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Josephine J. Tao  
Assistant Director  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: Request of FlexShares® Trust for Exemptive, Interpretive and/or No-Action Relief from Rule 10b-17 and Rules 101 and 102 of Regulation M under the Securities Exchange Act of 1934 for an Index-Based ETF of ETFs

Dear Ms. Tao:

**SUMMARY OF REQUEST FOR RELIEF**

I am writing on behalf of FlexShares Trust (the “Trust”), an open-end series investment company, with respect to the FlexShares® Real Assets Allocation Index Fund (the “Fund”), a series of the Trust described herein. The Trust, on behalf of itself, the Fund, any national securities exchange or national securities association on or through which shares of the Fund (“Shares”)<sup>1</sup> are listed (each, a “Listing Exchange”) and/or may subsequently trade (with each such market referred to herein as a “Market”)<sup>2</sup>, Foreside Fund Services, LLC (the “Distributor”) and other persons or entities engaging in transactions in Shares, including APs (as defined below), hereby requests, as applicable, from the staff of the Division of Trading and Markets (the “Staff”) of the Securities and Exchange Commission (the “Commission”), or from the Commission, exemptions, interpretive advice or no-action advice, as applicable, regarding Rule 10b-17, and Rules 101 and 102 of Regulation M, under the Exchange Act.

The Trust will offer Shares of the Fund. The Fund is an exchange-traded fund (“ETF”) organized as a series of the Trust. The Fund will seek to track the performance

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<sup>1</sup> The Trust intends to list the Shares of the Fund described herein on The NASDAQ Stock Market, LLC (“Nasdaq”).

<sup>2</sup> In the future, the Trust may determine to list Shares on a Market other than the Listing Exchange. If the Trust lists Shares on a Market other than the Listing Exchange, Shares will be listed in accordance with exchange listing standards that are, or will become, effective pursuant to Section 19(b) of the Securities Exchange Act of 1934, as amended (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 Section 19(b) of the Exchange Act.

of an underlying index that is constructed and maintained by Northern Trust Investments, Inc., in its role as the Index Provider (the “*Index Provider*”). The Fund intends to operate as an “ETF of ETFs.” As such, the Fund will seek to track the performance of its underlying index by investing at least 80% of its total assets in the ETFs that comprise its underlying index (“*Underlying ETFs*”). Except for the fact that the Fund will operate as an ETF of ETFs, the Fund will operate in a manner substantially identical to the Underlying ETFs.

The Staff has issued in the past relief substantially identical to that requested herein to index-based and actively managed ETFs operating as ETFs of ETFs (the “*Prior ETFs of ETFs*”).<sup>3</sup> The Staff has previously issued substantially similar relief to index-based ETFs<sup>4</sup> and actively managed ETFs<sup>5</sup> that invest directly in securities, as well as

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<sup>3</sup> See Release No. 34-76397, dated November 9, 2015 (with respect to FlexShares® Currency Hedged Morningstar DM ex-US Factor Tilt Index Fund, and FlexShares® Currency Hedged Morningstar EM Factor Tilt Index Fund); Release No. 34-76193, dated October 19, 2015 (with respect to DBX ETF Trust); Release No. 34-76117, dated October 8, 2015 (with respect to PowerShares DWA Tactical Sector Rotation Portfolio); Release No. 34-73298, dated October 3, 2014 (with respect to ProShares Morningstar Alternatives Solution ETF); Release No. 34-71652, dated March 5, 2014 (with respect to Global X Funds); See Release No. 34-69831, dated June 21, 2013 (with respect to ALPS ETF Trust); Release No. 34-68459, dated December 18, 2012 (with respect to ALPS ETF Trust); Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets, to Kathleen H. Moriarty, Katten Muchin Rosenman LLP, dated March 25, 2009 (revised April 12, 2009) (with respect to IndexIQ index-based ETFs of ETFs); Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets, to W. John McGuire, Morgan, Lewis & Bockius, LLP, dated September 14, 2009 (with respect to AdvisorShares Trust actively managed ETFs of ETFs); Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets, to Richard F. Morris, WisdomTree Asset Management, Inc., dated December 23, 2009 (with respect to WisdomTree Trust index-based ETF of ETFs); Letters to W. John McGuire, Morgan, Lewis & Bockius, LLP, from Josephine J. Tao, Assistant Director, Division of Trading and Markets, dated July 2, 2010 (with respect to AdvisorShares Mars Hill ETF), and from James A. Brigagliano, Deputy Director, Division of Trading and Markets, dated May 4, 2010 (with respect to U.S. One Trust ETF).

<sup>4</sup> See Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Jack P. Drogin of Morgan, Lewis & Bockius, LLP, dated August 4, 2005 (with respect to the iShares MSCI EAFE Growth Index Fund and iShares MSCI EAFE Value Index Fund); Letter from James Brigagliano, Assistant Director, Division of Market Regulation, to Jack P. Drogin, Morgan, Lewis & Bockius LLP, dated October 14, 2004 (with respect to the iShares FTSE/Xinhua China 25 Index Fund); Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Stuart Strauss, Mayer, Brown Rowe & Maw, dated October 21, 2002 (with respect to the Fresco Index Shares Fund); Letters from James A. Brigagliano, Assistant Director, Division of Market Regulation, to W. John McGuire, Morgan, Lewis & Bockius LLP, dated July 25, 2002, to Mary Joan Hoene, Carter, Ledyard & Milburn, dated December 1, 2000, and September 5, 2000, and to Kathleen H. Moriarty, Carter, Ledyard & Milburn, dated May 16, 2000 (with respect to various series of iShares Trust); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Kathleen Moriarty, Carter, Ledyard & Milburn, dated May 21, 2001 (with respect to Vanguard Index Funds); Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Barry A. Mendelson, The Vanguard Group, dated October 20, 2004 (with respect to Vanguard Index Funds); and Letter from James A. Brigagliano, Assistant Director,

substantially similar relief to various exchange traded products<sup>6</sup> (collectively, the “*Prior ETFs*”). The only ETFs in which the Fund invests will be organized in the United States, registered under the Investment Company Act of 1940, as amended (the “*1940 Act*”), and listed on a Market. The Fund will operate in a manner substantially identical to the *Prior ETFs* of ETFs. Except for the fact that it will operate as an ETF of ETFs, the Fund will operate in a manner substantially identical to the *Prior ETFs*. For example, the Fund will disclose its portfolio holdings on a daily basis and information about the prices of the securities and other instruments held by the Fund will be readily available from a variety of sources.

The Trust does not believe the Fund raises any significant new regulatory issues that have not already been addressed by the Commission and Staff. Nevertheless, because the Fund operates as an ETF of ETFs, the Trust is concerned that the “ETF Class Relief” previously issued by the Staff with respect to certain types of ETFs may not extend to the Fund.<sup>7</sup> Specifically, the ETF Class Relief does not appear to extend to the Fund since the

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Division of Market Regulation, to Kathleen Moriarty, Carter, Ledyard & Milburn, dated March 9, 2005 (with respect to Vanguard Index Funds).

<sup>5</sup> See Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to PIMCO ETF Trust Actively Managed Fixed Income Exchange Traded Fund, dated November 11, 2009; Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to Grail Advisors ETF Trust, dated April 30, 2009, as revised May 6, 2009; Letter from James A. Brigagliano, Associate Director, Division of Trading and Markets, to Clifford Chance US LLP regarding PowerShares Actively Managed Exchange Traded Fund Trust, dated April 4, 2008; and Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets, to Foley & Lardner LLP regarding Bear Stearns Active ETF Trust, dated March 24, 2008.

<sup>6</sup> See, e.g., Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Michael Schmidtberger, Esq., Sidley Austin Brown & Wood LLP, dated January 19, 2006 (with respect to DB Commodity Index Tracking Fund and DB Commodity Services LLC); Letter from Brian A. Bussey, Assistant Chief Counsel, Division of Market Regulation, to Kathleen H. Moriarty, Carter, Ledyard & Milburn, dated December 12, 2005 (with respect to the streetTRACKS Gold Trust); and Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Kathleen H. Moriarty, Carter, Ledyard & Milburn LLP, dated November 17, 2004 (with respect to the streetTRACKS Gold Trust).

<sup>7</sup> See Letter from James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to Claire P. McGrath, Esq., Vice President and Special Counsel, The American Stock Exchange, dated August 17, 2001 (re: Exemptive Relief for Exchange Traded Index Funds) (“2001 Class Letter”); Letter from James A. Brigagliano, Esq., Assistant Director, Division of Market Regulation, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated January 3, 2005 (re: No-action relief from Rule 200(g) of Regulation SHO); Letter from Catherine McGuire, Esq., Chief Counsel, Division of Market Regulation, to the Securities Industry Association Derivative Products Committee, dated November 21, 2005 (re: Expanded class relief for ETFs 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) (“SIA Letter”); Letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Stuart M. Strauss, Esq., Clifford Chance US LLP, dated October 24, 2006 (re: ETFs comprised of equity securities and incorporating relief

Fund does not meet the terms of Conditions 2, 3 and 4 of the Equity ETF Class Relief Letter as discussed more fully in Part III herein. With respect to Condition 2, the Fund does not expect to hold twenty (20) or more “Component Securities” and may, at times, hold Underlying ETFs in excess of 25% of its total portfolio value. With respect to Condition 3, the Fund may not be at least 70% comprised of Component Securities that meet the applicable minimum public float and minimum average daily trading volume thresholds.<sup>8</sup> In addition, with respect to Condition 4, the Fund expects to issue Shares in aggregations (“*Creation Units*”) that are smaller than those described in the Equity ETF Class Relief Letter. The Trust notes that the Commission has previously granted to an existing ETF relief similar to that requested herein regarding Conditions 2 and 4.<sup>9</sup> The Trust also notes that the Commission has previously granted to an existing ETF relief similar to that requested herein regarding Conditions 2 and 3.<sup>10</sup> Notwithstanding the foregoing, the Trust represents that all three Underlying ETFs in which the Fund invests will meet all conditions set forth in one or more of the ETF Class Relief Letters.

The Trust hereby requests, as applicable, exemptions, interpretive or no-action advice regarding Rule 10b-17, and Rules 101 and 102 of Regulation M, under the Exchange Act.

This Letter is divided into five parts. Part I is a description of the Trust and the Fund. Part II contains a discussion of the dissemination of information regarding Shares. Part III contains a discussion of the ETF Class Relief. Part IV contains the requests for relief and Part V is the conclusion.

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from certain prior letters) (“Equity ETF Class Relief Letter”); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Benjamin Haskin, Esq., Willkie, Fair & Gallagher LLP, dated April 9, 2007 (“Fixed Income ETF Class Relief Letter”); and Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to Domenick Pugliese, Esq., Paul, Hastings, Janofsky and Walker LLP, dated June 27, 2007 (re: ETFs that are comprised of both equity and fixed-income securities) (“Combination ETF Class Relief Letter”) (collectively, “ETF Class Relief” or “ETF Class Relief Letters”).

<sup>8</sup> In particular, because one of the Fund’s Component Securities (*i.e.*, one of the three Underlying ETFs which will initially constitute approximately 40% of the Fund) does not satisfy the minimum thresholds, the Fund does not expect to satisfy the minimum public float and ADTV requirements for the last two months with respect to 70% of the Fund’s Component Securities.

<sup>9</sup> See Release No. 34-73298, dated October 3, 2014 (with respect to ProShares Morningstar Alternatives Solution ETF).

<sup>10</sup> See Letter from Josephine J. Tao, Assistant Director, Division of Market Regulation, to Suzanne M. Russell, Chapman and Cutler LLP, dated January 15, 2015 (with respect to the First Trust Dorsey Wright Focus 5 ETF).

## **PART I**

### **A. The Trust and the Fund**

The Trust is an investment company currently consisting of separate ETFs. The Fund is named the FlexShares Real Assets Allocation Index Fund and will seek results that correspond generally to the return (before the Fund's fees and expenses) of the Northern Trust Real Assets Allocation Index<sup>SM</sup> (the "*Underlying Index*"). Northern Trust Investments, Inc. (the "*Advisor*") will act as investment adviser to the Fund. The Fund intends to qualify annually and to elect to be treated as a regulated investment company ("RIC") under the Internal Revenue Code of 1986, as amended (the "*Code*").

The Underlying Index measures the performance of an optimized allocation to the Underlying ETFs that is intended to provide exposures to certain real assets and minimize overall volatility of investment in the Underlying ETFs. The Underlying ETFs invest primarily in separate sets of securities representing or providing exposures to global "real assets." Real assets are defined by the Index Provider as physical or tangible assets. Examples of real assets include but are not limited to commodities, precious metals, oil, and real estate. The Underlying Index allocates among the Underlying ETFs, which are advised by the Advisor, using a rules-based methodology. The construction of the Underlying Index begins with a universe of eligible securities. Eligible securities are then optimized, with a main objective of lowering the absolute total risk of the Underlying Index, as measured by volatility of returns, while maintaining diversification amongst the eligible securities. In order to obtain robust estimates of expected portfolio volatility, standard risk models are incorporated into the process to isolate both common factor and idiosyncratic risk at the underlying asset level. In addition to solving for the main objective, constituent level weight constraints are utilized to maintain diversification within the Underlying Index during each optimization. The maximum constituent weight permitted during the optimization is 50%, while the minimum constituent weight permitted during the optimization is 10%. However, if the optimization process cannot be successfully completed in light of those maximum and minimum limits, one or both of those limits is relaxed.

The Underlying ETFs to be initially included in the Underlying Index are set forth below:

Name	Ticker Symbol	Underlying Index of Underlying ETF
FlexShares® Morningstar Global Upstream Natural Resources Index Fund	GUNR	Morningstar® Global Upstream Natural Resources Index <sup>SM</sup>
FlexShares® Global Quality Real Estate Index Fund	GQRE	Northern Trust Global Quality Real Estate Index <sup>SM</sup>
FlexShares® STOXX® Global Broad Infrastructure Index Fund.	NFRA	STOXX Global Broad Infrastructure Index <sup>SM</sup>

The Shares are expected to be listed on the Nasdaq and will trade at market prices that may differ to some degree from the net asset value (“NAV”) of the Shares. Unlike conventional mutual funds, as described further below, the Fund will issue and redeem Shares on a continuous basis, at NAV, only in Creation Units of at least 25,000 Shares.

B. The Advisor, Distributor, and APs

1. Advisor

The Advisor will act as the Fund’s investment adviser pursuant to an advisory agreement with the Trust, on behalf of the Fund (the “*Advisory Agreement*”). The Advisor is registered with the Commission as an investment adviser. Pursuant to the Advisory Agreement, the Advisor will manage the investment and reinvestment of the Fund’s assets and administer the affairs of the Fund to the extent requested by, and subject to the supervision of, the Board of Trustees of the Trust (the “*Board*”).

2. Distributor and APs

The Board has appointed the Distributor, a broker-dealer registered under the Exchange Act and a member of the Financial Industry Regulatory Authority, Inc. (“*FINRA*”), to act as the distributor and principal underwriter of the Creation Units of Shares. The Distributor will distribute Shares on an agency basis. The Board may appoint a different distributor in the future. Entities that have entered into an agreement (an “*AP Agreement*”) with the Distributor to become “authorized participants” (“*APs*”) may place orders with the Distributor to purchase or redeem Creation Units, as described below.

C. Shares

As described in subparts I.D. through I.F. below, the Fund will issue and redeem its Shares in Creation Units. Shares will not be individually redeemable. The Trust intends that the initial NAV of Shares will be established at a level convenient for trading purposes. Purchasers of Creation Units will be able to unbundle the Creation Units into the individual Shares comprising such Creation Unit.

D. Purchasing Shares

The Trust will issue Shares at NAV only in Creation Units. Creation Unit transactions to purchase Shares will typically be conducted in exchange for the deposit or delivery of in-kind securities constituting a substantial replication of the securities included in the Fund's Underlying Index and/or cash.

Individual Shares of the Fund may only be purchased and sold in secondary market transactions through brokers. Shares of the Fund are expected to be listed for trading on Nasdaq and, because Shares will trade at market prices rather than NAV, Shares of the Fund may trade at a price greater than or less than NAV.

E. Procedures Applicable to Purchases of the Fund

The consideration for purchase of Creation Units of the Fund may consist of (i) a designated portfolio of equity securities determined by the Advisor (the "*Deposit Securities*") per each Creation Unit constituting a substantial replication of the securities included in the Underlying Index or (ii) cash in lieu of all or a portion of the Deposit Securities together with, in each case, an amount of cash—the "Cash Component"—computed as described below. Together, the Deposit Securities (including the cash in lieu amount) and the Cash Component constitute the "Fund Deposit," which represents the minimum initial and subsequent investment amount for a Creation Unit of the Fund.

The Cash Component serves the function of compensating for any differences between the NAV per Creation Unit and the Deposit Amount (as defined below). The Cash Component is an amount equal to the difference between the NAV of Shares (per Creation Unit) and the market value of the Deposit Securities and/or cash in lieu of all or a portion of the Deposit Securities (the "*Deposit Amount*"). If the Cash Component is a positive number (i.e., the NAV per Creation Unit exceeds the Deposit Amount), the creator will deliver the Cash Component. If the Cash Component is a negative number (i.e., the NAV per Creation Unit is less than the Deposit Amount), the creator will receive the Cash Component.

The Advisor, through the National Securities Clearing Corporation ("NSCC"), will make available on each business day, prior to the opening of business of the Listing Exchange (currently 9:30 a.m., Eastern Time), the list of the names and the required

number of shares of each Deposit Security to be included in the current Fund Deposit (based on information at the end of the previous business day) for the Fund.

In order to be eligible to place orders with the Distributor and to create a Creation Unit of the Fund, an entity must be (i) a “Participating Party,” i.e., a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the NSCC (the “*Clearing Process*”), a clearing agency that is registered with the Commission; or (ii) a participant that uses the facilities of The Depository Trust Company (“DTC”, and such participant, a “*DTC Participant*”).

All orders to create Creation Units, whether through the Clearing Process (through a Participating Party) or outside the Clearing Process (through a DTC Participant), must be received by the Distributor no later than the order cut-off time in each case on the date such order is placed in order for the creation of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form.

No creation transaction fee is applicable to in kind purchase transactions. The AP may also be assessed an amount to cover the cost of purchasing the Deposit Securities, including operational processing and brokerage costs, transfer fees, stamp taxes, and part or all of the spread between the expected bid and offer side of the market related to such Deposit Securities.

To the extent contemplated in the applicable AP Agreement, Shares of the Fund may be issued in advance of receipt of all Deposit Securities subject to various conditions, including an undertaking by the AP to deliver the missing Deposit Securities as soon as possible, which undertaking will be secured by the delivery and maintenance of collateral.

#### F. Procedures Applicable to Redemptions of the Fund

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the Fund through the Distributor and only on a business day. The Advisor, through the NSCC, will make available prior to the opening of business on the Listing Exchange (currently 9:30 a.m., Eastern Time) on each business day, the identity of the Fund Securities (defined below) that will be applicable (subject to possible amendment or correction) to redemption requests received in proper form on that day.

Unless cash redemptions are available or specified for the Fund, the redemption proceeds for a Creation Unit generally consist of a portfolio of securities (“*Fund Securities*”) — as announced on the business day of the request for redemption received in proper form — plus or minus cash in an amount equal to the difference between the



NAV of the Shares being redeemed, as next determined after a receipt of a request in proper form, and the value of the Fund Securities (the “*Cash Redemption Amount*”), less the applicable Redemption Transaction Fee (defined below) and, if applicable, any operational processing and brokerage costs, transfer fees or stamp taxes. In the event that the Fund Securities have a value greater than the NAV of the Shares, a compensating cash payment equal to the difference plus the applicable Redemption Transaction Fee and, if applicable, any operational processing and brokerage costs, transfer fees or stamp taxes, is required to be made by or through an AP by the redeeming shareholder.

Orders to redeem Creation Units must be delivered through an AP that has executed an AP Agreement. Investors other than APs are responsible for making arrangements for a redemption request to be made through an AP. An order to redeem Creation Units of the Fund is deemed received by the Trust on a particular date (the “*Transmittal Date*”) if: (i) such order is received by the Distributor not later than the order cut-off time; (ii) such order is accompanied or followed by the requisite number of Shares of the Fund specified in such order, which delivery must be made through DTC to the transfer agent; and (iii) all other procedures set forth in the AP Agreement are properly followed.

No redemption transaction fee is applicable to in kind redemption transactions. A variable transaction fee equal to a percentage of the value of each Creation Unit redeemed may be applicable to a redemption transaction (the “*Redemption Transaction Fee*”). Investors will also bear the costs of transferring the Fund Securities from the Trust to their account or on their order.

## **PART II**

### **A. Dissemination of Information about Deposit Securities and Fund Securities**

As discussed above, the names and required number of shares of the Deposit Securities and Fund Securities to be tendered in connection with the issuance or redemption, respectively, of Shares of Creation Units will be made available on each business day prior to the opening of trading.

### **B. Dissemination of Information about the Fund’s Portfolio Securities**

The prices of the Fund’s portfolio securities (“*Portfolio Securities*”) will be readily available from, as applicable, the relevant listing Market, other Markets, automated quotation systems, and other sources, such as independent pricing services.

### **C. Dissemination of Information about Shares**

In order to provide current Share pricing information for the Fund for use by investors, professionals and persons wishing to create or redeem Shares, (i) the Listing

Exchange will disseminate continuously every 15 seconds throughout the trading day, through the facilities of the Consolidated Tape Association, the market value of a Share and (ii) the Listing Exchange, market data vendors or other information providers will disseminate, every 15 seconds throughout the trading day, a calculation of the intraday indicative value of a Share. Comparing these two figures will allow an investor to determine whether, and to what extent, Shares are selling at a premium or a discount to NAV.

The Fund's website (the "*Website*") will also contain the following information on a per Share basis for the Fund: (i) the prior business day's NAV, the closing market price or the midpoint of the bid-ask spread at the time of calculation of the NAV (the "*Bid/Ask Price*"), and a calculation of the premium or discount of the Bid-Ask Price at the time of calculation of the NAV against such NAV; and (ii) data displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. The Website will also display the Fund's Prospectus and additional quantitative information that is updated on a daily basis.

### **PART III**

A. Comparison of the Fund to the Other ETFs Which Have Sought Similar Commission Action and Received Similar Relief

The Trust believes that the relief requested herein is substantially identical to the relief granted by the Commission to the Prior ETFs of ETFs and substantially similar to the relief granted by the Commission to the Prior ETFs.

B. Applicability of the ETF Class Relief to the Fund

The ETF Class Relief provides exemptive and/or no-action or interpretive relief with respect to Rule 10b-17, as well as Rules 101 and 102 of Regulation M, to any ETF that meets the criteria set forth in the Equity ETF Class Relief Letter. The Equity ETF Class Relief Letter sets forth five criteria that an ETF must meet in order to rely upon the ETF Class Relief. These are:

1. The ETF Shares are issued by an open-end investment company or unit investment trust registered with the Commission under the [1940] Act;

2. The ETF consists of a basket of twenty or more Component Securities,<sup>11</sup> with no one Component Security constituting more than 25% of the total value of the ETF;<sup>12</sup>

3. At least 70% of the ETF must be comprised of Component Securities that meet the minimum public float and minimum average daily trading volume thresholds under the ‘actively-traded securities’ definition found in Regulation M for excepted securities during each of the previous two months of trading prior to the formation of the relevant ETF; provided, however, that if the ETF has 200 or more Component Securities then 50% of the Component Securities must meet the actively-traded securities thresholds;

4. ETF shares are to be issued and redeemed in Creation Unit aggregations of 50,000 shares or such other amount where the value of a Creation Unit is at least \$1 million at the time of issuance; and

5. The ETF must be managed to track a particular index all the components of which have publicly available last sale trade information. The intra-day proxy value of the ETF per share and the value of the ‘benchmark’ index must be publicly disseminated by a major market data vendor throughout the trading day.”<sup>13</sup>

The Fund will meet all of the criteria of the Equity ETF Class Relief Letter set forth above, with the exception of Conditions 2, 3 and 4. With respect to Condition 2, the Fund does not intend to hold “a basket of twenty or more Component Securities” and may hold Underlying ETFs in excess of 25% of the total value of its portfolio. With respect to Condition 3, the Fund may not be at least 70% comprised of Component Securities that meet the applicable minimum public float and minimum average daily

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<sup>11</sup> For purposes of the Commission’s response, “Component Securities” are defined as individual securities that comprise the ETF basket, e.g., securities that are assembled to replicate the particular index that the ETF tracks.

<sup>12</sup> For purposes of the Commission’s response, whether any one Component Security constitutes more than 25% of the total value of the ETF shall be determined as of the most recent rebalancing of the ETF’s reference securities index.

<sup>13</sup> See Equity ETF Class Relief Letter at 2.

trading volume thresholds.<sup>14</sup> In addition, with respect to Condition 4, the Fund will issue Shares in Creation Units of at least 25,000 Shares.<sup>15</sup> However, all three Underlying ETFs in which the Fund invests will meet all conditions set forth in one or more of the ETF Class Relief Letters. Further, the Trust hereby represents that: (a) the arbitrage mechanism will be facilitated by the transparency of the Fund's portfolio and the availability of the intra-day indicative value, the liquidity of securities held by the Fund and the ability to acquire such securities, as well as the arbitrageurs' ability to create workable hedges; (b) the Fund will invest solely in liquid securities; (c) the Fund will invest in securities that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges; (d) the Trust believes that arbitrageurs are expected to take advantage of price variations between the Fund's market price and its NAV; and (e) a close alignment between the market price of Shares and the Fund's NAV is expected. Therefore, the Trust hereby requests that the Commission grant exemptive, interpretive or no-action relief from Rule 10b-17 and Rules 101 and 102 of Regulation M as discussed below. As noted above, this relief is substantially identical to the relief granted to the Prior ETFs of ETFs.

#### **PART IV**

##### **A. Requests for Relief—Introduction**

The Trust, on behalf of itself, the Fund, the Listing Exchange, other Markets, the Distributor, APs and other persons or entities engaging in transactions in the Shares, requests that the Commission grant exemptions, interpretive or no-action advice regarding Rules 10b-17, and Rules 101 and 102 of Regulation M, under the Exchange Act.

##### **B. 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

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<sup>14</sup> In particular, because one of the Fund's Component Securities (i.e., one of the three Underlying ETFs which will initially constitute approximately 40% of the Fund) does not satisfy the minimum thresholds, the Fund does not expect to satisfy the minimum public float and ADTV requirements for the last two months with respect to 70% of the Fund's Component Securities.

<sup>15</sup> The Trust notes that the Commission has previously granted to an existing ETF relief similar to that requested herein regarding Conditions 2 and 4. See Release No. 34-73298, dated October 3, 2014 (with respect to ProShares Morningstar Alternatives Solution ETF); The Trust notes that the Commission also has previously granted to an existing ETF relief similar to that requested herein regarding Conditions 2 and 3. See Letter from Josephine J. Tao, Assistant Director, Division of Market Regulation, to Suzanne M. Russell, Chapman and Cutler LLP, dated January 15, 2015 (with respect to the First Trust Dorsey Wright Focus 5 ETF).

to such class of securities in accordance with Rule 10b-17(b). Specifically, Rule 10b-17(b)(1)(v)(a-b) require such advance notice to specify (a) for cash distributions, the amount of cash to be paid or distributed per share<sup>16</sup>, and (b) for in-kind distributions, the amount of the security outstanding immediately prior to and immediately following the dividend or distribution and the rate of such dividend or distribution. Paragraph (c) of the Rule, however, states that the Rule shall not apply to redeemable securities issued by open-end investment companies and unit investment trusts registered under the 1940 Act. Except for the fact that Shares must be redeemed in Creation Units, the Trust is intended to function like any other open-end fund continuously offering its shares. It is in recognition of the foregoing that the Division of Investment Management issued an order upon which the Trust may rely permitting the Trust to issue shares with limited redeemability while still treating the Trust like any other open-end investment company.

In addition, compliance with Rule 10b-17(b)(1)(v)(a-b) would be impractical in light of the nature of the Fund. This is because it is not possible for the Fund to accurately project ten days in advance what dividend, if any, would be paid on a particular record date. Because of this inability to project the amount of any dividend ten days in advance of a record date, applying the timing requirements of 10b-17(b)(1)(v)(a-b) to the Fund would increase the chances that the Fund would mis-estimate the amount of any such dividend.<sup>17</sup>

The Trust represents that it will comply with the requirements of Rule 10b-17 (other than paragraphs (b)(i)(v)(a-b) thereof). The Trust further represents that, as soon as

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<sup>16</sup> The Rule permits a reasonable approximation of the per share distribution to be provided if exact amounts cannot be given because of existing conversion rights which may be exercised during the notice period and may affect the per share cash distribution, as long as the actual per share distribution is subsequently provided on the record date.

<sup>17</sup> As a RIC, the Fund is required by the Code to distribute at least 98% of its ordinary income and 98.2% of its capital gains during the calendar year. If the Trust, with respect to the Fund, 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- or under-distribution of ordinary income, RICs, including the Fund, 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 the amount of a 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- or under-distribution. Requiring the Trust to declare the amount of a dividend ten days in advance of the record date also would increase the chance that the Fund would over- or under-distribute capital gains. Further, unlike ordinary income, the Fund does not have the problem of estimating the aggregate amount of capital gains it will earn between the declaration date and year-end, but as noted above, requiring the Trust to declare the amount of a dividend ten days in advance of the record date would increase the chance that the Trust would mis-estimate the number of outstanding shares. This, in turn, would increase the chance that the Trust would mis-estimate the per share amount of capital gains that the Fund must distribute.

practicable following the end of trading on the Exchange on the day prior to the ex-date (but not later than the last time at which the Exchange accepts such information on such date) with respect to any distribution to be made by the Fund, the Trust will provide notice to the Exchange containing the information required in Rule 10b-17(b)(1)(v)(a-b).

In the proposing release for Rule 10b-17 (the “*Proposing Release*”)<sup>18</sup>, in discussing the rights to receive dividends and other rights which accrue to holders of record of securities as of a record date, the Commission stated:

It has been the experience of the Commission and the securities industry that the failure of a publicly held company to provide a timely announcement of the record date with respect to these types of rights has had a misleading and deceptive effect on both the broker-dealer community and the investing public. As a direct result of such failure, purchasers and their brokers may have entered into and settled securities transactions without knowledge of the accrual of such rights and were thus unable to take necessary steps to protect their interests. Further, sellers who have received the benefits of such rights as recordholders on the specified record date after having disposed of their securities, have also disposed of the cash or stock dividends or other rights received as such recordholders without knowledge of possible claims of purchasers of the underlying security to those rights. In many instances, innocent buyers and sellers have suffered losses. In addition, some issuers have made belated declarations of stock splits or dividends with the apparent knowledge that this action would have a manipulative effect on the market for their securities.

The Trust respectfully submits that none of these concerns raised by the Commission in the *Proposing Release*<sup>19</sup> will be implicated if the requested relief is granted. As set forth above, the Trust will comply with the requirements of Rule 10b-17 except for the timing requirements for notification of the actual amounts of the distributions under Rule 10b-17(b)(1)(v)(a-b). Accordingly, market participants will receive timely notification of the existence and timing of a pending distribution, and will be able to plan their transactions in Shares accordingly. As a result, there should be no

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<sup>18</sup> Exchange Act Release No. 9076 (February 17, 1971).

<sup>19</sup> The foregoing concerns were largely reiterated by the Commission in the release adopting Rule 10b-17. See Exchange Act Release No. 9192 (June 7, 1971) (the “*Adopting Release*”).

confusion or opportunity for manipulation regarding parties' rights to receive distributions, which concerns inspired the Commission to propose and adopt Rule 10b-17. Therefore, the requested relief concerning the timing requirements of Rule 10b-17(b)(1)(v)(a-b) is consistent with the purposes underlying the adoption of Rule 10b-17 as outlined in the Proposing Release and Adopting Release. The exemption under paragraph (c) of Rule 10b-17, which covers open-end investment companies with fully redeemable shares, thus should be applicable to the Trust with respect to the timing requirements of Rule 10b-17(b)(1)(v)(a-b).

C. Rule 101 of Regulation M<sup>20</sup>

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

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 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 such distribution.

We understand that while broker-dealers that: (i) tender Fund Deposits to the Trust in return for Shares of the Fund in Creation Units; or (ii) redeem Shares of the Fund in Creation Units for receipt of Fund Securities and cash (or cash only) held by the Fund generally will not be part of a syndicate or selling group, and while no broker-dealer will receive fees, commissions or other remuneration from the Trust for the sale of Shares of the 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).

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 are not redeemable except in Creation Units. Due to the redeemability of the Shares in Creation

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<sup>20</sup> The relief being requested is analytically consistent with the Division of Market Regulation Staff Legal Bulletin No. 9, as revised on September 10, 2010, which stated that, subject to certain conditions, actively managed exchange traded funds ("Active ETFs") could rely on the exceptions in Rules 101(c)(4) and 102(d)(4) of Regulation M under the Exchange Act which are only available to open-end investment companies, notwithstanding the fact that shares of Active ETFs are redeemable only in Creation Units.

Units, there should be little disparity between the Shares' market price and their NAV 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 (c)(4) of such Rule.

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 in certain cases) at NAV, on any business day. Holders of Shares also have the benefit of intra-day secondary market liquidity by virtue of their Market listing. Thus, the secondary market price of Shares should not vary substantially from the NAV of such Shares. 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 Shares is largely based on the market value of the relevant Fund 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 requests that the Commission clarify that the tender of the Shares to the Fund for redemption and the receipt of Fund 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 Fund Securities. As described above, following notice of redemption, the Fund will deliver the specified Fund Securities after the redemption request is received in proper form, except in those cases where redemption proceeds are paid entirely in cash. Absent unusual circumstances, the Fund will not purchase Fund Securities in the secondary market to fulfill a redemption request. Therefore, redemptions of Shares cannot be expected to affect the market price of the Fund Securities. The Distributor will not engage in any secondary market transactions in Shares, either for its own account or for investors.

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 Shares pricing, application



of Rule 101 to a broker-dealer or other person who may be participating in a distribution of Shares or securities held by the 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 Shares trading discussed throughout this letter.

D. Rule 102 of Regulation M

The Trust respectfully 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, for the reasons previously stated under our request for relief under Rule 101(c)(4), transactions in Shares would be exempted from Rule 102 on the basis of the exception contained in paragraph (d)(4) of such Rule. Application of Rule 102 in this context would not further the anti-manipulative purposes of the Rule. Alternatively, the Trust requests that the Commission grant an exemption under paragraph (e) of Rule 102 to such effect. Application of Rule 102 in this context would not further the anti-manipulative purpose of this Rule.

The purpose of Rule 102 is to prevent persons from manipulating the price of a security during a distribution and to protect the integrity of the offering process by prohibiting activities that could artificially influence the market for that particular security.

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 a Portfolio Security held by the 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 the Fund at NAV in consideration principally for Portfolio Securities held by the Fund does not involve the abuses that Rule 102 was intended to prevent.

**PART V**

Based on the foregoing, 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.

Josephine J. Tao  
November 20, 2015  
Page 18

Thank you for your consideration of this request. Should you have any questions or require additional information, please do not hesitate to call the undersigned at 312-569-1167, or in my absence, Diana McCarthy at 215-988-1146.

Very truly yours,

A handwritten signature in cursive script that reads "Veena K. Jain". The signature is written in black ink and is positioned to the right of the typed name.

Veena K. Jain

VKJ