

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88301A)

February 28, 2020

Order Granting Limited Exemptions from Exchange Act Section 11(d)(1) to ActiveShares ETF Trust

I. INTRODUCTION

By letter dated February 28, 2020 (the “Letter”),¹ as supplemented by conversations with the staff of the Division of Trading and Markets, ActiveShares ETF Trust (the “Trust”), on behalf of itself, ClearBridge Focus Value ETF (the “Initial Fund”) and any additional series of the Trust, and any other open-end management investment companies operating under the same representations and adhering to the same conditions as set forth in the Letter and this Order (each a “Fund” and, collectively, the “Funds”), and any national securities exchange or national securities association on or through which shares (“Shares”) of the Funds subsequently trade (each such market, an “Exchange”), and persons or entities engaging in transactions in Shares (collectively, the “Requestors”), has requested that the Commission grant exemptive, interpretive or no-action relief from Section 11(d)(1) of the Securities Exchange Act of 1934 (“Exchange Act”), in connection with secondary market transactions in Shares and the creation and redemption of Creation Units.

II. BACKGROUND

Shares of the Funds will be issued by a Trust that is registered with the Commission under the Investment Company Act of 1940, as amended (the “1940 Act”), as an open-end management investment company. The Funds will be listed on an Exchange and will also be actively managed by an investment adviser registered under the Investment Advisers Act of 1940, and may be sub-advised by other registered investment advisers.

¹ Each defined term in this order has the same meaning as defined in the Letter, unless otherwise noted.

The Initial Fund, and each subsequent Fund, will be an “exchange-traded fund” (“ETF”) as that term is defined in Rule 6c-11 under the 1940 Act.² The Funds will invest only in ETFs, exchange-traded notes, exchange listed common stocks, exchange-traded preferred stocks, exchange-traded American Depositary Receipts, exchange-traded real estate investment trusts, exchange-traded commodity pools, exchange-traded metals trusts, exchange-traded currency trusts and exchange-traded futures that, in each case, trade on a U.S. Exchange contemporaneously with the Shares, as well as cash and cash equivalents. The Initial Fund will be classified as “diversified” under the 1940 Act. Moreover, each Fund intends to maintain the required level of diversification, and otherwise conduct its operations, so as to meet the regulated investment company diversification requirements of the Internal Revenue Code of 1986, as amended.

There are two material differences in the operation of the Funds compared to other ETFs. First, the Funds will not, on each Business Day, prior to the opening of the New York Stock Exchange, Inc., disclose on their websites, the identities and quantities of the securities and other assets held by such Fund (the “Portfolio Securities”) that will form the basis for a Fund’s calculation of net asset value at the end of the Business Day. Instead, the Funds will calculate and disseminate through the facilities of the Consolidated Tape Association a verified indicative intraday value every second throughout the trading day. Second, in connection with the purchase or redemption of Creation Units, because the Funds will not disclose their current Portfolio Securities on a daily basis, the delivery of any Portfolio Securities in-kind will be effected

² See generally Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019) [84 FR 57162 (Oct. 24, 2019)]. The Funds will not rely on Rule 6c-11 and instead will rely on an exemptive order (the “ActiveShares ETF Order”) issued under the Investment Company Act of 1940 that provides for operation of actively-managed ETFs that do not provide daily portfolio disclosures or another order granted by the Commission that is substantially similar to the ActiveShares ETF Order.

through a Confidential Account with an AP Representative for the benefit of the Authorized Participant³ that is purchasing or redeeming Creation Units without disclosing the identity of such Portfolio Securities to the Authorized Participant, or anyone else.

The Requestors seek relief from Section 11(d)(1) with respect to certain transactions effected by broker-dealers with respect to Fund Shares. Specifically, the Requestors are seeking an exemption from Section 11(d)(1) to permit broker-dealers to extend or maintain or arrange for the extension of maintenance of credit to or for customers on Shares of Funds for which such broker-dealer serves as an Authorized Participant. The Requestors also are seeking an exemption from Section 11(d)(1) to permit broker-dealers that do not act as Authorized Participants for a Fund, but that effect transactions in Shares of such Fund exclusively in the secondary market, to extend or maintain or arrange for the extension or maintenance of credit to or for customers on Shares in the secondary market. The Requestors represent that the forms of relief requested are substantially similar to those actions that the Commission and Staff have taken in similar circumstances.

III. DISCUSSION

Section 11(d)(1) generally prohibits a person that is both a broker and a dealer from extending or maintaining credit, or arranging for the extension or maintenance of credit, to or for a customer on any security (other than an exempted security) that was part of a distribution of a new issue of securities in which the broker-dealer participated as a member of a selling syndicate or group within thirty days prior to such transaction. Because ETF shares are in continuous

³ As described in the Letter, an “Authorized Participant” is a broker-dealer that is either (1) a participant in the Continuous Net Settlement System of the National Securities Clearing Corporation, a clearing agency registered with the Commission and affiliated with the Depository Trust Company (“DTC”), or (2) a DTC participant, which in either case has executed an agreement with the Fund’s distributor, with respect to creations and redemptions of Creation Units and a Confidential Account Agreement with an AP Representative.

distribution, broker-dealers selling such securities are participating in the “distribution” of new issue securities with respect to ETF shares, and thus continuously subject to the restrictions of Section 11(d)(1). As a result, absent relief, Authorized Participants that enter into a contractual arrangement with an ETF or one of its service providers that allows the Authorized Participant to place orders for the purchase or redemption of creation units are prohibited from providing or arranging for credit for their customers that purchase Shares.

Based on the representations and facts presented in the Letter, and subject to the conditions below, the Commission finds that it is necessary and appropriate in the public interest and consistent with the protection of investors to grant a conditional exemption from the new issue lending restriction in Section 11(d)(1) to a broker-dealer that extends or maintains credit, or arranges for the extension or maintenance of credit, to or for customers on shares for which the broker-dealer serves as an Authorized Participant, subject to both of the following two conditions:

1. Neither the broker-dealer, nor any natural person associated with such broker-dealer, directly or indirectly (including through any affiliate of such broker-dealer), receives from the “Fund Complex”⁴ any payment, compensation, or other economic incentive to promote or sell the Shares of the Fund to persons outside the Fund Complex, other than non-cash compensation currently permitted under Financial Industry and Regulatory Authority (“FINRA”) Rule 2341(1)(5)(A), (B), or (C) (“non-cash compensation”).

⁴ For purposes of this relief request, a “Fund Complex” means the issuer of the Shares, any other issuer of Shares that holds itself out to investors as a related company for purposes of investment or investor services, any investment adviser of a Fund, the Distributor for the Fund, or any affiliated person (as defined in the 1940 Act) of an investment adviser and the Distributor.

2. The broker-dealer does not extend, maintain or arrange for the extension or maintenance of credit to or for a customer on Shares of the Fund before thirty days have passed from the date that the Fund's Shares initially commence trading (except to the extent that such extension, maintenance, or arranging of credit is otherwise permitted pursuant to Rule 11d1-1).

This exemption permits an Authorized Participant to accept only limited forms of non-cash compensation that do not present broker-dealers with the types of potential conflicts of interest in their sale of securities that Section 11(d)(1) addresses.⁵ In addition, requiring an Authorized Participant to wait thirty days before margining its customers' ETF shares is consistent with the Section 11(d)(1) prohibition against a broker-dealer extending credit on securities that were part of a new issue, if the broker-dealer participated in the distribution of the new issue securities within the preceding thirty days. Thus, this condition ensures that Authorized Participants do not use credit to induce customers to buy ETF shares for at least a 30-day period following launch of the ETF, similar to the prohibition against extending credit that applies to other types of new issue securities under Section 11(d)(1).

In addition, the Commission finds that it is appropriate and in the public interest and consistent with the protection of investors to provide a conditional exemption from Section 11(d)(1) to permit broker-dealers (other than a Fund's distributor) that do not act as Authorized Participants for a Fund, but that effect transactions in Shares exclusively on the secondary market, to extend or maintain or arrange for the extension or maintenance of credit on Shares in connection with such secondary market transactions, provided that the broker-dealer does not (and its associated persons who are natural persons do not), directly or indirectly (including

⁵ See Exchange Act Release No. 21557 (Dec. 18, 1984), 49 FR 50172 at 50173-74 (Dec. 27, 1984) (available at: <https://cdn.loc.gov/service/ll/fedreg/fr049/fr049250/fr049250.pdf>).

through any affiliate of such broker-dealer), receive from the Fund Complex any payment, compensation or other economic incentive to promote or sell the Shares of the Fund to persons outside the Fund Complex, other than non-cash compensation permitted under FINRA Rule 2341(1)(5)(A), (B), or (C).

IV. CONCLUSION

In light of the above, and in accordance with Exchange Act Section 36, the Commission finds that conditionally exempting broker-dealers that engage in certain transactions in securities of the Funds from the requirements of Section 11(d)(1) of the Exchange Act is necessary and appropriate in the public interest, and consistent with the protection of investors.⁶

IT IS HEREBY ORDERED, pursuant to its authority under Section 36 of the Exchange Act, based on the representations and facts presented in the Letter and subject to the conditions discussed above, that an Authorized Participant that extends credit or maintains or arranges for the extension or maintenance of credit on Shares in connection with creation and redemption transactions is exempt from the requirements of Section 11(d)(1).

IT IS FURTHER ORDERED, pursuant to its authority under Section 36 of the Exchange Act, based on the representations and facts presented in the Letter and subject to the conditions discussed above, that a broker-dealer that does not act as an Authorized Participant (other than the Fund's distributor) and effects transactions in Shares exclusively in the secondary market, is exempt from Section 11(d)(1) when it extends or maintains, or arranges for the extension or maintenance of credit to or for customers on such Shares.

⁶ Exchange Act Section 36 [15 U.S.C. §78mm]. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt, by rule, regulation, or order any person, security, or transaction (or any class or classes of persons, securities, or transactions) from any provision of the Exchange Act or any rule or regulation thereunder, to the extent such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

This exemptive relief is subject to modification or revocation at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. 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. Responsibility for compliance with these and any other applicable provisions of the federal securities laws must rest with the persons relying on this exemption. This order should not be considered a view with respect to any other question that the proposed transactions may raise, including, but not limited to the adequacy of the disclosure concerning, and the applicability of other federal or state laws to, the proposed transactions.

For the Commission, by the Division of Trading and Markets pursuant to delegated authority.⁷

J. Matthew DeLesDernier
Assistant Secretary

⁷ 17 CFR 200.30-3(a)(6), (9), (32), and (62).