

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-88302; File No. TP 20-01)

February 28, 2020

ORDER GRANTING LIMITED CONDITIONAL EXEMPTION FROM RULE 200 OF REGULATION SHO TO PRECIDIAN ETF TRUST II

I. INTRODUCTION

By letter dated February 28, 2020 (the “Request Letter”),¹ Precidian ETF Trust II (the “Trust”) requested, on behalf of the Trust, its series, the ActiveSharesSMETFs identified in the Request Letter, any Future Funds operating under the same representations and adhering to the same conditions as set forth in the Request Letter and in the ActiveSharesSM Order, the APs for such ActiveSharesSMETFs and Future Funds, and the AP Representatives engaged by such APs, an exemption from Rule 200 of Regulation SHO (“Rule 200”)² under the Securities Exchange Act of 1934 as amended (the “Exchange Act”) from certain net position calculation and order marking requirements, subject to the representations and conditions identified in the Request Letter. Specifically, the Trust requests an exemption on behalf of APs and AP Representatives that would permit APs to engage in creation and redemption activity in the ActiveSharesSMETFs by permitting the AP Representative to determine the AP’s net position in a security by considering only those positions held in the AP’s Confidential Account, rather than positions held across all of the AP’s accounts, as required by Rule 200. Thus, with regard to the AP’s creation and redemption activity in the ActiveSharesSMETFs, the requested exemption would permit an AP Representative, in determining an AP’s net position in a security for order marking

¹ The defined terms in this Order have the same meaning as in the Request Letter, unless otherwise noted.

² 17 CFR 242.200.

purposes, to consider only the following positions in the AP's Confidential Account: (1) the securities positions resulting from the purchase of Deposit Securities in connection with a creation order, and the sale of Redemption Securities in connection with a redemption order, made by such AP Representative on behalf of such AP, and (2) the securities positions delivered by an ActiveSharesSMETF in consideration of such AP's creation or redemption activity. As part of the requested exemption, the Trust also requests that an AP, in determining its net position in a security for purposes of effecting sales outside of the AP's Confidential Account, be permitted to exclude the securities positions held in the AP's Confidential Account. The Trust represents that this requested exemption is necessary to facilitate creation and redemption activity by APs in the non-transparent ActiveSharesSMETFs while maintaining the confidentiality of the underlying Deposit Securities and Redemption Securities purchased and sold for the AP by the AP Representative through the AP's Confidential Account.³

II. BACKGROUND

Rule 200(c) provides that a "person shall be deemed to own securities only to the extent that he has a net long position in such securities."⁴ Rule 200(f) provides that "[i]n order to determine its net position, a broker or dealer shall aggregate all of its positions in a security unless it qualifies for independent trading unit aggregation."⁵ Rule 200(g) provides that "[a] broker or dealer must mark all sell orders of any equity security as 'long,' 'short,' or 'short exempt'" and provides that "[a]n order to sell shall be marked 'long' only if the seller is deemed to own the security being sold pursuant to paragraphs (a) through (f) of this section and either: (i) [t]he

³ The Trust represents that the AP's Confidential Account will be used for the narrow purpose of effecting purchases of Deposit Securities and sales of Redemption Securities to facilitate in-kind creation and redemption transactions with ActiveSharesSMETFs without disclosing the identity of the Deposit Securities and the Redemption Securities to the AP.

⁴ 17 CFR 242.200(c).

⁵ 17 CFR 242.200(f).

security to be delivered is in the physical possession or control of the broker or dealer; or (ii) [i]t is reasonably expected that the security will be in the physical possession or control of the broker or dealer no later than the settlement of the transaction.”⁶

Due to the unique, non-transparent structure of the ActiveSharesSMETFs, the Trust represents that compliance with the net position calculation and order marking requirements of Rule 200 would create certain operational difficulties for APs and AP Representatives seeking to create or redeem ActiveSharesSMETFs. Specifically, the Trust represents that, because of the non-transparent structure of the ActiveSharesSMETFs, by design, an AP would not know the identities of the underlying Deposit Securities and Redemption Securities beneficially owned by such AP and held in such AP’s Confidential Account. As a result, the Trust represents that an AP would not be able to accurately determine its net position in those securities, as required under Rule 200(c), based solely on holdings held outside of the AP’s Confidential Account. Conversely, the Trust represents that an AP Representative would not be able to accurately determine the AP’s net position in those securities, as required under Rule 200(c), based solely on the holdings in the AP’s Confidential Account because the AP Representative would not have information related to the AP’s holdings held outside of the AP’s Confidential Account. Further, the Trust represents that it would be impracticable and cost prohibitive for an AP and an AP Representative to establish the infrastructure necessary to properly determine securities positions held within the AP’s Confidential Account at a designated AP Representative with the securities positions held by the AP outside of the AP’s Confidential Account while maintaining the confidentiality of the AP’s Confidential Account’s holdings. Accordingly, the Trust requests an exemption to permit such APs and AP Representatives to implement an alternative approach that would address such

⁶ 17 CFR 242.200(g).

operational issues while also preserving the goals of Regulation SHO in ensuring an accurate net position calculation in a security for order marking purposes (the “ActiveShares ETF Approach”).

III. DISCUSSION

In the Request Letter, the Trust makes the following representations, among others:

- Each AP Agreement would provide that once a creation order or redemption order is accepted by the Distributor for an ActiveSharesSMETF, such creation order or redemption order would be unconditional and irrevocable by the AP, the AP Representative, and the Distributor.
- The AP Representative would establish, maintain, and enforce written policies and procedures, including information barriers, reasonably designed to maintain in strict confidence the identity of the Deposit Securities and the Redemption Securities.
- Representatives of the AP Representative effecting transactions in an AP’s Confidential Account would not be authorized to share information regarding the identity of the Deposit Securities and the Redemption Securities or the AP Restricted List with other personnel of the AP Representative or its affiliates, other than on a need-to-know basis, or with any third party (except on a confidential basis with its clearing broker and as required by applicable law or requested by a regulatory authority). AP Representative personnel would be required to sign annual certifications attesting to the fact: (1) that they are in compliance with the confidentiality requirements set forth in their agreement with the Trust and firm policies and procedures connected with the business, and (2) that they will not use the identity or weighting of the securities in the creation basket for any purpose other than executing creations and redemptions for an ActiveSharesSMETF on behalf of an AP. The Compliance Department of the AP Representative would monitor personnel for compliance, and the Internal Audit group of the AP Representative would conduct periodic audits of the AP Representative to ensure compliance with the policies and procedures noted herein, the annual certifications, and applicable law.
- Each AP seeking to rely on the requested relief would, at all relevant times, be a party to, and comply with: (i) an enforceable, written AP Agreement, among other things, authorizing the AP to create and redeem shares of the ActiveSharesSMETF(s) associated with the AP’s Confidential Account at an AP Representative, and (ii) an enforceable written AP Representative Agreement with each AP Representative selected by the AP and approved by the particular ActiveSharesSMETF(s), among other things, appointing each such AP Representative as agent of the AP to purchase Deposit Securities and sell Redemption Securities for the AP through the AP’s Confidential Account in connection with creations and redemptions for the ActiveSharesSMETFs for which the AP acts as an authorized participant and designates such AP Representative to act as its AP Representative, subject, in both cases, to approval by the applicable ActiveSharesSMETF

of the AP Representative and the representations, acknowledgments and conditions as described in the Request Letter.

- An AP would be required to execute creation and redemption orders for an ActiveSharesSMETF through the AP's Confidential Account at an AP Representative designated by the AP to execute the particular creation order or redemption order.
- The creation orders and redemption orders submitted by an AP would be settled through the AP Representative's (or its clearing broker's) account at NSCC or DTC.
- The AP Representative would establish, maintain, and enforce written policies and procedures reasonably designed to ensure, in connection with each creation order effected through the AP's Confidential Account, that: (i) the Balancing Amount and the Cash Creation Amount would be delivered to the AP's Confidential Account, on or prior to the settlement date for the purchase of the Deposit Securities, which is the standard U.S. market settlement date for equity securities (currently T+2), and (ii) Deposit Securities would be purchased for the AP by the AP Representative on the date on which the creation order was accepted by the Distributor, in accordance with the AP's standing instructions, and would be delivered to the applicable ActiveSharesSMETF issuing the creation unit, together with the Balancing Amount, on or prior to the settlement date for such creation order, which is the standard U.S. market settlement date for equity securities (currently T+2), through the AP's Confidential Account at such AP Representative, in exchange for the creation unit purchased by the AP.
- The AP Representative would establish, maintain, and enforce written policies and procedures reasonably designed to ensure, in connection with each redemption order effected through the AP's Confidential Account, that: (i) the creation unit tendered for redemption by the AP, together with the Balancing Amount, would be delivered to the AP's Confidential Account at such AP Representative, on or prior to the settlement date for the redemption order, which is the standard U.S. market settlement date for equity securities (currently T+2), for delivery to such ActiveSharesSMETF, (ii) the creation unit, together with the Balancing Amount, would be tendered to the ActiveSharesSMETF on or before the settlement date for the redemption order, in exchange for the Redemption Securities, and (iii) the Redemption Securities would be sold for the AP by the AP Representative on the date on which the redemption order was accepted by the Distributor, in accordance with the AP's standing instructions. The sale of the Redemption Securities would settle in the CNS system of NSCC or DTC on the settlement date for the redemption order, which is the standard U.S. market settlement date for equity securities (currently T+2), and the proceeds of such sale would be distributed to the AP in exchange for the creation unit tendered for redemption by the AP.

In view of these representations, the Trust, on behalf of APs and AP Representatives, has requested that the Commission grant an exemption that would permit APs to engage in creation and redemption activity in the ActiveSharesSMETFs by permitting an AP Representative to

determine an AP's net position in a security by considering only those positions held in the AP's Confidential Account, rather than positions held across all of the AP's accounts, as required by Rule 200.

IV. RESPONSE

Based on the representations and facts presented in the Request Letter, and without necessarily concurring with the analysis in the Request Letter, the Commission finds that it is appropriate in the public interest, and is consistent with the protection of investors, to grant the Trust the requested exemption⁷ from Rule 200 of Regulation SHO, as described herein, in order to address the Trust's stated operational difficulties associated with creation and redemption activity in the non-transparent ActiveSharesSMETFs.⁸

Specifically, this exemption from Rule 200 would permit an AP Representative, in determining an AP's net position in a security for order marking purposes, to consider only the following positions in the AP's Confidential Account: (1) the securities positions resulting from the purchase of Deposit Securities in connection with a creation order, and the sale of Redemption Securities in connection with a redemption order, made by such AP Representative on behalf of such AP, and (2) the securities positions delivered by an ActiveSharesSMETF in

⁷ Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of Rule 200, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities, or to any person or class of persons. *See* 17 CFR 242.200(h).

⁸ Aside from the requested exemption described herein, both the AP and the AP Representative (in a principal or agency capacity) would remain subject to the requirements of Rule 200, Rule 201, Rule 203, and Rule 204 of Regulation SHO, as applicable. Thus, as with any ETF, we note that the creation or redemption order for an ETF would not be an unconditional contract for purposes of marking a sell order "long" or "short" under Regulation SHO. Further, as with any ETF, following the submission of a redemption order to the Distributor, the AP Representative may not increment the net position of the AP's Confidential Account in the underlying securities unless and until the Distributor has confirmed in writing to the AP Representative that the redemption order submitted by the AP would be filled with the Redemption Securities. For any underlying securities that are replaced with cash or other substituted securities (and not with Redemption Securities), the AP Representative may not increment the net position of the AP's Confidential Account in such underlying securities. Moreover, as with any ETF, following the submission of a creation order to the Distributor, the AP Representative may not increment the net position of the AP's Confidential Account in the ActiveSharesSMETF unless and until the Distributor has confirmed in writing to the AP Representative that the creation order submitted by the AP would occur.

consideration of such AP's creation or redemption activity. This exemption would also permit an AP, in determining its net position in a security for purposes of effecting sales outside of the AP's Confidential Account, to exclude the securities positions held in the AP's Confidential Account. The requested exemption is subject to certain conditions designed to maintain the policy objectives of Regulation SHO, including to ensure accurate order marking and to prevent fails to deliver.

Certain conditions of the relief granted herein require APs and AP Representatives to maintain accurate books and records consistent with the Trust's representations related to the ActiveShares ETF Approach, and to make such books and records readily available to Commission staff and other regulators upon request. These conditions are designed to provide Commission staff and other regulators with the necessary information to conduct meaningful oversight of reliance on the requested exemption by APs and AP Representatives engaged in creation and redemption activity in the ActiveSharesSMETFs.

The condition requiring that, prior to selling Redemption Securities for an AP through the AP's Confidential Account, the AP Representative confirm with the Distributor: (1) that the AP's redemption order was duly accepted, (2) the settlement date for the redemption order is the standard U.S. market settlement date for equity securities (currently T+2), and (3) that the ActiveSharesSMETF to which the redemption order relates has not suspended redemptions, is designed to ensure that transactions within the AP's Confidential Account will not settle outside of the standard settlement processes as a potential way to circumvent Regulation SHO's Rule 204 close out requirements, and that unnecessary fails to deliver would not be inadvertently caused by an ActiveSharesSMETF's suspension of redemption activity.

In addition, a separate condition requires that the AP Representative segregate assets held in an AP's Confidential Account from other assets held by the AP Representative. This condition is designed to help ensure that the AP Representative uses the AP's Confidential Account solely for activity necessary to create or redeem ActiveSharesSMETFs and not for other activity or other units, if applicable, at the AP Representative. We believe that this condition limits, or prevents, the potential for abuse that could arise if an AP Representative was able to use the AP's Confidential Account for any purpose other than effecting creations or redemptions in ActiveSharesSMETFs and helps to ensure that the net position of a security in an AP's Confidential Account is maintained independently and separately.

A separate condition requires that, aside from the requested exemption, APs and AP Representatives remain subject to the requirements of Regulation SHO, as applicable. These conditions are designed to help ensure, for example, that all other AP activity away from the AP's Confidential Account continues to operate in compliance with Regulation SHO regardless of the use of the AP's Confidential Account to separately calculate the net position of a security for order marking purposes related to creation and redemption activity in ActiveSharesSMETFs. The condition requiring AP Representatives (or its clearing broker) to close out fails to deliver resulting from the sale of Redemption Securities in an AP's Confidential Account is intended to ensure that the exemption will not undermine the overall goals of Regulation SHO, including to prevent persistent fails to deliver.

V. CONCLUSION

IT IS HEREBY ORDERED, pursuant to Rule 200(h), that the Trust, on behalf of APs and AP Representatives, be granted an exemption from the requirements of Rule 200 of Regulation SHO with regard to creation and redemption activity in ActiveSharesSMETFs, subject to the

Trust's representations related to the ActiveShares ETF Approach as described in the Request Letter, and the conditions stated below.⁹ The exemption permits an AP Representative, in determining an AP's net position in a security for order marking purposes, to consider only the following positions in the AP's Confidential Account: (1) the securities positions resulting from the purchase of Deposit Securities in connection with a creation order, and the sale of Redemption Securities in connection with a redemption order, made by such AP Representative on behalf of such AP, and (2) the securities positions delivered by an ActiveSharesSMETF in consideration of such AP's creation or redemption activity. This exemption also permits an AP, in determining its net position in a security for purposes of effecting sales outside of the AP's Confidential Account, to exclude the securities positions held in the AP's Confidential Account.

This exemption is subject to the following conditions:

1. The AP Representative shall segregate the assets held in an AP's Confidential Account carried by the AP Representative from the proprietary assets of the AP Representative, and from the assets of other customers of the AP Representative.
2. The AP Representative shall maintain books and records with respect to the AP's Confidential Account in accordance with applicable law.
3. Prior to selling Redemption Securities for an AP through the AP's Confidential Account, the AP Representative shall confirm with the Distributor: (1) that the AP's redemption order was duly accepted, (2) the settlement date for the redemption order, which is the standard U.S. market settlement date for equity securities (currently T+2), and (3) that the

⁹ The exemption would also be available with regard to creation and redemption activity in a non-transparent Future Fund, as defined in the Request Letter, provided that such non-transparent Future Fund meets the same representations related to the ActiveShares ETF Approach, as described in the Request Letter, and the conditions as stated in this Order.

ActiveSharesSMETF to which the redemption order relates has not suspended redemptions.

4. APs and AP Representatives shall maintain accurate books and records evidencing compliance with the facts and representations related to the ActiveShares ETF Approach as described in the Request Letter, and the conditions stated in this Order, and shall provide such books and records to Commission staff and other regulators, including self-regulatory organizations, upon request.
5. An AP Representative (or its clearing broker) shall close out fails to deliver resulting from the sale of Redemption Securities in accordance with Regulation SHO.
6. Aside from the exemption granted herein, both APs and AP Representatives shall remain subject to the requirements of Regulation SHO, as applicable.

The foregoing exemption from Rule 200 is based solely on the representations and facts presented by the Trust, and is strictly limited to the application of this rule to the proposed transactions as described above. In the event that any material change occurs with respect to any of those representations or facts presented, use of the foregoing exemption should be discontinued pending presentation of updated representations or facts to the staff of the Commission's Division of Trading and Markets. This exemption is subject to modification or revocation at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, persons relying on this exemption are directed to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Sections 9(a) and 10(b), and Rule 10b-5 thereunder.¹⁰

¹⁰ 15 U.S.C. §§ 78i(a) and 78j(b); 17 CFR 240.10b-5.

Responsibility for compliance with these and any other applicable provisions of the federal securities laws rests with the persons relying on this exemption. This Order should not be considered a view with respect to any other question that the Request Letter, or any activities undertaken pursuant to this exemption, may raise, including, but not limited to, the applicability of other federal or state securities or other laws and rules to the proposed activities.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

J. Matthew DeLesDernier
Assistant Secretary

¹¹ 17 CFR 200.30-3(a)(11).