds seek daily investment results corresponding, before fees and expenses, to 300% of the inverse of the daily performance of an Underlying Index. The Bear Funds do not invest in equity securities but rather create short exposure to the relevant Underlying Index. In other words, rather than creating short positions in the individual equity security components of the relevant Underlying Index, each Bear Fund will rely on establishing positions in Financial Instruments and Money Market Instruments. If a Bear Fund is successful in meeting its objective, its net asset value should gain approximately 300% as much, on a percentage basis, as any decrease in the relevant Underlying Index when the prices of the equity security components in such index decline on any given day and should lose approximately 300% as much, on a percentage basis, as any increase in the relevant Underlying Index when the prices of such equity security components increase on a given day. Normally, 100% of the value of the portfolios of the Bear Funds will be devoted to such Financial and Money Market Instruments.

*Response:*

*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 Trust an exemption from certain provisions of the 1940 Act in order to permit the Trust to maintain its registration as an open-end management investment company and to issue Shares that are redeemable only in Creation Unit size aggregations of Shares.

*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.<sup>1</sup> 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, and without necessarily concurring in your analysis, particularly that the Trust is a registered open-end management investment company that will continuously redeem at net asset value Creation Unit size aggregations of the Shares of the Bull Funds, and the secondary market price of the Shares of the Bull Funds should not vary substantially from the net asset value of such Shares, which is based on the value of the Bull Funds' portfolio securities and other holdings, the Staff hereby confirms that the Trust is excepted under paragraph (c)(4) of Rule 101 of Regulation M with

---

<sup>1</sup> 17 CFR 242.101.

respect to the Bull Funds, thus permitting persons who may be deemed to be participating in a distribution of Shares of the Bear Funds to bid for or purchase such Shares during their participation in such distribution.<sup>2</sup>

The Staff also confirms the interpretation of Rule 101 of Regulation M that a redemption of Creation Unit size aggregations of Shares of the Bull Funds and the receipt of Redemption Securities in exchange therefor by a participant in a distribution of Shares of the Bull Funds 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 Trust is a registered open-end management investment company that will redeem at net asset value Creation Units of Shares of the Bull Funds, the Staff hereby confirms that the Trust is excepted under paragraph (d)(4) of Rule 102 of Regulation M with respect to the Bull Funds, thus permitting the Bull Funds to redeem Shares of the Bull Funds during the continuous offering of such Shares.

*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 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.

---

<sup>2</sup> We note that Regulation M does not prohibit a distribution participant and its affiliated purchasers from bidding for and purchasing component equity securities in accordance with the exceptions contained in paragraphs (b)(6) and (c)(1) of Rule 101. Rule 101(b)(6)(i) excepts basket transactions in which bids or purchases are made in the ordinary course of business in connection with a basket of 20 or more securities in which a covered security does not comprise more than 5% of the value of the basket purchased. Rule 101(b)(6)(ii) excepts adjustments to such a basket made in the ordinary course of business as a result of a change in the composition of a standardized index. Also, Rule 101(c)(1) excepts transactions in actively-traded securities, 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.

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 an Equity Security, a dealer-manager is prohibited from purchasing or arranging to purchase that Equity Security until the expiration of the offer.

On the basis of your representations and the facts presented, particularly that purchases or redemptions of Shares of the Bull Funds 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 an Equity Security to: (1) redeem Shares of the Bull Funds in Creation Unit size aggregations to the Trust for a redemption basket that may include a security subject to the tender offer; and (2) purchase Shares of the Bull Funds during such offer.<sup>3</sup>

*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, and without necessarily concurring in your analysis, particularly that the Commission has determined to grant an exemption from the 1940 Act to register the Trust as an open-end management investment company notwithstanding the fact that it issues shares with limited redeemability, the Commission hereby grants an exemption from the requirements of Rule 10b-17 to the Trust with respect to transactions in the Shares.<sup>4</sup>

The foregoing exemptions from Rules 14e-5 and 10b-17 under the Exchange Act, and Rules 101 and 102 of Regulation M are based solely on your representations and the facts presented to Staff, and are strictly limited to the application of those rules to transactions involving the Shares of the specified Funds 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 14e-5 and 10b-17

---

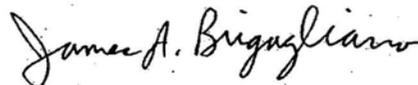
<sup>3</sup> The Staff also confirms its no-action position under Rule 14e-5 when a broker-dealer, acting as a dealer-manager of a tender offer for an Equity Security held by a Bull Fund, purchases or arranges to purchase shares of such Equity Security in the secondary market for the purpose of tendering them to purchase one or more Creation Units of Shares of a Bull Fund, if such transactions are effected as adjustments to such a basket in the ordinary course of business as a result of a change in the composition of the relevant index.

<sup>4</sup> We also note that compliance with Rule 10b-17 would be impractical in light of the nature of the Funds. This is because it is not possible for the Trust to accurately project ten days in advance what dividend, if any, would be paid on a particular record date.

under the Exchange Act, and Rules 101 and 102 of Regulation M are subject to the condition that such transactions in Shares of the specified Funds, Equity 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  
Trading and Markets, pursuant to delegated  
authority,



James A. Brigagliano  
Associate Director

Attachment

RECEIVED  
2008 OCT 31 PM 1:12  
SEB / LR

October 30, 2008

Francine J. Rosenberger  
D 202.778.9187  
F 202.778.9100  
francine.rosenberger@klgates.com

James Brigagliano  
Associate Director  
Office of Trading Practices and Processing  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

**Re: Request for Exemptive, Interpretive and No-Action Relief from Certain Rules under the Securities Exchange Act of 1934**

Dear Mr. Brigagliano:

**SUMMARY OF REQUEST FOR RELIEF**

We are writing on behalf of Direxion Shares ETF Trust (the "Trust"), on behalf of itself, NYSE Arca, Inc. ("NYSE Arca") or any other national securities exchange or national securities association on or through which the exchange-traded shares of the Trust ("Shares") may subsequently trade (each such exchange referred to herein as an "Exchange").<sup>1</sup> Foreside Fund Services, LLC ("Distributor"), and persons or entities engaging in transactions in Shares, including Authorized Participants (as defined below) (collectively, "Applicants"), hereby request, as appropriate, from the staff of the Division of Trading and Markets ("Staff") of the U.S. Securities and Exchange Commission ("Commission"), or from the Commission, exemptions from, or interpretive or no-action advice regarding, Rules 10b-17 and 14e-5 under the Securities Exchange Act of 1934, as amended ("Exchange Act"), and Rules 101 and 102 of Regulation M under the Exchange Act, in connection with secondary market transactions in Shares and the creation and redemption of Shares.

The relief requested in this letter ("Letter") is substantially similar to the exemptive, interpretive and no-action relief granted by the Commission to the open-end management investment

---

<sup>1</sup> In the future, the Trust may determine to list Shares on Exchanges other than NYSE Arca. If the Trust lists shares on Exchanges other than NYSE Arca, Shares will be listed in accordance with Exchange listing standards that are, or will become, effective pursuant to Section 19(b) of the Exchange Act. If the Shares also trade on a market 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).

James Brigagliano  
October 30, 2008  
Page 2

companies and to the unit investment trusts (registered as such with the Commission) that have been listed and traded on an Exchange as “exchange-traded funds” (“ETFs”).<sup>2</sup>

Applicants recognize that the Staff has issued letters during the past few years in connection with certain “class relief” requested by, or on behalf of, exchange-traded funds and others.<sup>3</sup> However, Applicants have concluded that the class relief previously extended to exchange-traded funds with respect to Rules 10b-17 and 14e-5 under the Exchange Act and Rules 101 and 102 of Regulation M does not cover the Trust’s investment portfolios.<sup>4</sup> To date, the class relief with respect to these provisions has been extended only to ETFs that are “managed to track a particular index” and fixed income ETFs. As discussed below, none of the Trust’s investment portfolios are fixed income ETFs or are managed to track a particular index. Rather, each investment portfolio will be leveraged, meaning that it will be managed to track a specified multiple of the daily performance or inverse daily performance of a particular index.

This Letter is divided into six parts. Part I is a description of the Trust, and certain of its investment portfolios that would be listed for trading on an Exchange. Part II is a description of

---

<sup>2</sup> See Letter from Josephine J. Tao, Assistant Director, Division of Market Regulation, to Jack P. Drogin, Morgan, Lewis & Bockius LLP, dated October 31, 2007 (with respect to the trading of the Shares of Rydex ETF Trust), and Letter from Josephine J. Tao, Assistant Director, Division of Market Regulation, to W. John McGuire, Morgan, Lewis & Bockius LLP, dated April 24, 2008 (with respect to the trading of Additional and Future Rydex Funds) (collectively, the “Rydex Letters”); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Kathleen H. Moriarty, Carter Ledyard & Milburn LLP, dated January 24, 2007 (with respect to the trading of the Shares of ProShares Trust), and Letter from Brian B. Bussey, Assistant Chief Counsel, Division of Market Regulation, to Kathleen H. Moriarty, Carter Ledyard & Milburn LLP, dated June 20, 2006, as Revised November 15, 2006. (with respect to the trading of Additional and Future ProShares Funds) (collectively, the “ProShares Letters”); see also the Class Relief Letters, *infra* note 3.

<sup>3</sup> See Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Benjamin Haskin, Wilkie Farr & Gallagher, LLP, dated April 9, 2007 (entitled “Class Relief for Fixed Income Exchange Traded Funds”) (“Fixed Income Class Relief Letter”); Letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Stuart M. Strauss, Clifford Chance US LLP, dated October 24, 2006 (entitled “Class Relief for Exchange Traded Index Funds”) (“2006 Class Relief Letter”); Letter from Catherine McGuire, Chief Counsel, Division of Market Regulation to Georgia Bullitt, Esq. *et al.*, on behalf of the Securities Industry Association, Derivative Products Committee, dated November 21, 2005 (“2005 Class Relief Letter”); Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Ira Hammerman, Senior Vice President and General Counsel to the Securities Industries Association, dated July 18, 2005, and Letter from James Brigagliano, Assistant Director, Division of Market Regulation to Ira Hammerman, Senior Vice President and General Counsel to the Securities Industry Association, dated January 3, 2005 (collectively, the “SIA Relief Letters”); and Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, dated August 17, 2001, to Claire P. McGrath of the American Stock Exchange for a recital of the conditions for the ETF class exemption (“2001 Class Relief Letter”) (collectively, the “Class Relief Letters”).

<sup>4</sup> See Fixed Income Class Relief Letter, 2006 Class Relief Letter and 2001 Class Relief Letter.

James Brigagliano  
October 30, 2008  
Page 3

the Trust's disclosure documents with respect to its Shares. Part III is a comparison of the Trust to prior ETFs. Part IV contains a discussion of the dissemination of information regarding Shares. Part V contains the requests for relief, and Part VI is the conclusion. Appendix A attached to this Letter, contains a list of each of the investment portfolios of the Trust ("Funds"), including the Funds that are the subject of this request for relief, and a brief description of the investment objective of each Fund. Appendix B attached to this Letter describes the underlying securities index for each of the Funds (each, an "Underlying Index" and collectively, "Underlying Indices").

## **PART I.**

### **A. THE TRUST AND ITS FUNDS**

The Trust is registered with the Commission under the Investment Company Act of 1940, as amended (the "1940 Act"), as an open-end management investment company, and is a Delaware statutory trust organized on April 23, 2008 that is authorized to have multiple series or portfolios. The Trust currently consists of 32 separate Funds, eight of which are the subject of this request for relief: Large Cap Bull 3X Shares, Small Cap Bull 3X Shares, Energy Bull 3X Shares, Financial Bull 3X Shares (collectively, "Bull Funds"), Large Cap Bear 3X Shares, Small Cap Bear 3X Shares, Energy Bear 3X Shares, and Financial Bear 3X Shares (collectively, "Bear Funds").

The Trust also plans to issue additional investment portfolios in the future, each of which will operate in the same manner as the funds identified in Appendix A. The Trust offers and sells its Shares pursuant to a "Registration Statement" (Registration Nos. 811-22201 and 333-150525) on Form N-1A under the 1940 Act and the Securities Act of 1933 ("1933 Act"), respectively, which was declared effective by the Commission on September 17, 2008. Each Fund has a distinct investment objective which is different than that of the other Funds. Each of the Funds attempts to achieve its investment objective (as stated in the Registration Statement and summarized briefly in Appendix A) by corresponding to a specified multiple of the daily performance or inverse daily performance of a particular Underlying Index as described in Appendix B. Each Fund is "indexed" and its portfolio is managed based upon the same strategies as those employed by leveraged and inverse index funds currently sold to retail investors.

The portfolio investments held by a Fund may include (i) futures contracts, (ii) options on securities, indices and futures, (iii) equity caps, collars and floors, (iv) swap agreements, (v) forward contracts, (vi) repurchase agreements and reverse repurchase agreements (collectively, "Financial Instruments") and (vii) Money Market Instruments. As used in this Letter, the term "Money Market Instruments" means short-term debt instruments that have terms-to-maturity of less than 397 days and exhibit high quality credit profiles and includes U.S. government securities, repurchase agreements and money market funds.

James Brigagliano  
October 30, 2008  
Page 4

## **Bull Funds**

The Bull Funds seek daily investment results that correspond, before fees and expenses, to three times (300%) the daily performance of an Underlying Index. Each Bull Fund invests its assets based upon the same strategies as conventional index funds, as well as other leveraged index funds currently sold to retail investors. Rather than holding positions intended to create exposure to 100% of the daily performance of an Underlying Index, the Bull Funds hold positions designed to create exposure three times (300%), before fees and expenses, of the daily performance of an Underlying Index. To accomplish this goal, each Bull Fund holds 80% to 100% of its total assets in the component securities of its Underlying Index and the remainder of its assets is devoted to Financial Instruments and Money Market Instruments that are intended to create the additional exposure to such Underlying Index necessary to pursue its investment objective.”

## **Bear Funds**

The Bear Funds seek daily investment results that correspond, before fees and expenses, to 300% of the inverse (opposite) of the daily performance of an Underlying Index. The Bear Funds do not invest in equity securities of an Underlying Index. Under normal circumstances, Bear Funds create short positions by investing at least 80% of their net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to a Bear Fund’s Underlying Index. The remainder of a Bear Fund’s assets are invested in Money Market Instruments. If a Bear Fund is successful in meeting its objective, its net asset value should gain approximately as much, on a percentage basis, as any decrease in the relevant Underlying Index when the prices of the securities in the Underlying Index decline on any given day and should lose approximately as much, on a percentage basis, as any increase in the relevant Underlying Index when the prices of such securities increase on a given day.

Additional information relating to the Trust, the Funds, the Shares and the Underlying Indices may be found in: (1) the Registration Statement, which contains the statutory prospectus and statement of additional information (“SAI”) (collectively, the “Prospectus”); and (2) the Trust’s request for relief from the 1940 Act for the Funds, contained in the application filed with the Commission on January 23, 2008, as amended on May 8, 2008 and September 12, 2008, the notice contained in Release No. IC-28379 dated September 12, 2008 and the order granting relief contained in Release No. IC-28434 dated October 6, 2008. Once the Trust has received all necessary regulatory relief, the Trust and/or the Exchange on which the Shares are primarily listed (the “Primary Listing Market”) will host a public website which will contain additional information and data with respect to the Shares, as described in Part IV of this Letter.

James Brigagliano  
October 30, 2008  
Page 5

## **B. OTHER PARTIES**

### **1. Adviser**

Rafferty Asset Management, LLC (“Adviser”) is a New York limited liability corporation, with its principal office located in New York, New York. The Adviser is registered as an “investment adviser” under Section 203 of the Investment Advisers Act of 1940 (“Advisers Act”). The Adviser may enter into sub-advisory agreements with additional investment advisers to act as sub-advisers with respect to the Trust and any Fund, if warranted. The Adviser is not affiliated (within the meaning of Section 2(a)(3) of the 1940 Act) with NYSE Arca, any other Exchange or the provider or compiler of any Underlying Index (“Underlying Index Provider”).

### **2. Distributor and Authorized Participants**

The Distributor, a broker-dealer registered with the Commission under the Exchange Act and a member of the Financial Industry Regulatory Authority, Inc. (“FINRA”), will act as the principal underwriter and distributor of the Creation Units of Shares as defined below. The Distributor will distribute Shares on an agency basis. The Distributor is not, and will not be, affiliated, within the meaning of Section 2(a)(3) of the 1940 Act, with NYSE Arca, any other Exchange or any Underlying Index Provider.

Entities that have entered into an agreement with the Distributor and the transfer agent (“Authorized Participant Agreement”) to become “Authorized Participants” may place orders with the Distributor to purchase or redeem Creation Units, as described in Part I.D. below. The Authorized Participants are not affiliated, within the meaning of Section 2(a)(3) of the 1940 Act, with the Adviser, NYSE Arca, any other Exchange nor any Underlying Index Provider.

### **3. Administrator; Custodian; Transfer Agent; Index Receipt Agent and Fund Accounting Agent**

The Bank of New York (“BNY”) will act as administrator, custodian, transfer agent, index receipt agent and fund accounting agent for the Trust, for which it will receive fees. BNY is not affiliated, within the meaning of Section 2(a)(3) of the 1940 Act, with NYSE Arca, any other Exchange or any Underlying Index Provider. The identity of the administrator, custodian, transfer agent, index receipt agent and fund accounting agent will be disclosed in the Funds’ Prospectus. If any such persons are “affiliated” within the meaning of Section 2(a)(3) of the 1940 Act with the Trust, the Adviser or the Distributor, such affiliation will also be disclosed and the performance of their duties and obligations will be conducted in accordance with the provisions of the 1940 Act and the rules thereunder.

James Brigagliano  
October 30, 2008  
Page 6

## C. SHARES

As described in subparts I.D. through I.H. below, each Fund will issue and redeem its Shares only in aggregations of 100,000 Shares ("Creation Units").<sup>5</sup> Shares will not be individually redeemable; only Shares aggregated into Creation Units will be redeemable. The Trust intends that the initial net asset value (sometimes referred to as "NAV") of Shares will be established at a level convenient for trading purposes.<sup>6</sup> Purchasers of Creation Units will be able to unbundle the Creation Units into the individual Shares comprising such Creation Unit.

It is not expected that the Funds' Distributor will maintain a secondary market in individual Shares. NYSE Arca will designate one or more member firms to act as a lead market maker to maintain a market for the Shares that trade on NYSE Arca. The Shares will trade on NYSE Arca in a manner similar to the units and shares of other ETFs that trade on the American Stock Exchange, such as SPDRs, MidCap SPDRs, DIAMONDS, iShares and VIPERs.<sup>7</sup>

Shares will be registered in book-entry form only. The Funds will not issue individual certificates for Shares. The Depository Trust Company ("DTC") will serve as the securities depository for Shares, and DTC or its nominee will be the record or registered owner of all outstanding Shares, and the Trust will recognize such record ownership for all purposes. Beneficial ownership of Shares will be shown on the records of DTC or a broker-dealer that is a participant in DTC (a "DTC Participant"). Beneficial owners of Shares ("Beneficial Owners") will receive, at the relevant Fund's expense, all of the statements, notices, and reports required under the 1940 Act and other applicable law ("Required Materials").

The Trust understands that, consistent with existing industry practice, in the event the Trust requests any action of Beneficial Owners, or a Beneficial Owner desires to take any action that DTC, as the record owner of all outstanding Shares, is entitled to take, DTC would authorize the DTC Participants to take such action and that the DTC Participants would authorize the indirect participants and Beneficial Owners acting through such DTC Participants to take such action and would otherwise act upon the instructions of Beneficial Owners owning Shares through them.

---

<sup>5</sup> For any particular Fund, the number of Shares in a Creation Unit will not change, except in the case of a share split, reverse split or similar revaluation.

<sup>6</sup> The Trust believes that a convenient trading range will be in the range of \$60 per Share, and the Trust reserves the right to declare a share split, or a reverse share split, if the trading price over time deviates significantly from such price range. Each shareholder will have one vote per Share.

<sup>7</sup> The Trust expects that the trading of Shares on any other Exchange would be conducted in a similar manner.

James Brigagliano

October 30, 2008

Page 7

Accordingly, to exercise any rights of a holder of Shares, each Beneficial Owner must rely upon the procedures of (1) DTC, (2) DTC Participants and (3) brokers, dealers, banks and trust companies that clear through, or maintain a custodial relationship with, a DTC Participant, either directly or indirectly, through which such Beneficial Owner holds its interest. Moreover, because the Trust's records will reflect ownership of Shares by DTC only, the Trust will furnish the Required Materials to the DTC Participants who, in turn, will be responsible for distributing the Required Materials to the Beneficial Owners. This arrangement is identical to that of prior ETFs.

## **D. PURCHASING SHARES**

The Trust will offer, issue and sell Shares of each Fund in Creation Units through the Distributor on a continuous basis at the net asset value per Share next determined after receipt of an order in proper form. The NAV of each Fund will be calculated as of the close of regular trading, usually as of 4:00 p.m. Eastern time, each day the New York Stock Exchange ("NYSE") is open for business (each such day a "Business Day"). The Trust will sell and redeem Creation Units of each Fund on every Business Day, and will not suspend the right of redemption or postpone the date of payment or satisfaction upon redemption unless (1) the NYSE is closed other than customary weekend and holiday closings, (2) trading on the NYSE is restricted, as determined by the Commission, (3) any emergency circumstances exist, as determined by the Commission, or (4) the Commission by order so permits for the protection of shareholders. Each Fund will always have a fixed number (100,000) of Shares in a Creation Unit as specified in the Prospectus for such Fund.<sup>8</sup>

As discussed above, individual Shares will be listed on NYSE Arca or another Exchange and traded in the secondary market in the same manner as other equity securities and the units or shares (as the case may be) of prior ETFs currently listed and trading. The price of Shares trading in the secondary market will be based on a current bid/offer market. No secondary sales will be made to brokers or dealers at a concession by the Distributor or by any Fund. Transactions involving the sale of Shares in the secondary market, which will be between purchasers and sellers and will not involve a Fund, will be subject to customary brokerage commissions and charges. This also is the method employed by SPDRs, MidCap SPDRs, DIAMONDS, streetTRACKS, iShares, VIPERs, Select Sector SPDRs and the individual securities of other prior ETFs. Like those products, the price at which Shares trade will be disciplined by arbitrage opportunities created by the ability to purchase or redeem Creation Units at NAV, which should ensure that Shares do not trade at a material premium or discount in relation to their NAV.

---

<sup>8</sup> The number of Shares of a Fund that constitute a Creation Unit for each Fund and the value of such Creation Unit as of each Fund's inception will be 100,000 and \$6,000,000, respectively.

James Brigagliano

October 30, 2008

Page 8

Sales of Shares of the Bull Funds generally will be purchased in Creation Units in exchange for the purchaser's deposit of an "In-Kind Deposit," largely comprised of equity securities ("Equity Securities") as described below under Part I.E. Likewise, redemptions of Shares of each Bull Fund in Creation Units generally will be made by the Trust either in cash or an "In-Kind Payment" as described below under Part I.G. The Bear Funds will generally be purchased and redeemed entirely for cash. Shares of each Fund may only be directly purchased, or redeemed, by or through an entity which is an "Authorized Participant" (*i.e.*, (i) a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the National Securities Clearing Corporation ("NSCC"), a clearing agency that is registered with the Commission, or a DTC Participant, and (ii) which has executed an agreement with the Distributor with respect to creations and redemptions of Creation Units). Authorized Participants may be, but are not required to be, members of the Primary Listing Market. Authorized Participants are generally broker-dealers and are not compensated by the Trust or any Fund in connection with the issuance or redemption of Shares.

## **E. PROCEDURES APPLICABLE TO PURCHASES OF BULL FUNDS**

*In-Kind Deposits.* To purchase Creation Units directly from a Bull Fund, an Authorized Participant must deposit with the Fund a basket of securities and/or cash. Each Business Day, prior to the opening of trading on an Exchange, an agent of the Fund ("Index Receipt Agent") will make available through the NSCC a list of the names and number of shares of each security, if any, to be included in that day's creation basket ("Deposit Securities").<sup>9</sup> The identity and number of shares of the Deposit Securities required for a Creation Unit will change from time to time. The Fund reserves the right to permit or require the substitution of an amount of cash – *i.e.*, a "cash in lieu" amount – to be added to the Balancing Amount (defined below) to replace any Deposit Security that may not be available in sufficient quantity for delivery, eligible for transfer through the Enhanced Clearing Process (discussed below) or eligible for trading by an Authorized Participant or the investor for which it is acting. For such custom orders, "cash in lieu" may be added to the Balancing Amount. The Balancing Amount and any "cash in lieu" must be paid to the Trust on or before the third Business Day following the Transmittal Date, as

---

<sup>9</sup> Deposit Securities will, on any given day, be comprised of a basket of some or all of the component securities of the relevant Underlying Index or the equivalent equity securities selected by the Adviser to correspond to the performance of such Index for each Bull Fund. The size of the basket will be determined by the Adviser to optimize a Fund's ability to track the Underlying Index. For Bull Funds that track the Russell 1000 Index and the Russell 2000 Index, the Adviser expects a basket of component securities to include 400 and 650 stocks, respectively. For Bull Funds that track the Russell 1000 Energy Index and the Russell 1000 Financial Services Index, the Adviser expects a basket of component securities to include each of the 85 and 215 stocks included in the Underlying Index, respectively. In each case, it is the Adviser's expectation that the basket will be weighted in favor of the stocks issued by the larger issuers included in the Underlying Index.

James Brigagliano

October 30, 2008

Page 9

defined below. An Authorized Participant must also pay a Transaction Fee, described below, in cash.

*Balancing Amount.* In addition to the “In-Kind Deposit” of securities, Authorized Participants will either pay to, or receive from, a Bull Fund an amount of cash referred to as the “Balancing Amount.” The Balancing Amount is the amount equal to the differential, if any, between the market value of the Deposit Securities and the NAV of a Creation Unit. The Fund will publish, on a daily basis, information about the previous day’s Balancing Amount. The Balancing Amount may, at times, represent a significant portion of the aggregate purchase price (or, in the case of redemptions, the redemption proceeds). This is because the mark-to-market value of the Financial Instruments held by the Funds will be included in the Balancing Amount (not in the deposit basket or redemption basket). The Balancing Amount may fluctuate significantly due to the leveraged nature of the Bull Funds. For custom orders, a “cash in lieu” amount may be added to the Balancing Amount to replace any Deposit Security that may not be available in sufficient quantity for delivery or that may not be eligible for transfer through the Enhanced Clearing Process (discussed below), or that may not be eligible for trading by an Authorized Participant or the investor for which it is acting. The Balancing Amount must be made on or available before the contractual settlement date.<sup>10</sup>

*Placement of Purchase Orders.* All purchase orders for Creation Units must be placed by or through an Authorized Participant. Purchase orders will be processed either through a manual clearing process using the facilities of DTC’s book-entry system<sup>11</sup> (“Manual Clearing Process”) or through an enhanced clearing process (“Enhanced Clearing Process”) that is available only to those DTC Participants that also are participants in the Continuous Net Settlement System of the NSCC. Authorized Participants that do not use the Enhanced Clearing Process will be charged a higher Transaction Fee (discussed below). A purchase order must be received in good order by the Distributor by 4:00 p.m. Eastern time, whether transmitted by mail,<sup>12</sup> through the transfer agent’s automated system, telephone, facsimile or other electronic means permitted under the Authorized Participant Agreement in order to receive that day’s NAV per Share. All other

---

<sup>10</sup> For an order to be accepted on a particular Business Day, the order must be received in good order by the Distributor by 4:00 p.m. Eastern time, whether transmitted by mail, through the transfer agent’s automated system, telephone, facsimile or other electronic means permitted under the Authorized Participant Agreement in order to receive that day’s NAV per Share. All other procedures set forth in the Authorized Participant Agreement must be followed in order for an Authorized Participant to receive the NAV determined on that day. The Business Day on which an order is received in accordance with the previous sentences is the “Transmittal Date.”

<sup>11</sup> It is our understanding that a purchase or redemption order may be entered at a PTS terminal whereby the purchaser or redeemer would initiate appropriate delivery order instructions.

<sup>12</sup> Mail is received periodically throughout the day. If an order to create a Creation Unit is received by U.S. mail at or before 4:00 p.m. Eastern time, it will be processed that day.

James Brigagliano  
October 30, 2008  
Page 10

procedures set forth in the Authorized Participant Agreement must be followed in order for an Authorized Participant to receive the NAV determined on that day.

Purchases of Creation Units of Shares of a Bull Fund by an Authorized Participant through either the Enhanced Clearing Process or the Manual Clearing Process will settle according to a "regular way" delivery and settlement process which is currently no later than the third (3<sup>rd</sup>) business day following the Transmittal Date (generally expressed as T + 3).<sup>13</sup>

Shares may be issued in advance of receipt of Deposit Securities subject to various conditions including a requirement to maintain on deposit with the Trust cash in an amount up to 115% of the market value of the missing Deposit Securities. Any such transaction effected with the Trust must be effected using the Manual Clearing Process consistent with the terms of the Authorized Participant Agreement.

*Transaction Fee on Purchases of Creation Units of Bull Funds.* Each Fund may impose Transaction Fees to offset transfer and other transaction costs associated with the issuance and redemption of Creation Units. There is a fixed and a variable component to the total Transaction Fee on transactions in Creation Units. A fixed Transaction Fee is applicable to each creation and redemption transaction, regardless of the number of Creation Units transacted. A variable Transaction Fee based upon the value of each Creation Unit also is applicable to each creation and redemption transaction. Purchasers and redeemers of Creation Units of the Funds effected through the Manual Clearing Process are required to pay an additional charge to compensate for brokerage and other expenses. In addition, purchasers of Creation Units are responsible for payment of the costs of transferring the Deposit Securities to the Trust. Redeemers of Creation Units are responsible for the costs of transferring securities from the Trust. Investors who use the services of a broker or other such intermediary may pay additional fees for such services.

The maximum Transaction Fee, and any variations or waivers thereof, will be fully disclosed in the Funds' current Prospectus. From time to time and for such periods as a Bull Fund in its sole discretion may determine, the Transaction Fees for purchase or redemption of Creation Units of the Fund may be increased, decreased or otherwise modified. Such changes and variations will be effected by an amendment or supplement to the then current Registration Statement for the Funds. Such Transaction Fees will be limited to amounts that will have been determined by the Adviser to be appropriate and will take into account transaction and operational processing costs associated with the recent purchases and sales of the Equity Securities, Financial Instruments and Money Market Instruments held by the Trust. In all cases, such Transaction Fees will be limited

---

<sup>13</sup> To the extent that the standard for the delivery and settlement of Equity Securities traded on an Exchange is shortened from T+3 to T+2, T+1 or even T, the time for the delivery and settlement of purchases or redemptions of Creation Units of Shares of a Bull Fund by an Authorized Participant through either the Enhanced Clearing Process or the Manual Clearing Process will be similarly shortened.

James Brigagliano  
October 30, 2008  
Page 11

in accordance with requirements of the Commission applicable to management investment companies offering redeemable securities. Investors that elect to substitute cash in lieu of one or more Deposit Securities are subject to an additional charge determined at the discretion of the Bull Fund.

## **F. PROCEDURES APPLICABLE TO PURCHASE OF BEAR FUNDS**

Although the organizational documents of the Trust permit the Funds to accept In-Kind Deposits, the Bear Funds intend only to accept cash to purchase Creation Units. The purchaser must transfer cash in an amount equal to the value of the Creation Unit(s) purchased and the applicable Transaction Fee. All purchase orders will be processed through the Manual Clearing Process. The Trust will deliver Shares of the Bear Funds upon payment of cash to the Trust on or before the third (3<sup>rd</sup>) Business Day following the Transmittal Date consistent with the terms of the Authorized Participant Agreement. A purchase order must be received in good order by the Distributor by 4:00 p.m. Eastern time, whether transmitted by mail, through the transfer agent's automated system, telephone, facsimile or other electronic means permitted under the Authorized Participant Agreement in order to receive that day's NAV per Share. The final purchase price of the Creation Unit will be determined when the NAV for the Bear Fund is calculated at the end of such day.

Purchases of Creation Units of Shares of any Bear Fund by an Authorized Participant through the Manual Clearing Process will settle according to a "regular way" settlement process which is currently no later than T+3.<sup>14</sup>

## **G. REDEMPTION PROCEDURES APPLICABLE TO BULL FUNDS**

*Redemption Proceeds.* Redemption proceeds will be paid either in cash or in-kind with a basket of securities ("Redemption Securities"). In most cases, Redemption Securities will be the same as Deposit Securities on a given day. There will be times, however, when the Deposit and Redemption Securities differ. The composition of the Redemption Securities will be available through the NSCC. Each Fund reserves the right to honor a redemption request with a non-conforming redemption basket.

*Balancing Amount.* If the value of a Creation Unit is higher than the value of the Redemption Securities, the Authorized Participant will receive from the Fund a Balancing Amount in cash less an amount reduced by a Transaction Fee. If the value of a Creation Unit is lower than the

---

<sup>14</sup> To the extent that the standard for the delivery and settlement of Equity Securities traded on an Exchange is shortened from T+3 to T+2, T+1 or even T, the time for the delivery and settlement of purchases or redemptions of Creation Units of Shares of a Bear Fund by an Authorized Participant through either the Enhanced Clearing Process or the Manual Clearing Process will be similarly shortened.

James Brigagliano  
October 30, 2008  
Page 12

value of the Redemption Securities, the Authorized Participant will be required to pay to the Fund a Balancing Amount in cash.

*Placement of Redemption Orders.* As with purchases, redemptions may be processed either through the Manual Clearing Process or the Enhanced Clearing Process. A redemption order must be received in good order by the Distributor by 4:00 p.m. Eastern time, whether transmitted by mail, through the transfer agent's automated system, telephone, facsimile or other electronic means permitted under the Authorized Participant Agreement in order to receive that day's authorized NAV per Share. All other procedures set forth in the Authorized Participant Agreement must be followed in order for an Authorized Participant to receive the NAV determined on that day.

*Transaction Fee on Redemption of Creation Units.* The Trust may impose Transaction Fees in connection with the redemption of Creation Units. The exact amount of any Transaction Fee will be determined by the Bull Fund. The purpose of this fee is to protect the continuing shareholders of the Trust against the possible dilutive transactional expenses including operational processing and brokerage costs associated with establishing and liquidating portfolio positions in connection with the redemption of Creation Units. An investor may request a redemption in cash, which a Bull Fund may, in its sole discretion, permit. Investors that elect to receive cash in lieu of one or more of the Redemption Securities are subject to an additional charge. Redemptions of Creation Units for cash (when available) and/or outside of the Enhanced Clearing Process also require the payment of an additional charge.

## **H. REDEMPTION PROCEDURES APPLICABLE TO BEAR FUNDS**

*Redemption Proceeds.* Redemption proceeds of each Bear Fund will be paid in cash only. The redemption proceeds will be reduced by the amount of the applicable Transaction Fee.

*Placement of Redemption Orders.* As with purchases, redemption orders of each Bear Fund may be processed either through the Manual Clearing Process or the Enhanced Clearing Process. A redemption order must be received in good order by the Distributor by 4:00 p.m. Eastern time, whether transmitted by mail, through the transfer agent's automated system, telephone, facsimile or other electronic means permitted under the Authorized Participant Agreement in order to receive that day's authorized NAV per Share. All other procedures set forth in the Authorized Participant Agreement must be followed in order for the Authorized Participant to receive the NAV determined on that day.

## **I. DIVIDEND REINVESTMENT SERVICE**

The Trust will not make the DTC book-entry Dividend Reinvestment Service available for use by Beneficial Owners for reinvestment of their cash proceeds. Broker-dealers may make a dividend reinvestment service available to a Beneficial Owner as a client service, but the Trust is

James Brigagliano  
October 30, 2008  
Page 13

not responsible for implementing or operating a dividend reinvestment service. The Prospectus will inform investors of this fact and direct interested investors to contact such investor's broker-dealer to ascertain the availability and a description of such a service separately through a broker-dealer. The Prospectus will also caution interested Beneficial Owners that they should note that each broker-dealer 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-dealer necessary details. Shares acquired pursuant to such service will be held by the Beneficial Owners in the same manner, and subject to the same terms and conditions, as the original Shares owned by the Beneficial Owners. Brokerage commission charges and other costs, if any, incurred in purchasing Shares in the secondary market with the cash from the distributions generally will be an expense borne by the individual Beneficial Owners participating in reinvestment through such service.

## **J. POTENTIAL INVESTORS AND USERS OF SHARES**

Shares will offer investors and financial professionals the opportunity to experience "leveraged" investment results, as well as the ability to manage their exposure to market risk on a low-cost basis and with risk of loss limited to the amount of the initial investment. For example, investors may seek to triple the daily performance of one or more Underlying Indices through investment in Shares of certain Bull Funds. Other investors interested in obtaining gains or hedging a portfolio in anticipation of a declining market may do so by investing in Shares of one or more Bear Funds which seek to increase in value when the market measured by their relevant Underlying Indices declines. Still other investors may be interested in managing their market risk by developing a strategy of targeting their exposure to a specified Underlying Index somewhere along the spectrum between 300% of the inverse of its daily performance and 300% of its daily performance, by investing in Shares of a combination of Funds.

## **PART II.**

### **A. DISCLOSURE DOCUMENTS**

The primary disclosure documents with respect to the Shares will be the Prospectus and the Product Description described below.

As with all investment company securities, the purchase of Shares in Creation Units from any Fund will be accompanied or preceded by a Prospectus. A statutory prospectus may not accompany secondary market trades of Shares, however, because the Commission has granted the Trust an exemption from Section 24(d) of the 1940 Act. This exemption is conditioned on an undertaking that investors purchasing from or through dealers in the secondary market will receive a short "Product Description." The Product Description, if employed by the Trust, will provide a plain-English description of the relevant Fund and the Shares it issues.

James Brigagliano

October 30, 2008

Page 14

Because the Prospectus will be delivered to investors dealing directly with the Trust, while the Product Description may be delivered to investors purchasing on the secondary market, the two documents will be tailored to meet the information needs of their particular audiences.

With respect to disclosure in the Prospectus concerning the non-redeemability of Shares, the Trust and the Funds will observe the following policies: (1) the term “mutual fund” will not be used except to compare and contrast the Trust or a Fund with conventional mutual funds; (2) the term “open-end management investment company” will be used in the Prospectus only to the extent required by Form N-1A or other securities law requirements, and this phrase will not be included on the Prospectus cover page or summary; (3) the Prospectus summary will include a distinct paragraph or paragraphs setting forth the fact that Shares will be listed on an Exchange (which will be identified) and will be individually non-redeemable; (4) the Prospectus will disclose that the owners of Shares may acquire those Shares from a Fund, and tender those Shares for redemption to the Fund, only in Creation Units; and (5) the Prospectus will clearly disclose that individual Share prices may be different from the most recently calculated NAV.

The Prospectus will also indicate that the proposed method by which Shares will be purchased and traded may raise certain issues under applicable securities laws. Similar disclosure is made in the prospectuses for other ETFs currently trading on an Exchange. As described above, Shares in Creation Units will be offered continuously to the public. Because new Shares may be created and issued on an ongoing basis, at any point during the life of the relevant Fund, a “distribution,” as such term is used in the 1933 Act, may be occurring. Broker-dealers and other persons will be cautioned in the Prospectus that some activities on their part may, depending on the circumstances, result in their being deemed participants in a distribution in a manner that could render them statutory underwriters and subject them to the prospectus delivery and liability provisions of the 1933 Act. The Prospectus will also state that a determination of whether one is an underwriter must take into account all the facts and circumstances pertaining to the activities of the broker-dealer or its client in the particular cases, and may provide examples of activities that could lead to categorization as an underwriter. The Prospectus will also state that dealers who are not “underwriters,” but are participating in a distribution (as contrasted to ordinary secondary trading transactions), and thus dealing with Shares that are part of an “unsold allotment” within the meaning of Section 4(3)(C) of the 1933 Act, would be unable to take advantage of the prospectus delivery exemption provided by Section 4(3) of the 1933 Act.<sup>15</sup>

---

<sup>15</sup> The Trust notes that prospectus delivery is not required in certain instances, including when an investor who has previously been delivered a prospectus purchases Shares or unsolicited brokers’ transactions in Shares (pursuant to Section 4(4) of the 1933 Act). Also, firms that do incur a prospectus-delivery obligation with respect to Shares will be reminded that, under Rule 153 under the 1933 Act, the prospectus-delivery obligation pursuant to Section 5(b)(2) of the 1933 Act owed to a member of an Exchange in connection with a sale on such Exchange is satisfied by the fact that the Prospectus is available at such Exchange upon request. The Prospectus also will note that the prospectus-delivery mechanism provided in Rule 153 is only available with respect to transactions on the

James Brigagliano  
October 30, 2008  
Page 15

In contrast, the Product Description will not mention such legal risks, insofar as these are not issues relevant to investors purchasing Shares on the secondary market. The Product Description will provide a plain-English overview of the Trust and the Fund including its investment objectives and investment strategies and the material risks and potential rewards of owning Shares. It also will provide a brief, plain-English description of the salient aspects of Shares, including: (i) the manner in which the Fund's Underlying Index value is reported; (ii) the manner in which Creation Units are purchased and redeemed; (iii) the manner in which Shares will be traded on an Exchange, including application of trading halt procedures; (iv) the identity of the Adviser; (v) the composition and frequency of dividend and capital gains distributions; and (vi) the actions, if any, that would be taken by the Fund if its Shares are delisted or if its license with the compiler or sponsor of the Underlying Index is terminated. The Product Description also will clearly disclose, among other things, that Shares are not redeemable individually and that an investor selling Shares on the secondary market may incur brokerage commissions when selling such shares and may receive less than the NAV of such Shares. Finally, the Product Description will provide a website address (in most cases the address of the Underlying Index Providers or such other Index compiler or sponsor, as relevant) where investors can obtain information about the composition and compilation methodology of a Fund's Underlying Index (*see* Part II.B. below).

The Product Description is not intended to substitute for a statutory prospectus, and other than as described above, will not contain information that is not also contained in the Prospectus. The Product Description will indicate that a Prospectus about the Trust may be obtained, without charge, from the investor's broker-dealer or from the Distributor.

The Distributor will coordinate the production and distribution of Prospectuses or Product Descriptions to broker-dealers. It will be the responsibility of the broker-dealers to ensure that a Prospectus or Product Description is provided to each secondary market purchaser of Shares. NYSE Arca will circulate an Information Circular to NYSE Arca members and member organizations prior to the commencement of trading that will inform them of the Prospectus and/or Product Description delivery requirements that apply to the Funds.

## **B. PUBLIC WEBSITE**

As discussed more fully in Part IV below, the portfolio holdings of each Fund will be disclosed on the public website of the Primary Listing Market and/or the Trust ("Website").<sup>16</sup> The Primary

---

Exchange.

<sup>16</sup> The Trust will comply with its obligations to disclose in its SAI its policies and procedures with respect to the disclosure of its portfolio securities and to state in its Prospectus that a description of each Fund's policies and procedures is available in the SAI. *See* Release No. IC-26418 (April 16, 2004).

James Brigagliano  
October 30, 2008  
Page 16

Listing Market will also calculate and publish the “Indicative Optimized Portfolio Value” or “IOPV” (discussed in Part IV below) for each Fund, as well as the current updated value of the relevant Underlying Index every 15 seconds throughout the trading day, if such information about the Underlying Index is not already available from another organization authorized by the relevant Underlying Index Provider.

### **PART III. COMPARISON OF THE FUNDS TO THE PRIOR ETFS THAT HAVE SOUGHT SIMILAR COMMISSION ACTION AND RECEIVED SIMILAR RELIEF**

The relief requested in this Letter is substantially similar to the relief granted by the Commission to ProShares Trust and Rydex ETF Trust cited in footnote 2 above.

### **PART IV. AVAILABILITY OF INFORMATION REGARDING FUNDS, UNDERLYING INDEXES AND SHARES**

#### **A. GENERAL**

##### **1. Information Provided to Authorized Participants**

All Authorized Participants, regardless of whether they transact outside the Shares’ clearing process, may access the information described below. Applicants note that Authorized Participants that are not also NSCC members may have to either join NSCC or obtain the portfolio composition file (“PCF”) from a third-party data vendor.

At the end of each Business Day, the Trust will prepare the next day’s Deposit List and Redemption List (if different from the Deposit List) for the Bull Funds and send this information to the Index Receipt Agent. The same evening, the Index Receipt Agent will add to this information the cash information effective as of the close of business on that Business Day and create a PCF for each Fund, which it will transmit to NSCC before the opening of business the next Business Day. The information in the PCF will be available to all NSCC members and sufficient for them to calculate the IOPV during such next Business Day. For the Bull Funds, the PCF is also used to determine the composition of the Deposit List and the Redemption List.<sup>17</sup> This process does not apply to the Bear Funds because all purchases and redemptions are expected to be in cash rather than for in-kind securities.

---

<sup>17</sup> Bull Funds may invest their assets in Financial Instruments. See Section I.A., *supra*. To the extent that a Bull Fund does hold Financial Instruments, information regarding these instruments will be disclosed in a Holdings File (described below), if necessary, for such Fund.

James Brigagliano  
October 30, 2008  
Page 17

The NSCC's system for the receipt and dissemination to its participants of the PCF was designed for portfolios consisting entirely of Equity Securities (or debt securities) and cash and money market instruments. As a result, it is not currently capable of processing information with respect to Financial Instruments, although Applicants expect that it may become so in the future. Therefore, the Adviser has developed what it calls a "Holdings File," which it will use to disclose Funds' holdings of Financial Instruments until such time (or perhaps longer, if the Trust deems it advisable) as the NSCC's PCF system can process such information regarding such instruments. The Trust, or the Adviser or Index Receipt Agent on the Trust's behalf, will post the Holdings File to a password-protected Website before the opening of business on each Business Day, and all Authorized Participants will have access to the password and the Website containing the Holdings File.<sup>18</sup> The Holdings File will contain, for each Fund, to the extent that it holds Financial Instruments, information sufficient by itself or in connection with the PCF for market participants to calculate a Fund's IOPV and effectively arbitrage the Fund. For example, the following information would be provided in the Holdings File for a Bull Fund holding swaps, futures contracts and Equity Securities: (i) the total value of the Equity Securities held by such Fund; (ii) the notional value of the swaps held by such Fund together with an indication of the index on which such swap is based and whether the Fund's position is long or short; (iii) the most recent valuation of the swaps held by the Fund; (iv) the notional value of any futures contracts together with an indication of the index on which such contract is based, whether the Fund's position is long or short and the contract's expiration date; (v) the number of futures contracts held by the Fund together with an indication of the index on which such contract is based, whether the Fund's position is long or short and the contract's expiration date; (vi) the most recent valuation of the futures contracts held by the Fund; (vii) the Fund's total assets and total shares outstanding; and (viii) a "net other assets" figure reflecting expenses and income of the Fund to be accrued during and through the following Business Day and accumulated gains or losses on the Fund's Financial Instruments through the end of the Business Day immediately preceding the publication of the Holdings File. The Holdings File for a Fund holding other Financial Instruments would contain analogous information for such instruments. To the extent that any Fund holds cash or Money Market Instruments about which information is not available in a PCF, information regarding such Fund's cash and Money Market Instrument positions will be disclosed in the Holdings File for such Fund.

The information in the Holdings File will be sufficient for participants in the NSCC system to calculate the IOPV for Bull and Bear Funds (and, together with the information on Equity Securities contained in the PCF, will be sufficient for calculation of IOPV for Bull Funds) during

---

<sup>18</sup> As noted above, Authorized Participants that are not also NSCC members may have to either join NSCC or pay a third-party data vendor to obtain PCF information made available through the facilities of NSCC. Applicants understand that NYSE Arca receives PCF files from NSCC and expect other Primary Listing Markets would as well.

James Brigagliano  
October 30, 2008  
Page 18

such next Business Day. The Holdings File, together with the applicable information in the PCF in the case of Bull Funds, will also be the basis for the next Business Day's NAV calculation.

Under normal circumstances, there will be no Deposit List or Redemption List for Bear Funds, which will ordinarily be created and redeemed entirely for cash. The Holdings File published before the open of business on a Business Day will, however, permit NSCC participants to calculate (by means of calculating the IOPV) the amount of cash required to create a Creation Unit, and the amount of cash that will be paid upon redemption of a Creation Unit, for each Bull Fund and Bear Fund for that Business Day.

## **2. Information Provided to General Public**

The daily NAV for each Fund will be calculated and disseminated each Business Day. In addition, BNY will make publicly available the portfolio holdings of each Fund.<sup>19</sup> The portfolio holdings of each Fund will be disclosed on the Website. The Website disclosure of portfolio holdings will be made and updated daily and will include, as applicable, the names and number of shares held of each specific Equity Security, the specific types of Financial Instruments and characteristics of such instruments, Money Market Instruments, and amount of cash held in the portfolio of each Fund.<sup>20</sup> The portfolio holdings information made available on the Website on any Business Day will form the basis for a Fund's NAV calculation as of 4:00 p.m. Eastern Time on that Business Day and will reflect portfolio trades made on the immediately preceding Business Day. The Primary Listing Market will also calculate and publish the IOPV and the current updated value of the relevant Underlying Index every 15 seconds throughout the trading day, if such information about the Underlying Index is not already available from another organization authorized by the relevant Underlying Index Provider.

Applicants expect the following to be disclosed on the Website of the Trust and/or the Primary Listing Market with respect to each type of Financial Instrument held by a Fund: (i) a description

---

<sup>19</sup> The Trust has complied with its obligations to disclose in its Prospectus its policies and procedures with respect to the disclosure of its portfolio securities and to state in its Prospectus that a description of each Fund's policies and procedures is available in the SAI. *See* Release No. IC-26418 (April 16, 2004).

<sup>20</sup> This information will be the same as that disclosed to Authorized Participants in the PCF and Holdings File, except that (i) the information provided on the public Website will be formatted to be reader-friendly and (ii) the PCF and Holdings File data are different from the portfolio holdings data available on the Website in that the former will be calculated and displayed on a per Creation Unit basis while the latter will be on a per Fund basis. The Website disclosure and the PCF and Holdings File information also will be made available at the same time. The PCF, Holdings File and the Website will reflect dividends paid to date and accruals for expenses incurred to date as well as the next Business Day's estimated dividend and expense accrual information. While Applicants intend to make the Website disclosure reader-friendly, the PCF and Holdings File will be formatted so that it is compatible with the systems that the Primary Listing Market and Authorized Participants use to retrieve and process such data. For this reason, the PCF and Holdings File will be posted on a separate, password protected site.

James Brigagliano  
October 30, 2008  
Page 19

of the Financial Instrument; (ii) a statement as to whether the Fund's position in the Financial Instrument is long or short; (iii) the most recent closing or other value of the Financial Instrument; (iv) the number of such Financial Instruments held; and (v) the aggregate notional value of such Financial Instrument.

## **B. IOPV**

The Trust has been advised that NYSE Arca intends to disseminate, every 15 seconds, during regular trading hours, through the facilities of the Consolidated Tape Association, the IOPV for each Fund, on a per Shares basis.<sup>21</sup> NYSE Arca will calculate an IOPV for each Fund, including those Bear Funds that do not hold Equity Securities, in the manner discussed below. The IOPV is designed to provide investors with a reference value which can be used in connection with other related market information. NYSE Arca will not guarantee the accuracy or completeness of the IOPV.

The Trust, the Trustees and the Adviser are not responsible for the calculation or dissemination of the IOPV and make no warranty as to its accuracy, or its usefulness to traders of Shares. It is expected that the Primary Listing Market for the Shares of each Fund will calculate and disseminate the same data in a similar manner as discussed below.

### **1. IOPV Calculation for Bull Funds**

The NYSE Arca will calculate the IOPV throughout the trading day for each Bull Fund by: (i) calculating the current value of all Equity Securities held by a Fund; (ii) calculating the estimated cash; (iii) calculating the marked-to-market gains or losses from the Fund's total return equity swap exposure based on the Underlying Index percentage change, the swap costs determined by the daily imbedded weighted interest rate and the notional value of the swap contracts, if any; (iv) calculating the marked-to-market gains or losses of the futures contracts and other Financial Instruments held by the Fund, if any; (v) adding the current value of Equity Securities, the estimated cash, the marked-to-market gains or losses from swaps and the futures contracts and other Financial Instruments, to arrive at a value; and (vi) dividing that value by the total Shares outstanding to obtain current IOPV.

### **2. IOPV Calculation for Inverse and Bear Funds**

The NYSE Arca will calculate the IOPV throughout the trading day for each Inverse and Bear Fund by: (i) calculating the estimated cash; (ii) calculating the marked-to-market gains/losses of

---

<sup>21</sup> This value is variously referred to as IOPV, "Underlying Trading Value," "Indicative Intraday Value" and "Intraday Value" in the prospectuses, marketing materials and other written materials disseminated in connection with prior ETFs.

James Brigagliano  
October 30, 2008  
Page 20

swaps, futures and other Financial Instruments held by such Fund in the manner described above; (iii) adding the estimated cash and the marked-to-market gains or losses of the Financial Instruments to arrive at a value; and (iv) dividing that value by the total Shares outstanding to obtain current IOPV.

## **C. UNDERLYING INDEX VALUE**

Applicants understand that the value of each Underlying Index will be updated intra-day on a real-time basis as its individual component securities change in price. These intra-day values of each Underlying Index will be disseminated every 15 seconds throughout the trading day by the Primary Listing Market or another organization authorized by the relevant Underlying Index Provider.

## **D. ADDITIONAL INFORMATION AND DATA**

In addition, for all Funds, the Trust expects to maintain the Website, which will display the Prospectus and additional quantitative information that is updated on a daily basis, including daily trading volume, closing price, and closing NAV. Also, NYSE Arca intends to disseminate a variety of data with respect to Shares on a daily basis by means of CTA and CQ High Speed Lines including: information as of the previous day's close with respect to NAV and the number of Shares outstanding. The Trust has been advised that similar information will be provided in connection with Shares of each Fund primarily listed on an Exchange other than NYSE Arca.

The closing prices of the Equity Securities of each deposit basket will be readily available from, as applicable, the relevant Exchange, automated quotation systems, published or other public sources or on-line information services such as Quotron, Bloomberg or Reuters. Similarly, information regarding market prices and volume of Shares will be broadly available on a real-time basis throughout the trading day. Applicants expect that the previous day's closing price and volume information will be published daily in the financial sections of many newspapers. In addition, Applicants expect, given the past history of SPDRs and shares of other prior ETFs, that Shares will be followed by stock market and mutual fund professionals, as well as investment advisers who will offer their analysis of why investors should purchase, hold, sell or avoid Shares. Exchange listing of Shares should help ensure that there is a substantial amount of raw data available, and that such data is packaged, analyzed and widely disseminated to the investing public.

## **PART V. REQUESTS FOR RELIEF - INTRODUCTION**

The Trust, on behalf of itself, the NYSE Arca, other Exchanges, the Distributor, Authorized Participants and persons or entities engaging in transactions in the Shares, requests that the Commission grant exemptive, interpretive or no-action relief from Rules 10b-17 and 14e-5 under the Exchange Act, and Rules 101 and 102 of Regulation M under the Exchange Act, in

James Brigagliano  
October 30, 2008  
Page 21

connection with secondary market transactions in Shares and the creation or redemption of Shares, as discussed below. As noted above, this requested relief is substantially similar to relief granted to prior ETFs currently trading on an Exchange.<sup>22</sup>

## A. 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). The Trust respectfully requests the Commission, pursuant to paragraph (b)(2), to unconditionally exempt the Trust and the Funds from the application of Rule 10b-17.

In light of the nature of the Trust, compliance with Rule 10b-17 would be impractical. As an open-end management investment company, the Trust is required by the Internal Revenue Code to distribute at least 98% of its ordinary income and capital gains during the calendar year. If the Trust declares too small a dividend, it will be charged an excise tax. If it declares too large a dividend, the excess could be considered a return of capital to investors.

To avoid an over-distribution or under-distribution of ordinary income, open-end investment companies, including the Trust, must estimate: (i) the amount of ordinary income to be earned during the period from the date the dividend is declared to December 31; and (ii) the number of shares that will be outstanding as of the record date. Requiring the Trust to declare its dividend ten days in advance of the record date would increase the period for estimating ordinary income and the number of outstanding shares, and thus increase the risk of an over-distribution or under-distribution.

Requiring the Trust to declare its dividend ten days in advance of the record date also would increase the chance that the Trust would over-distribute or under-distribute capital gains. Unlike ordinary income, the Trust does not have the problem of estimating the aggregate amount of capital gains it will earn between declaration date and year-end because it is required to distribute only such capital gains as have been realized through October 31 of the year. However, as noted above, requiring the Trust to declare its dividend ten days in advance of the record date would increase the chance that the Trust would incorrectly estimate the number of outstanding shares. This, in turn, would increase the chance that the Trust would incorrectly estimate the per share amount of capital gains it must distribute. In view of the foregoing, the

---

<sup>22</sup> The Trust *et al.* is not requesting relief with respect to Section 11(d)(1) of the Exchange Act, and Rules 10b-10, 11d1-2, 15c1-5 and 15c1-6 under the Exchange Act in reliance on the relief granted in the Rydex Letters, the ProShares Letters and the 2005 Class Relief Letter (*see* note 3 and note 4, *supra*), which granted relief to certain broker-dealers from Section 11(d)(1) and Rules 10b-10, 11d1-2, 15c1-5 and 15c1-6 in connection with the issuance, redemption and trading of shares in qualifying ETFs.

James Brigagliano  
October 30, 2008  
Page 22

Trust requests that the Commission, pursuant to paragraph (b)(2), exempt the Trust, the Funds and the Shares from the application of Rule 10b-17.

In the alternative, the Trust seeks clarification that the exemption contained in paragraph (c) of Rule 10b-17 is applicable to the Shares of each Fund of the Trust. Paragraph (c) of Rule 10b-17 states that the Rule shall not apply to "redeemable securities" issued by open-end investment companies and unit investment trusts registered pursuant to the 1940 Act. Except for the fact that Shares must be redeemed in Creation Units, Shares are redeemable securities issued by the Trust, consistent with the Trust's status as an open-end investment company. It is in recognition of the foregoing that the Commission has issued orders to those prior ETFs resembling conventional index funds permitting them to issue shares with limited redeemability while still treating them like any other open-end investment company or unit investment trust. Therefore, the exemption under paragraph (c) of Rule 10b-17, which covers open-end investment companies with fully redeemable shares, should be applicable to the Shares of each of the Funds.

## **B. RULE 14e-5**

Rule 14e-5 prohibits a "covered person" from directly or indirectly purchasing or arranging to purchase any securities that are the subject of a tender offer (or related security) except as part of such tender offer. The dealer-manager of a tender offer is a "covered person" subject to the Rule.

The Trust respectfully requests that the Commission grant an exemption from Rule 14e-5 to permit any person (including a member or member organization of the NYSE Arca or another Exchange) acting as a dealer-manager of a tender offer for a security contained in a deposit basket or redemption basket, during the existence of such offer, to: (1) redeem Shares of a Bull Fund in Creation Units to the Trust for a redemption basket that may include a security subject to the tender offer; and (2) engage in secondary market transactions in Shares of a Bull Fund during such tender offer, if such bids or purchases are not effected for the purposes of facilitating a tender offer. Applicants believe that redemptions of Shares would not result in the abuses that Rule 14e-5 was designed to prevent, which include fraudulent, deceptive or manipulative acts or practices in connection with a tender offer for Equity Securities. The acquisition of individual Equity Securities held by a Bull Fund by means of redemptions of Shares of such Bull Fund would be impractical and extremely inefficient in view of the relatively small number of shares of any one security included in a redemption basket and the requirement that a minimum of 100,000 Shares of a Fund (*i.e.*, a Creation Unit), or multiples thereof, be redeemed. In addition, as discussed below in the request for relief 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 the Shares' pricing efficiency.

The Trust similarly believes that it would be equally inefficient to facilitate a tender offer in a particular security included in a deposit basket by means of purchasing all of the specific Equity

James Brigagliano  
October 30, 2008  
Page 23

Securities comprising such deposit basket. Therefore, the Trust also respectfully requests that the Commission take a no-action position under Rule 14e-5 if a broker-dealer, including a member or member organization of the NYSE Arca or another Exchange, acting as a dealer-manager of a tender offer for an Equity Security held by a Bull Fund, purchases or arranges to purchase shares of such Equity Security in the secondary market for the purpose of tendering them to purchase one or more Creation Units of Shares of a Bull Fund, if such transactions are not effected for the purposes of facilitating a tender offer. An example of such a transaction includes making an adjustment to a Fund's deposit basket in the ordinary course of business as a result of a change in the composition of its Underlying Index. Applicants also believe that the purchase of a portfolio security during the existence of a tender offer would not result in the abuses that Rule 14e-5 was designed to prevent. This requested relief is substantially similar to that afforded to Rydex, ProShares and the VIPERs, in their respective letters.<sup>23</sup>

The Trust is not requesting relief from the provisions of Rule 14e-5 with respect to the Bear Funds.

## **C. RULE 101 OF REGULATION M**

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

Generally, Rule 101 of Regulation M is an anti-manipulation rule that, subject to certain exemptions, prohibits any "distribution participant" and "its affiliated purchasers" from bidding for, purchasing from, 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 otherwise specifically permitted in Regulation M. The provisions of Rule 101 apply to underwriters and prospective underwriters, brokers, dealers, and other persons who have agreed to participate or are participating in a distribution.

The Trust understands that, although broker-dealers that: (i) tender Deposit Securities to the Trust through the Distributor in return for Shares of a Bull Fund in Creation Units; or (ii) redeem Shares of a Bull Fund in Creation Units for receipt of Redemption Securities held by a Bull Fund, generally will not be part of a syndicate or selling group, and although no broker-dealer will receive fees, commissions or other remuneration from the Trust or the Distributor for the sale of Shares of a Bull Fund in Creation Units, under certain circumstances such broker-dealers could be deemed to be "underwriters" or "distribution participants" as such terms are defined in Rule 100(b) of Regulation M.

---

<sup>23</sup> See footnote 2, *supra*.

James Brigagliano  
October 30, 2008  
Page 24

Paragraph (c)(4) of Rule 101 exempts from its application, *inter alia*, redeemable securities issued by an open-end management investment company (as such terms are used in the 1940 Act). The Trust is registered as an open-end management investment company under the 1940 Act. However, as discussed above, individual Shares of the Funds are not redeemable except in Creation Units. Due to the redeemability of the Shares in Creation Units, there should be little disparity between the Shares' market price and their net asset value per Share. Accordingly, the rationale for exempting redeemable securities of open-end management investment companies from the application of Rule 101 is equally applicable to the Shares. Although redemption is subject to the condition of tendering the appropriate number of Shares of Creation Units, the Trust otherwise will continue to 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 Trust requests that the Commission confirm that as a result of registration of the Trust as an open-end management investment company and the redeemable nature of the Shares in Creation Units, transactions in the Shares would be exempted from Rule 101 on the basis of the exception contained in sub-paragraph (c)(4).

The purpose of Rule 101 is to prevent persons from conditioning the market to facilitate a distribution. Creation Units of Shares may be created and redeemed, in-kind or in cash at NAV, on any Business Day. Holders of Shares also have the benefit of intra-day secondary market liquidity by virtue of their Exchange listing. Thus, the secondary market price of Shares should not vary substantially from their NAV. Because of the redeemability of Shares in Creation Units, coupled with the open-end nature of the Trust, any significant disparity between the market price of the Shares and their NAV should be eliminated by arbitrage activity. Because the NAV of a Share is largely based on the market value of the relevant Fund's portfolio securities or other holdings, transactions involving Shares (creations from and redemptions with the Trust, as well as purchases and sales in the secondary market) will not affect NAV. Similarly, such transactions should not have a significant effect on the market price of Shares.

The Trust respectfully requests relief from the provisions of Rule 101 to the extent necessary to permit persons or entities that may be deemed to be "distribution participants" of Shares or shares of any Equity Securities included as Deposit Securities (i) to purchase Deposit Securities for the purpose of tendering them to a Bull Fund as part of a Creation Deposit, for the purchase of Creation Units of Shares and (ii) to tender Shares for redemption in Creation Units and to receive Redemption Securities as part of redemption proceeds.

The Trust also respectfully requests that the Commission clarify that the tender of the Shares to a Bull Fund for redemption and the receipt of Redemption 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 Redemption Securities. As

James Brigagliano  
October 30, 2008  
Page 25

described above, following notice of redemption, a Bull Fund will deliver the specified Redemption Securities after the redemption request is received in proper form, except in those cases where redemption proceeds are paid in cash. Absent unusual circumstances, the Trust will not purchase Redemption Securities in the secondary market to fulfill a redemption request. Therefore, redemptions of Shares cannot be expected to affect the market price of the Redemption Securities. As indicated above, the Distributor will not engage in any secondary market transactions in Shares, either for its own account or for investors.

In addition, the Trust believes that the purchase of Deposit Securities, during a distribution with respect to such stock should be exempted from Rule 101 as it relates to the acquisition of a Creation Unit of Shares. The purpose of Rule 101 is to prevent persons from conditioning the market to facilitate a distribution. The Trust believes there would be little financial incentive to engage in transactions in stock baskets valued at approximately \$6,000,000 in order to manipulate the price of a single stock in the applicable Underlying Index. Furthermore, as discussed above, aberrations in price should be readily detected by the marketplace and corrected by arbitrage activity when detected, thus eliminating the need for the limitations contained in Rule 101. 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 Units of Shares, combined with a predictable lack of any meaningful potential for the issuance and the secondary market trading of Shares to affect significantly Share pricing, application of Rule 101 to a broker-dealer or other person who may be participating in a distribution of Shares or Equity Securities held by a Bull Fund 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 Shares and thus undermine the potential beneficial market effects of trading Shares.

The Trust is not requesting relief from the provisions of Rule 101 of Regulation M with respect to the Bear Funds.

#### **D. RULE 102 OF REGULATION M**

The Trust also respectfully requests that, as a result of registration of the Trust as an open-end management investment company and the redeemable nature of the Shares in Creation Units, the Commission grant exemption from Rule 102 of Regulation M with respect to transactions in Shares of the Bull Funds for the reasons previously stated under the request for relief under Rule 101(c)(4) on the basis of the exception contained in sub-paragraph (c)(4). Application of Rule 102 in this context would not further the anti-manipulative purposes underlying the Rule.

Rule 102 regulates activities by issuers and selling security holders during a distribution. The purpose of Rule 102 is to prevent persons from manipulating the price of a security during a

James Brigagliano  
October 30, 2008  
Page 26

distribution and to protect the integrity of the offering process by prohibiting activities that could artificially influence the market for that particular security. The Trust respectfully requests that the Commission grant an exemption under paragraph (e) of Rule 102 to allow the Trust to redeem Shares in Creation Units of the Bull Funds during the continuous offering of such Shares. The Trust respectfully submits that the redemption procedures described in this Letter do not constitute manipulative or deceptive practices within the purpose of Rule 102 and are eligible for an exemption from the provisions of Rule 102 to allow each of the Bull Funds to redeem their Shares in Creation Units during the continuous offering of such Shares.

For the reasons described in connection with the requested Rule 101 relief, redemption transactions and secondary market transactions in the Shares are not viable means to manipulate the price of an Equity Security held by a Bull Fund during a distribution of such security. The Trust will redeem the Creation Units of Shares at the NAV of the Shares. Although Shares are traded on the secondary market, Shares may only be redeemed in Creation Units. Thus, the Trust believes that the redemption by the Trust of the Shares of each of the Bull Funds at NAV in consideration principally for Equity Securities held by a Bull Fund does not involve the abuses that Rule 102 was intended to prevent.

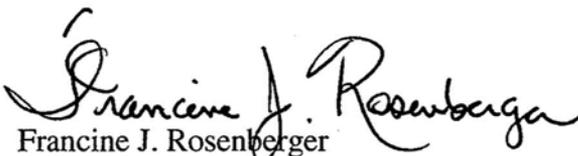
The Trust is not requesting relief from the provisions of Rule 102 of Regulation M with respect to the Bear Funds.

## **PART VI. CONCLUSION**

Based on the foregoing and on our conversations with the Staff, the Trust respectfully requests that the Commission and the Division of Trading and Markets grant the relief requested herein. The forms of relief requested are virtually identical to those actions which the Commission and the Division of Trading and Markets have taken in similar circumstances.

Thank you for your consideration of this request. The Trust intends to launch the trading of the Shares of each of the Funds as soon as practicable. In light of this schedule and given the ample precedent for the requested relief, the Trust is hopeful that the requests contained herein will be handled expeditiously. Should you have any questions or require additional information, please do not hesitate to call the undersigned at (202) 778-9187.

Very truly yours,

  
Francine J. Rosenberger

# K&L|GATES

James Brigagliano  
October 30, 2008  
Page 27

cc: Ms. Joan Collopy  
Division of Trading and Markets

Mr. Daniel O'Neill  
Rafferty Asset Management, LLC

## Appendix A

### Investment Objectives of the Funds

#### **BRIC Bull 3X Shares**

The BRIC Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the BNY BRIC Select ADR Index<sup>®</sup>. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the BNY BRIC Select ADR Index<sup>®</sup>. On a day-to-day basis, the BRIC Bull 3X Shares also holds Money Market Instruments.

#### **BRIC Bear 3X Shares**

Under normal circumstances, the BRIC Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the BNY BRIC Select ADR Index<sup>®</sup>, and the remainder in Money Market Instruments.

#### **China Bull 3X Shares**

The China Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the BNY China Select ADR Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the BNY China Select ADR Index. On a day-to-day basis, the China Bull 3X Shares also holds Money Market Instruments.

#### **China Bear 3X Shares**

Under normal circumstances, the China Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the BNY China Select ADR Index, and the remainder in Money Market Instruments.

#### **Clean Energy Bull 3X Shares**

The Clean Energy Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the S&P Global Clean Energy Index<sup>™</sup>. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the S&P Global Clean Energy Index<sup>™</sup>. On a day-to-day basis, the Clean Energy Bull 3X Shares also holds Money Market Instruments.

#### **Clean Energy Bear 3X Shares**

Under normal circumstances, the Clean Energy Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the S&P Global Clean Energy Index<sup>™</sup>, and the remainder in Money Market Instruments.

**Developed Markets Bull 3X Shares**

The Developed Markets Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the MSCI EAFE<sup>®</sup> Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the MSCI EAFE<sup>®</sup> Index. On a day-to-day basis, the Developed Markets Bull 3X Shares also holds Money Market Instruments.

**Developed Markets Bear 3X Shares**

Under normal circumstances, the Developed Markets Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the MSCI EAFE<sup>®</sup> Index, and the remainder in Money Market Instruments.

**Emerging Markets Bull 3X Shares**

The Emerging Markets Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the MSCI Emerging Markets Index<sup>SM</sup>. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the MSCI Emerging Markets Index<sup>SM</sup>. On a day-to-day basis, the Emerging Markets Bull 3X Shares also holds Money Market Instruments.

**Emerging Markets Bear 3X Shares**

Under normal circumstances, the Emerging Markets Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the MSCI Emerging Markets Index<sup>SM</sup>, and the remainder in Money Market Instruments.

**Energy Bull 3X Shares**

The Energy Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the Russell 1000<sup>®</sup> Energy Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 1000<sup>®</sup> Energy Index. On a day-to-day basis, the Energy Bull 3X Shares also holds Money Market Instruments.

**Energy Bear 3X Shares**

Under normal circumstances, the Energy Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 1000<sup>®</sup> Energy Index, and the remainder in Money Market Instruments.

**Financial Bull 3X Shares**

The Financial Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the Russell 1000<sup>®</sup> Financial Services Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 1000<sup>®</sup> Financial Services Index. On a day-to-day basis, the Financial Bull 3X Shares also holds Money Market Instruments.

**Financial Bear 3X Shares**

Under normal circumstances, the Financial Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 1000<sup>®</sup> Financial Services Index, and the remainder in Money Market Instruments.

**Homebuilders Bull 3X Shares**

The Homebuilders Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the S&P Homebuilding Select Industry Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the S&P Homebuilding Select Industry Index. On a day-to-day basis, the Homebuilders Bull 3X Shares also holds Money Market Instruments.

**Homebuilders Bear 3X Shares**

Under normal circumstances, the Homebuilders Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the S&P Homebuilding Select Industry Index, and the remainder in Money Market Instruments.

**India Bull 3X Shares**

The India Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the Indus India Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Indus India Index. On a day-to-day basis, the India Bull 3X Shares also holds Money Market Instruments.

**India Bear 3X Shares**

Under normal circumstances, the India Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Indus India Index, and the remainder in Money Market Instruments.

**Large Cap Bull 3X Shares**

The Large Cap Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the Russell 1000<sup>®</sup> Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 1000<sup>®</sup> Index. On a day-to-day basis, the Large Cap Bull 3X Shares also holds Money Market Instruments.

**Large Cap Bear 3X Shares**

Under normal circumstances, the Large Cap Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 1000<sup>®</sup> Index, and the remainder in Money Market Instruments.

**Latin America Bull 3X Shares**

The Latin America Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the S&P Latin America 40 Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the S&P Latin America 40 Index. On a day-to-day basis, the Latin America Bull 3X Shares also holds Money Market Instruments.

**Latin America Bear 3X Shares**

Under normal circumstances, the Latin America Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the S&P Latin America 40 Index, and the remainder in Money Market Instruments.

**Mid Cap Bull 3X Shares**

The Mid Cap Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the Russell MidCap<sup>®</sup> Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell MidCap<sup>®</sup> Index. On a day-to-day basis, the Mid Cap Bull 3X Shares also holds Money Market Instruments.

**Mid Cap Bear 3X Shares**

Under normal circumstances, the Mid Cap Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell MidCap<sup>®</sup> Index, and the remainder in Money Market Instruments.

**Real Estate Bull 3X Shares**

The Real Estate Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the Dow Jones Wilshire Real Estate Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Dow Jones Wilshire REIT Index. On a day-to-day basis, the Real Estate Bull 3X Shares also holds Money Market Instruments.

**Real Estate Bear 3X Shares**

Under normal circumstances, the Real Estate Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Dow Jones Wilshire REIT Index, and the remainder in Money Market Instruments.

**Small Cap Bull 3X Shares**

The Small Cap Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the Russell 2000<sup>®</sup> Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 2000<sup>®</sup> Index. On a day-to-day basis, the Small Cap Bull 3X Shares also holds Money Market Instruments.

**Small Cap Bear 3X Shares**

Under normal circumstances, the Small Cap Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 2000<sup>®</sup> Index, and the remainder in Money Market Instruments.

**Technology Bull 3X Shares**

The Technology Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the Russell 1000<sup>®</sup> Technology Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 1000<sup>®</sup> Technology Index. On a day-to-day basis, the Technology Bull 3X Shares also holds Money Market Instruments.

**Technology Bear 3X Shares**

Under normal circumstances, the Technology Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 1000<sup>®</sup> Technology Index, and the remainder in Money Market Instruments.

**Total Market Bull 3X Shares**

The Total Market Bull 3X Shares, under normal circumstances, creates long positions by investing at least 80% of its net assets in the equity securities that comprise the Russell 3000<sup>®</sup> Index. The Fund will also invest in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 3000<sup>®</sup> Index. On a day-to-day basis, the Total Market Bull 3X Shares also holds Money Market Instruments.

**Total Market Bear 3X Shares**

Under normal circumstances, the Total Market Bear 3X Shares creates short positions by investing at least 80% of its net assets in Financial Instruments that, in combination, provide leveraged and unleveraged exposure to the Russell 3000<sup>®</sup> Index, and the remainder in Money Market Instruments.

## Appendix B

### Underlying Securities Indices

#### **BNY BRIC Select ADR Index<sup>®</sup>**

The Bank of New York BRIC Select ADR Index<sup>SM</sup> is a free float-adjusted capitalization-weighted index designed by the Bank of New York to track the performance of a basket of companies who have their primary equity listing on a stock exchange of an emerging market country and which also have depositary receipts that trade on a U.S. exchange or on the Nasdaq. Decisions regarding additions to and deletions from the index are guided by conditions established by the Bank of New York with the intention of creating and maintaining a benchmark for emerging market equity performance. The index currently includes securities from issuers in the following countries, among others: Argentina, Brazil, China, India, Indonesia, Israel, Korea, Russia, South Africa and Taiwan. As of April 30, 2008, the index had 50 components with an average market capitalization of over \$35.8 billion dollars and a median market capitalization of \$19.9 billion dollars.

#### **BNY China Select ADR Index**

The BNY China Select ADR Index is a free float-adjusted capitalization-weighted index designed by the Bank of New York to track the performance of a basket of companies who have their primary equity listing on a stock exchange in China and which also have depositary receipts that trade on a U.S. exchange or on the Nasdaq. Decisions regarding additions to and deletions from the index are guided by conditions established by the Bank of New York with the intention of creating and maintaining a benchmark for emerging market equity performance. As of April 30, 2008, the index was comprised of ADRs of 40 companies with an average market capitalization of over \$14.3 billion dollars and a median market capitalization of \$2.4 billion dollars.

#### **Dow Jones Wilshire REIT Index**

The Dow Jones Wilshire Real Estate Index is a float-adjusted market capitalization-weighted index that is comprised of REITs that are components of the Dow Jones Real Estate Securities index. This index is constructed to provide measures of real estate securities that serve as proxies for direct real estate investing. This index does not include securities that are not directly tied to the value of underlying real estate. Each component of the index must be both an equity owner and operator of commercial and or residential real estate and have a minimum market capitalization of more than \$200 million dollars. As of April 30, 2008, the components in the index had an average market capitalization of \$3.2 billion dollars and a median market capitalization of \$1.6 billion dollars.

#### **Indus India Index**

The Indus India Index is designed to replicate the Indian equity markets as a whole through a group of 50 Indian stocks selected from a universe of the largest companies listed on two major Indian exchanges. The Indus India Index has 50 constituents, spread among the following sectors: Information Technology, Health Services, Financial Services, Heavy Industry, Consumer Products and Other Market Segments. The Indus India Index is supervised by an

index committee, comprised of representatives of the Index Provider and members of academia specializing in emerging markets.

#### **MSCI EAFE<sup>®</sup> Index**

The MSCI EAFE<sup>®</sup> Index is a free float-adjusted market capitalization index that is designed to measure developed market equity performance, excluding the U.S. and Canada. As of September 30, 2007, the MSCI EAFE<sup>®</sup> Index consisted of the following 20 developed market country indices: Australia, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Hong Kong, Ireland, Italy, Japan, the Netherlands, Norway, Portugal, Singapore, Spain, Sweden, Switzerland and the United Kingdom.

#### **MSCI Emerging Markets Index<sup>SM</sup>**

The MSCI Emerging Markets Index<sup>SM</sup> is a free float-adjusted market capitalization index that is designed to measure equity market performance in the global emerging markets. As of September 30, 2007, the MSCI Emerging Markets Index<sup>SM</sup> consisted of the following 21 emerging market country indices: Argentina, Brazil, Chile, China, Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Israel, Malaysia, Mexico, Peru, Philippines, Russia, South Africa, South Korea, Taiwan, Thailand and Turkey.

#### **Russell 1000<sup>®</sup> Index**

The Russell 1000<sup>®</sup> Index measures the performance of the large-cap segment of the U.S. equity universe. It is a subset of the Russell 3000<sup>®</sup> Index and includes approximately 1000 of the largest securities based on a combination of their market cap and current index membership. The Russell 1000 represents approximately 92% of the U.S. market and has an average market capitalization of \$14.3 billion dollars and a median market capitalization of \$5 billion dollars as of April 30, 2008.

#### **Russell 1000<sup>®</sup> Energy Index**

The Russell 1000<sup>®</sup> Energy Index is a capitalization-weighted index of companies engaged in energy-related businesses, such as oil companies involved in the exploration, production, servicing, drilling and refining processes, and companies primarily involved in the production and mining of coal and other fuels used in the generation of consumable energy. Also included are gas distribution, gas pipeline and related companies. These companies span a broad range of industries including: domestic, international and crude oil producers, offshore drilling, oil well equipment and service, machinery and energy equipment, coal, utilities, gas pipelines and miscellaneous energy services.

#### **Russell 1000<sup>®</sup> Financial Services Index**

The Russell 1000<sup>®</sup> Financial Services Index is a capitalization-weighted index of companies that provide financial services. As of April 30, 2008, the index had 227 components, derived from the Russell 1000 Index with an average market capitalization of over \$11 billion dollars and a median market capitalization of \$4.4 billion dollars.

#### **Russell 1000<sup>®</sup> Technology Index**

The Russell 1000<sup>®</sup> Technology Index is a capitalization-weighted index of companies that serve the electronics and computer industries or that manufacture products based on the latest applied

science. The index currently has 105 components, derived from the Russell 1000, with an average market cap of over \$19 billion dollars and a median market capitalization of \$6.1 billion dollars as of April 30, 2008.

#### **Russell 2000® Index**

The Russell 2000® Index measures the performance of the small-cap segment of the U.S. equity universe and is comprised of the smallest 2000 companies in the Russell 3000® Index, representing approximately 10% of the total market capitalization of that index. It includes approximately 2000 of the smallest securities based on a combination of their market cap and current index membership. The companies included in the index have an average market capitalization of more than \$700 million dollars and a median market capitalization of \$500 million dollars as of April 30, 2008.

#### **Russell 3000® Index**

The Russell 3000® Index measures the performance of the largest 3000 U.S. companies representing approximately 98% of the investable U.S. equity market. The companies included in the index have an average market capitalization of \$5.4 billion dollars and a median market capitalization of \$1 billion as of April 30, 2008.

#### **Russell MidCap® Index**

The Russell Midcap® Index measures the performance of the mid-cap segment of the U.S. equity universe. The Russell Midcap® Index is a subset of the Russell 1000® Index. It includes approximately 800 of the smallest securities based on a combination of their market cap and current index membership. The Russell Midcap® Index represents approximately 31% of the total market capitalization of the Russell 1000 companies and has an average market capitalization of \$5.5 billion dollars and a median market capitalization of \$3.8 billion dollars as of April 30, 2008.

#### **S&P Global Clean Energy Index™**

The S&P Global Clean Energy Index™ is designed to provide liquid and tradable exposure to 30 companies from around the world that are involved in clean energy related businesses. The index is comprised of a diversified mix of clean energy production, clean energy technology and equipment provider companies.

#### **S&P Homebuilding Select Industry Index**

The S&P Homebuilding Select Industry Index™ is an equal weighted index that draws constituents from companies involved in homebuilding, directly and indirectly through furnishings, retailing, manufacturing, textiles and chemicals keyed to homebuilding. The median market cap of the 24 holdings as of April 30, 2008 was \$2.08 billion and the average weighted market cap was \$5.86 billion.

#### **S&P Latin America 40 Index**

The S&P Latin America 40 Index is an equity index drawn from four major Latin American markets: Argentina, Brazil, Chile and Mexico. The index constituents are leading, large liquid companies from the Latin American markets with a total market capitalization of \$505 billion and a median market capitalization of \$5 billion, each as of December 31, 2007. Brazil, Mexico,

Chile and Argentina provide 18, 10, 10 and 2 companies, respectively. The Brazilian companies provide 63% of the market capitalization of the index, with Mexican, Chilean and Argentinean companies accounting for 27%, 7% and 3%, respectively.