

*File Support*



DIVISION OF TRADING AND MARKETS

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



10047212

June 18, 2010

Act	1934, SECURITIES EXCHANGE ACT
Section	.
Rule	10b-17, REG M RULES 101 and 102
Public Availability	JUNE 18, 2010

W. John McGuire, Esq.  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004

**Re: AdvisorShares Trust Actively-Managed Exchange Traded Fund,  
WCM/BNY Mellon Focused Growth ADR  
File No. TP 10-19**

Dear Mr. McGuire:

In your letter dated June 18, 2010, as supplemented by conversations with the staff of the Division of Trading and Markets ("Division"), AdvisorShares Trust (the "Trust") on behalf of itself, the Fund, any national securities exchange or national securities association on or through which shares issued by the Fund ("Shares") may subsequently trade, and persons or entities engaging in transactions in Shares, requests exemptions from, or interpretive or no-action relief from Rule 10b-17 of the Securities Exchange Act of 1934, as amended ("Exchange Act"), and Rules 101 and 102 of Regulation M in connection with secondary market transactions in Shares and the creation or redemption of Creation Units as discussed in your letter. 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 July 30, 2007, 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 one series, the Dent Tactical ETF (the "Original Fund"), and has completed the registration of another exchange traded fund ("ETF"), the WCM/BNY Mellon Focused Growth ADR ETF (the "Fund"). At this time, you are only requesting relief related to the Fund. The Fund's objective is long-term capital appreciation and will consist of a portfolio of ADRs and other U.S. traded securities of non-U.S. organizations. While the Fund will not seek to track the performance of an underlying index, the Fund will in all other material respects, comply with conditions that have been applied to other actively managed ETFs that invest in equities. In your letter, you represent the following:

- Shares of the Fund will be issued by an open-end management investment company that is registered with the Commission;
- The Fund will continuously redeem, at net asset value ("NAV"), Creation Unit aggregations of at least 25,000 Shares valued at a minimum of \$500,000, and the

secondary market price of the Shares should not vary substantially from the NAV of such Shares;

- Shares of the Fund will be listed and traded on the NYSE Arca;
- The Fund will hold 20 or more Portfolio Securities with no one Portfolio Security constituting more than 25% of the Fund;
- At least 70% of the Fund will be comprised of Portfolio 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;
- On each Business Day before commencement of trading in Shares on the Exchange, the Fund will disclose on its website the identities and quantities of the securities and other assets held by the Fund, which will form the basis for the calculation of the Fund’s NAV at the end of the Business Day;
- The Exchange or other information provider will disseminate every 15 seconds throughout the trading day through the facilities of the Consolidated Tape Association an amount representing on a per Share basis, the sum of the current value of the In-Kind Creation Securities and the estimated Cash Component;
- The arbitrage mechanism will be facilitated by the transparency of the Fund’s portfolio and the availability of the IIV, the liquidity of its Portfolio Securities, and the ability to access those securities, as well as the arbitrageurs’ ability to create workable hedges;
- The Fund will solely invest in liquid securities;
- The Fund will invest in Portfolio Securities with liquidity levels that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges;
- Arbitrageurs are expected to take advantage of price variations between the Fund’s market price and its NAV; and
- A close alignment between the Fund’s market price and the Fund’s NAV is expected.

*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 exceptions, prohibits any “distribution participant” and its “affiliated purchasers” from bidding for, purchasing, or attempting to induce any person to bid for or purchase any security which is the subject of a distribution until after the applicable restricted period except as specifically permitted in the Regulation. 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 the NAV Creation Unit size aggregations of the Shares of the Fund, and the secondary market price of the Shares of the Fund should not vary substantially from the NAV of such Shares, which is based on the identity and quantity of the securities and the other assets held by the Fund, the Division hereby confirms that the Trust is excepted under paragraph (c)(4) of Rule 101 of Regulation M with respect to the Fund thus permitting persons who may be deemed to be participating in a distribution of Shares of the Fund to bid for or purchase such Shares during their participation in such distribution.<sup>1</sup>

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<sup>1</sup> We note that Regulation M does not prohibit a distribution participant and its affiliated purchasers from bidding for and purchasing portfolio 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.

The Division also confirms the interpretation of Rule 101 of Regulation M that a redemption of Creation Unit size aggregations of Shares of the Fund and the receipt of In-Kind Redemption Securities in exchange therefor by a participant in a distribution of Shares of the Fund would not constitute an “attempt to induce any person to bid for or purchase a covered security, during the applicable restricted period” within the meaning of 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 the NAV Creation Units of Shares of the Fund, the Division hereby confirms that the Trust is excepted under paragraph (d)(4) of Rule 102 of Regulation M with respect to the Fund, thus permitting the Fund to redeem Shares of the Fund during the continuous offering of such Shares.

*Rule 10b-17*

Rule 10b-17, with certain exceptions, requires an issuer of a class of publicly traded securities to give notice of certain specified actions (for example, a dividend distribution, 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>2</sup>

These exemptions and interpretations are subject to modification or revocation if

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<sup>2</sup> We also note that compliance with Rule 10b-17 would be impractical in light of the nature of the Fund. 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.

W. John McGuire  
Morgan, Lewis & Bockius LLP  
June 18, 2010  
Page 5 of 5

at any time the Commission or Division determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, persons relying on these exemptions and interpretations 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 and interpretations.

The Division 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,



Josephine J. Tao  
Assistant Director

Attachment

Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
Tel. 202.739.3000  
Fax: 202.739.3001  
www.morganlewis.com

**Morgan Lewis**  
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SEC / TM

**W. John McGuire**  
Partner  
202.739.5654  
wjmcguire@MorganLewis.com

June 18, 2010

Josephine J. Tao, Esq.  
Assistant 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 by Actively-Managed Exchange Traded Fund for Exemptive, Interpretive or No-Action Relief from Rule 10b-17, and Rules 101 and 102 of Regulation M, promulgated under the Securities Exchange Act of 1934**

Dear Ms. Tao:

We are writing on behalf of AdvisorShares Trust ("Trust"). The Trust is an open-end series management investment company organized on July 30, 2007 as a Delaware statutory trust. The Trust currently offers shares of one series, the Dent Tactical ETF (the "Original Fund"), and has completed the registration of another exchange traded fund ("ETF"), the WCM/BNY Mellon Focused Growth ADR ETF (the "Fund").

## **Background**

On April 13, 2010, the Trust filed with the Securities and Exchange Commission (the "Commission" or the "SEC") an exemptive application (File No. 812-13677) seeking the relief from various provisions of the Investment Company Act of 1940, as amended ("1940 Act")

necessary to operate as an ETF. An order granting the requested relief was issued on May 28, 2010.<sup>1</sup> The Trust plans to list on an exchange (an "Exchange") shares of the Fund ("Shares") with trading commencing as soon as practicable.

The Trust on behalf of itself, the Fund, and any national securities exchange or national securities association on or through which the shares subsequently trade and persons or entities engaging in transactions in Shares issued by the Fund, as applicable, request that the SEC grant exemptive, interpretive or no-action relief from Rule 10b-17 under the Securities Exchange Act of 1934 (the "Exchange Act"), and Rules 101 and 102 of Regulation M, in connection with secondary market transactions in Shares and the creation and redemption of Creation Units, as discussed below.

The Trust will issue and redeem Shares of the Fund in Creation Units of at least 25,000 Shares, with a minimum market value of \$500,000. The Trust filed an amendment to its registration statement on Form N-1A which has become effective, and will have the Shares listed on the NYSE Arca. The Trust is overseen by a board of trustees (the "Board") that will maintain the composition requirements of Section 10 of the 1940 Act. The Fund will adopt fundamental policies consistent with the 1940 Act and be classified as "diversified" under the 1940 Act. The 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. The Fund will under normal circumstances invest at least 80% of its assets in U.S. traded securities of non-U.S. organizations (usually American Depositary Receipts ("ADRs")), with the remainder in cash and cash items

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<sup>1</sup> Investment Company Act Rel. No. 29291 (May 28, 2010).

which are government securities. With one minor clarification, we believe that the Additional Fund complies with the conditions that have been applied to actively managed ETFs which invest in equities.<sup>2</sup>

The Staff has previously issued relief identical to that requested herein to other actively-managed ETFs.<sup>3</sup> The Grail Letter provided relief specific to the fund described therein and, therefore, the Trust and the Fund are not entitled to rely on the Grail Letter for relief. The Trust and the Fund note, however, that their proposal—the creation and issuance by an actively-managed investment company of shares that individually trade on an Exchange, but that can only be purchased from and redeemed with the issuing investment company in large aggregations—is no longer novel. The Commission has in the past sixteen years considered and approved many similar proposals. Some of the index-based products for which relief has been granted have been trading publicly for years, and the Trust is not aware of any abuses associated with them. Indeed, several of the index-based products have been so embraced by investors that they are routinely among the highest volume securities on the exchanges on which they trade.<sup>4</sup>

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<sup>2</sup> Letter from Josephine Tao, Assistant Director, Division of Market Regulation, to Stacy L. Fuller, Esq. K&L Gates LLP (April 30, 2009) re: Grail Advisors ETF Trust (“Grail Letter”).

<sup>3</sup> See Grail Letter. In the May 9, 2008 letter from Josephine Tao to Wisdom Tree Trust, it was stated that the Staff would not respond to requests for relief under Section 11(d)(1) or Rules 10b-10, 11d1-2, 15c1-5, and 15c1-6 relating to ETFs that are not managed to track a particular index unless they present novel or unusual issues. Because the Trust does not believe that the creation, redemption, listing or trading of Shares should present any novel or unusual issues, the Trust does not request relief from Section 11 (d)(1) or Rules 10b-10, 11d1-2, 15c1-5 and 15c1-6 under the Exchange Act. As indicated below, the Board has authorized a Distribution and Service Plan (“Plan”) pursuant to Rule 12b-1 under the 1940 Act, but no such fee is currently being paid by the Fund and the Board has not approved any payments for the current fiscal year. We understand that the exemptive and no-action relief under Section 11(d)(1) would not be available to any broker-dealer that received 12b-1 fees under the Plan. See Letter from Catherine McGuire, Esq., Chief Counsel Division of Market Regulation to the Securities Industry Association Derivative Products Committee, dated November 21, 2005 (the “SIA Letter”).

<sup>4</sup> The SEC has previously granted exemptive or no-action relief under Rules 10a-1, 10b-6, 10b-7, 10b-10, 10b-13, 10b-17, 11 d1-2, 15c1-5, 15c1-6 and Regulation M under the Exchange Act similar to that requested here. See e.g., Letter from Nancy Sanow, Assistant Director, Division of Market Regulation



The Grail letter was based on the following seven representations:

- 1. Shares of the . . . ETF will be issued by an open-end management investment company that is registered with the Commission;*
- 2. The . . . ETF will continuously redeem, at net asset value ("NAV"), Creation Unit aggregations of 50,000 Shares, and the secondary market price of the Shares should not vary substantially from the NAV of such Shares;*
- 3. Shares of the . . . ETF will be listed and traded on an Exchange;*
- 4. The . . . ETF will hold twenty or more Portfolio Securities with no one Portfolio Security constituting more than 25% of total value of each ETF;*
- 5. At least 70% of the . . . ETF will be comprised of Portfolio Securities that meet the minimum public float and minimum average daily trading volume thresholds under the "actively-traded securities"*

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to James Duffy, Senior Vice President and General Counsel, AMEX, dated January 22, 1993 with respect to trading of SPDR Trust, Series 1; Letter from Nancy Sanow, Assistant Director, Division of Market Regulation to James Duffy, Senior Vice President and General Counsel, AMEX, dated April 21, 1995 with respect to trading of MidCap SPDR Trust; Letters from Larry E. Bergman, Senior Associate Director, Division of Market Regulation to Stuart M. Strauss, Gordon Altman Butowsky, dated December 14, 1998 and December 22, 1998, respecting the trading of the Select Sector SPDR Trust; Letter from James Brigagliano, Assistant Director, Division of Market Regulation to James Duffy, Senior Vice President and General Counsel, AMEX, dated March 3, 1999 with respect to the trading of the Nasdaq 100 Trust; Letter from James Brigagliano, Assistant Director, Division of Market Regulation to Kathleen Moriarty, Carter, Ledyard & Milburn dated May 16, 2000 with respect to the trading of the iShares Trust; Letter from James Brigagliano, Assistant Director, - Division of Market Regulation, to Stuart Strauss, Mayer, Brown & Matt dated September 26, 2000 with respect to the trading of the streetTRACKS® Series Trust; Letter from James Brigagliano, Assistant Director, Division of Market Regulation to W. John McGuire, Morgan, Lewis & Bockius LLP dated July 25, 2002 with respect to the trading of various series funds of the iShares Trust; Letter from James Brigagliano, Assistant Director, Division of Market Regulation, to Stuart Strauss, Mayer, Brown Rowe & Maw dated October 21, 2002 with respect to the trading of the Fresco<sup>SI</sup> Index Shares Fund; Letter from James Brigagliano, Assistant Director, Division of Market Regulation to Jack P. Drogin, Morgan, Lewis & Bockius LLP dated September 25, 2003 with respect to the trading of the iShares Lehman U.S. Treasury Inflation Protected Securities Fund and the iShares Lehman U.S. Aggregate Bond Fund (each a series of the iShares Trust).

*definition found in Regulation M for excepted securities;*

*6. On each Business Day before commencement of trading in Shares on the Exchange, the . . .  
ETF will disclose on its website the identities and quantities of the securities and other assets held by the .  
. . . ETF, which will form the basis for the . . . ETF's calculation of NAV at the end of the Business Day;  
and*

*7. The Exchange or other information provider will disseminate every 15 seconds throughout the  
trading day through the facilities of the Consolidated Tape Association an amount representing on a per  
Share basis, the sum of the current value of the In-Kind Creation Securities and the estimated Cash  
Component.*

The Fund is not an index-based ETF investing in securities and therefore is ineligible to rely on the class relief letter available to equity ETFs.<sup>5</sup> The Fund will comply with the seven representations from the Grail Letter except for representation 2. As to representation 2, the Fund represents that it will continuously redeem, at net asset value (“NAV”), Creation Unit Aggregations of at least 25,000 Shares valued at the minimum of \$500,000 and the secondary market price of the Shares should not vary substantially from the NAV of such Shares. The sole difference is that the minimum Creation Unit Aggregation in the Grail Letter was 50,000 shares.

The Fund will meet the following conditions, as applicable:

- Shares of the Fund will be issued by an open-end management investment company that is registered with the Commission;

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<sup>5</sup> Letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Stuart M. Strauss, Esq., Clifford Chance US LLP (October 24, 2006)(“Equity ETF Class Relief Letter”).

- The Fund will continuously redeem, at NAV, Creation Unit Aggregations of at least 25,000 Shares valued at a minimum of \$500,000, and the secondary market price of the Shares should not vary substantially from the NAV of such Shares;
- Shares of the Fund will be listed and traded on the NYSE Arca;
- The Fund will hold 20 or more Portfolio Securities with no one Portfolio Security constituting more than 25% of the Fund;
- At least 70% of the Fund will be comprised of Portfolio 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;
- On each Business Day before commencement of trading in Shares on the Exchange, the Fund will disclose on its website the identities and quantities of the securities and other assets held by the Fund, which will form the basis for the Fund's calculation of NAV at the end of the Business Day; and
- The Exchange or other market information provider will disseminate every 15 seconds throughout the trading day through the facilities of the Consolidated Tape Association an amount representing on a per Share basis, the sum of the current value of the Portfolio Securities to be used in calculating the NAV of the Fund at the end of the Business Day and the estimated Cash Component.

### **The Fund and its Investment Objective**

AdvisorShares Investments, LLC (the "Manager") will serve as the investment adviser to the Fund. The Fund is sub-advised by WCM Investment Management ("WCM"), a

California corporation organized in 1976. WCM, in consultation with the Manager, handles day-to-day portfolio management of the Fund's assets and is primarily responsible for selecting portfolio securities for the Fund.

The Fund's investment objective is long-term capital appreciation. The investment objective of the Fund is "non-fundamental" and may be changed without a shareholder vote. WCM seeks to achieve the Fund's investment objective by selecting a portfolio of ADRs and other U.S. traded securities of non-U.S. organizations. WCM's core philosophy is to invest in industry-leading non-US organizations, led by visionary management teams with sound business strategies. WCM believes that concentration is an important component in achieving long-term growth and will typically have 20-30 holdings. WCM believes that using their portfolio construction guidelines, 20-30 companies provide sufficient diversification and risk control.

### **Availability of Information**

On each day the Fund is open (a "Business Day"),<sup>6</sup> before commencement of trading in Shares on the Exchange, it will disclose on its website the identities and quantities of the securities and other assets held by the Fund that will form the basis for its calculation of NAV at the end of the Business Day. The website and information will be publicly available at no charge. See also "Sales of ETF Shares" below describing the daily disclosure of In-Kind Creation Securities and "Calculation of Intraday Indicative Value" below.

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<sup>6</sup> A Business Day is any day on which the Exchange is open for business.

### **Sales of ETF Shares**

Foreside Fund Services, LLC, a registered broker-dealer under the Exchange Act and member of the Financial Industry Regulatory Authority (“Distributor”), acts on an agency basis as the Fund’s principal underwriter. The Distributor will not maintain a secondary market in Shares. The Exchange will designate one or more member firms to act as a market maker and maintain a market for Shares traded on that Exchange. No secondary sales will be made to brokers or dealers at a concession by the Distributor or by the Fund.

The Fund will sell Shares to investors only in Creation Units through the Distributor on a continuous basis at the NAV per share next determined after an order in proper form is received. In order to keep costs at a low level and permit the Fund to be as fully invested as possible, Shares will be purchased in Creation Units generally in exchange for the deposit, by the purchaser, of a particular portfolio of securities (“In-Kind Creation Securities”)<sup>7</sup>, designated by the Manager or WCM, together with the deposit or refund of a specified cash payment as the case may be (“Cash Component”--collectively with the In-Kind Creation Securities, a “Fund Deposit”). The Fund will issue and sell Shares on any Business Day. The NAV will be determined as of the close of the regular trading session on the NYSE Arca (ordinarily 4:00 p.m. Eastern time) (the “Closing Time”) on each Business Day.

The Trust expects that the In-Kind Creation Securities will generally consist of a *pro rata* basket of the Fund's portfolio.<sup>8</sup> The Cash Component will be equal to the difference, if any,

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<sup>7</sup> The Fund reserves the right to require Creation Units to be purchased for cash.

<sup>8</sup> *Ibid.*

between the NAV per Creation Unit and the market value per Creation Unit of the In-Kind Creation Securities.

In order to defray the transaction expenses, including brokerage costs that will be incurred by the Fund when investors purchase or redeem Creation Units, it will impose purchase or redemption transaction fees ("Transaction Fees") to be borne only by such purchasers or redeemers.

Creation Units will be aggregations of at least 25,000 Shares. The Trust recognizes that each Share is issued by an investment company and, accordingly, the acquisition of any Shares by an investment company, whether acquired from the Fund or in the secondary market, will be subject to the restrictions of Section 12(d)(1) of the 1940 Act except as permitted by an exemptive order that permits investment companies to invest in the Fund beyond those limitations.

Bank of New York Mellon (the "Custodian") will be the Fund's custodian and, in consultation with the Manager and WCM, will, through the facilities of the National Securities Clearing Corporation (the "NSCC"), make available on each Business Day, immediately prior to the opening of trading on the Exchange, a list of the names and the required number of shares of each In-Kind Creation Security included in the current Fund Deposit (based on information at the end of the previous Business Day) for the Fund. Such Fund Deposit will be applicable, subject to any adjustments as described below, in order to effect purchases of Creation Units until such time as the next-announced Fund Deposit composition is made available. In the same manner, the Custodian also will make available the previous day's Cash Component as well as the estimated Cash Component for the current day.

Creation Units may be purchased through orders placed to the Distributor through an "Authorized Participant" which is either (1) a "Participating Party," i.e., a broker-dealer or other participant in the Clearing Process through the Continuous Net Settlement System of the NSCC, a clearing agency that is registered with the Commission, or (2) a DTC Participant, which in either case has executed an agreement with the Distributor, with respect to creations and redemptions of Creation Units ("Participant Agreement"). An investor does not have to be an Authorized Participant, but must place an order through, and make appropriate arrangements with, an Authorized Participant. The Distributor will be responsible for transmitting orders to the Fund. Authorized Participants making payment for Creation Units placed through the Distributor must either (1) initiate instructions through the Continuous Net Settlement System of the NSCC as such processes have been enhanced to effect purchases and redemptions of Creation Units (the "Clearing Process") or (2) deposit the Fund Deposit with the Trust "outside" the Clearing Process through the facilities of DTC as described in the SAI.

All orders to create a Creation Unit must be received no later than the Closing Time on the date such order is placed, as described in the Participant Agreement, in order for creation of Creation Units to be effected based on the NAV of Shares, as next determined on such date.

### **Redemption of Shares**

Beneficial owners of Shares must accumulate enough Shares to constitute a Creation Unit in order to redeem through an Authorized Participant. Creation Units will be redeemable at the NAV next determined after receipt of a request for redemption by the Fund. Shares generally will be redeemed in Creation Units in exchange for a particular portfolio of

securities<sup>9</sup> ("In-Kind Redemption Securities").<sup>10</sup> The Trust will redeem Shares of the Fund on any Business Day. Consistent with the provisions of Section 22(e) of the 1940 Act and Rule 22e-2 under the 1940 Act, the right to redeem will not be suspended, nor payment upon redemption delayed, except as provided by Section 22(e) of the 1940 Act. Redemption requests must be received by the Closing Time on a given Business Day to be redeemed that day. The Custodian, through the NSCC, will make available immediately prior to the opening of business on the Exchange (currently 9:30 a.m. Eastern time) on each Business Day, the list of In-Kind Creation Securities (the "Creation List") which will be applicable to a purchase and the list of In-Kind Redemption Securities (the "Redemption List") that will be applicable (each subject to possible amendment or correction in light of an administrative error in compiling the Creation or Redemption List) to redemption requests received in proper form on that day. In some instances, the Creation List may differ slightly from the Redemption List. The In-Kind Creation Securities and In-Kind Redemption Securities may differ as a result of revisions to the Fund's portfolio or as a result of corporate actions.

The Fund will have the right to make a redemption payment in cash, in-kind or a combination of each, provided the value of the payment equals the NAV of the Creation Unit being redeemed. The Trust currently contemplates that, unless cash redemptions are available or specified for the Fund, the redemption proceeds for a Creation Unit generally will consist

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<sup>9</sup> The Fund reserves the right to redeem Creation Units for cash.

<sup>10</sup> The Fund will comply with the federal securities laws in accepting In-Kind Creation Securities and satisfying redemptions with In-Kind Redemption Securities, including that the In-Kind Creation Securities and In-Kind Redemption Securities are sold in transactions that would be exempt from registration under the Securities Act of 1933, as amended (the "Securities Act").



of In-Kind Redemption Securities<sup>11</sup> plus or minus a "Cash Redemption Amount" as the case may be (collectively, an "ETF Redemption"). The Cash Redemption Amount is cash in an amount equal to the difference between the NAV of the Creation Unit being redeemed and the market value of the In-Kind Redemption Securities. A redeeming investor will pay Transaction Fees calculated in the same manner as Transaction Fees payable in connection with the purchase of a Creation Unit. To the extent that any amounts payable to the Fund by the redeeming investor exceed the amount of the Cash Redemption Amount, the investor will be required to deliver payment to the Fund.

#### **Depository Trust Company**

DTC serves as securities depository for the Shares. The Shares may be held only in book-entry form. DTC, or its nominee, is the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or its participants ("DTC Participants") (i.e., securities brokers and dealers, banks, trust companies, clearing corporations and certain other organizations), some of whom (and/or their representatives) own DTC. Beneficial owners of Shares are not entitled to have Shares registered in their names, and will not receive or be entitled to receive physical delivery of certificates.

Accordingly, to exercise any rights as a holder of Shares, each beneficial owner must rely on the procedures of: (i) DTC; (ii) DTC Participants; and (iii) 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 interests.

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<sup>11</sup> The Fund reserves the right to redeem Creation Units for cash.

### **Calculation of Intraday Indicative Value**

The Exchange or other market information provider will disseminate every 15 seconds throughout the trading day through the facilities of the Consolidated Tape Association an amount (the “IIV”) representing on a per Share basis, the sum of the current value of the Portfolio Securities to be used in calculating the Fund’s NAV at the end of the Business Day and the estimated Cash Component. The Trust is not involved in or responsible for the calculation or dissemination of any such amount and makes no warranty as to its accuracy.

### **The Trading Market**

The Shares will be listed and traded on the Exchange. Shares will be freely tradable on the Exchange throughout the trading session. The price of Shares trading on the Exchange will be based on a current bid/offer market. The trading market on the Exchange affords investors the opportunity to assume and liquidate positions in Shares at their discretion, permitting them to take advantage of prices at any time during the trading day. This combination of intraday liquidity with the Creation Unit purchase and redemption features creates potential arbitrage opportunities that, in turn, should and historically have proven to mitigate pricing inefficiencies. Indeed, the high degree of historical and expected correlation between ETFs' NAVs and their share prices contrasts with the case of shares of closed-end equity funds which, not having the ability to create and redeem at the fund level, typically trade at a material discount (or premium) to their underlying NAVs.

The arbitrage mechanism will be facilitated by the transparency of the Fund’s portfolio and the availability of the IIV, the liquidity of its Portfolio Securities and the ability to access

those securities, as well as the arbitrageurs' ability to create workable hedges. As discussed above, there will be disclosure on each Business Day of the Fund's Portfolio Securities and the IIV will be disseminated every 15 seconds throughout the trading session. The Fund will invest in Portfolio Securities with liquidity levels that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges. For these reasons, we expect arbitrageurs to be able to take advantage of price variations between the Fund's market price and its NAV. Thus, we expect a close alignment between the market price and the NAV.

We believe that, like the fund in the Grail Letter, the Fund will not present any new issues with respect to the exemptions which allow for current index-based ETFs to redeem their shares only in Creation Units. While we recognize that the potential for more significant deviations between a security's bid/ask price average and NAV exists with actively-managed ETFs, such deviations should not arise here, because the Fund's portfolio holdings will be fully transparent.<sup>12</sup> As noted previously, on each Business Day before commencement of trading in Shares on the Exchange, the Fund will disclose on its website the identities and quantities of the Portfolio Securities and other assets held by it that will form the basis for the calculation of NAV at the end of the Business Day. The website and information will be publicly available at no charge. Under accounting procedures followed by the Fund, trades made on the prior Business Day ("T") will be booked and reflected in NAV on the current Business Day ("T+1"). Accordingly, the Fund will be able to disclose, at the beginning of each Business Day, the Portfolio Securities and

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<sup>12</sup> The Board has authorized a Plan pursuant to Rule 12b-1 under the 1940 Act, but no such fee is currently being paid by the Fund and the Board has not approved any payments for the current fiscal year. We believe, if such fees are paid in the future, that such payments would not create more than *de minimis* additional deviations between the NAV and the market price of Shares.

other assets that will form the basis for the NAV calculation at the end of the same Business Day, whether or not the Manager or WCM makes trades for the portfolio during that Business Day. Since market participants will be aware at all times of the Fund's Portfolio Securities and other assets held by it that will form the basis for the NAV calculation, the risk of significant deviation between NAV and market price is similar to that which exists in the case of index-based ETFs.

### **Rule 101 of Regulation M**

Subject to certain enumerated exceptions, Rule 101 of Regulation M prohibits a "distribution participant," in connection with a distribution of securities, from bidding for or purchasing, or from attempting to induce any person to bid for or purchase, a "covered security" during the applicable restricted period. "Distribution participant" is defined in Rule 100(b) to include an underwriter or prospective underwriter in a particular distribution of securities, or any broker, dealer or other person who has agreed to participate or is participating in such distribution. We note that Rule 100(b) of Regulation M defines "distribution" for purposes of such Rule as an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.

We understand that while broker-dealers that tender In-Kind Creation Securities to the Trust through the Distributor in return for Creation Unit(s) of Shares will not be part of a syndicate or selling group, and no broker-dealer will receive fees, commissions or other remuneration from the Trust or the Distributor for the sale of Creation Units, under certain

circumstances they could be deemed to be an "underwriter" or "distribution participant" as those terms are defined in Rule 100(b).

The Trust respectfully requests that the Commission or Staff grant exemptive, interpretive or no-action relief from Rule 101, as discussed below, to permit persons participating in a distribution of Shares to bid for or purchase, or engage in other secondary market transactions in, such Shares during their participation in such distribution.

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, the individual Shares 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 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 minimum condition of tendering 25,000 Shares (i.e., a Creation Unit), the Trust is intended to function like any other 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 Staff 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 paragraph (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 Shares in Creation Units may be redeemed, in-kind at NAV, on any Business Day. Holders of Shares also have the benefit of intra-day secondary market liquidity by virtue of the Exchange listing. Thus, the secondary market price of Shares should not vary substantially from the NAV of Shares. Because of the redeemability of Shares in Creation Units, coupled with the open-ended nature of the Fund, any significant disparity between the market price of the Shares and NAV should be eliminated by arbitrage activity. Because their NAV is largely determined based on the market value of the Portfolio Securities, neither the creation nor redemption of Shares, nor purchases or sales of Shares in the secondary market, will impact the NAV, and such transactions should not have a significant impact on the market value of Shares.

The Trust also respectfully requests relief from the provisions of Rule 101 to the extent necessary to permit persons or entities that may be deemed to be participating in the distribution of the Shares or a Portfolio Security of the Fund to tender Shares for redemption in Creation Units and to receive as part of redemption proceeds the In-Kind Redemption Securities of the Fund.

The Trust requests, in this regard, that the Staff confirm that the tender of the Shares to the Trust for redemption and the receipt of In-Kind Redemption Securities upon redemption does not constitute a bid for, or purchase of, any of such securities for the purposes of Rule 101, or alternatively, that the Commission or Staff grant exemptive or no-action relief to the extent

necessary to permit redemptions of Shares for In-Kind Redemption Securities as described above. Redemption entails no separate bid for any of the In-Kind Redemption Securities. Absent unusual circumstances, the Trust will not purchase In-Kind 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 In-Kind Redemption Securities. The Trust believes that the purchase of In-Kind Redemption Securities, while engaged in a distribution with respect to such securities, for the purpose of acquiring a Creation Unit aggregation of Shares should be exempted from Rule 101. The purpose of Rule 101 is to prevent persons from conditioning the market to facilitate a distribution. Application of Rule 101 in this context would not further the anti-manipulative purposes underlying the Rule.

As a general matter, the lack of any special financial incentive to create Creation Units, combined with a predictable lack of any meaningful potential for the issuance and the secondary market trading of the Shares to affect significantly Share pricing, application of Rule 101 to a broker-dealer or other person who may be participating in a distribution or broker-dealers or other persons in their creation and redemption activities, in their day-to-day ordinary business of buying and selling securities and the Shares, may undermine the potential beneficial market effect of Share trading.

### **Rule 102 of Regulation M**

The Trust also 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 that, for the reasons previously stated under our request with respect to

the exemption under Rule 101(c)(4), transactions in the Shares would be exempted from Rule 102 on the basis of the exception contained in paragraph (d)(4) of Rule 102.

Alternatively, the Trust respectfully 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 purposes underlying the 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 security in the Fund's portfolio during a distribution of such security. The Trust will redeem the Creation Units of Shares at the NAV of the Shares. Although the Shares will be traded on the secondary market, the Shares may only be redeemed in Creation Units. Thus, the Trust believes that the redemption by the Trust of the Shares at NAV in consideration principally for In-Kind Redemption Securities does not involve the abuses that Rule 102 was intended to prevent.

#### **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). 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.<sup>13</sup> Except for the fact that redemption is subject to the minimum condition of tendering 25,000 Shares, the Trust is intended to function like any other open-end fund continuously offering its shares.<sup>14</sup> It is in recognition of the foregoing that the Division of Investment Management issued an order 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 would be impractical in light of the nature of the Fund. 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. 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 Trust.

## **Conclusion**

Based on the foregoing, we respectfully request that the Commission and the Staff grant the relief requested herein. The forms of relief requested are substantially similar to those actions that the Commission and the Staff have taken in similar circumstances, most notably in the Grail Letter. If you have any questions please call me at (202) 739-5654 or my colleague Michael Berenson at (202) 739-5450.

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<sup>13</sup> See *supra* note 3.

<sup>14</sup> See *supra* note 3.

Josephine J. Tao, Esq.  
June 18, 2010  
Page 21

**Morgan Lewis**  
C O U N S E L O R S   A T   L A W

Sincerely,

A handwritten signature in cursive script that reads "W. John McGuire". The signature is written in black ink and is positioned above the printed name.

W. John McGuire

cc: Bradley Gude  
Michael Berenson

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