

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-76397; File No. TP 16-1)

November 9, 2015

Order Granting Limited Exemptions from Exchange Act Rule 10b-17 and Rules 101 and 102 of Regulation M to FlexShares Trust, FlexShares<sup>®</sup> Currency Hedged Morningstar DM ex-US Factor Tilt Index Fund, and FlexShares<sup>®</sup> Currency Hedged Morningstar EM Factor Tilt Index Fund Pursuant to Exchange Act Rule 10b-17(b)(2) and Rules 101(d) and 102(e) of Regulation M

By letter dated November 9, 2015 (the “Letter”), as supplemented by conversations with the staff of the Division of Trading and Markets, counsel for FlexShares Trust (the “Trust”), on behalf of the Trust, FlexShares<sup>®</sup> Currency Hedged Morningstar DM ex-US Factor Tilt Index Fund (the “DM Fund” or a “Fund”), FlexShares<sup>®</sup> Currency Hedged Morningstar EM Factor Tilt Index Fund (the “EM Fund” or a “Fund,” and together with the DM Fund, the “Funds”), any national securities exchange on or through which shares issued by the Funds (“Shares”) may subsequently trade, Foreside Fund Services, LLC (the “Distributor”), and persons or entities engaging in transactions in Shares (collectively, the “Requestors”), requested exemptions, 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 aggregations of Shares of at least 25,000 shares (“Creation Units”).

The Trust is registered with the Securities and Exchange Commission (“Commission”) under the Investment Company Act of 1940, as amended (“1940 Act”), as an open-end management investment company. The DM Fund seeks to track the performance of the Morningstar<sup>®</sup> Developed Markets ex-US Factor Tilt Hedged Index<sup>SM</sup> (the “DM Index” or an “Index”), which consists of (a) the equity securities included in the Morningstar<sup>®</sup> Developed Markets ex-US Factor Tilt Index<sup>SM</sup> (the “DM Underlying Index” or an “Underlying Index”), and

(b) a currency hedging component (reflecting the effect of selling the foreign currencies included in the DM Index [the “Foreign Currencies”] forward each month), which is intended to mitigate exposure to fluctuations between the Foreign Currencies and the U.S. dollar. The DM Fund intends to track the DM Index by (a) holding shares of the FlexShares<sup>®</sup> Morningstar Developed Markets ex-US Factor Tilt Index Fund (the “DM Underlying ETF” or an “Underlying ETF”), an ETF whose investment objective is to seek investment results that correspond generally to the performance, before fees and expenses, of the DM Underlying Index, instead of the DM Fund investing directly in the shares of issuers of the individual securities of the DM Underlying Index, and (b) entering into forward currency contracts. Accordingly, the DM Fund intends to operate as an “ETF of ETFs.” Except for the fact that the DM Fund intends to operate as an ETF of ETFs and enter into forward currency contracts, the DM Fund will operate in a manner substantially identical to the DM Underlying ETF.

Similarly, the EM Fund seeks to provide investment results that closely correspond, before fees and expenses, to the performance of Morningstar<sup>®</sup> Emerging Markets Factor Tilt Hedged Index<sup>SM</sup> (the “EM Index” or an “Index”), which consists of (a) the equity securities included in the Morningstar<sup>®</sup> Emerging Markets Factor Tilt Index<sup>SM</sup> (the “EM Underlying Index” or an “Underlying Index”), and (b) a currency hedging component (reflecting the effect of selling the foreign currencies included in the EM Index [also the “Foreign Currencies”] forward each month), which is intended to mitigate exposure to fluctuations between the Foreign Currencies and the U.S. dollar. The EM Fund intends to track the EM Index by (a) holding shares of the FlexShares<sup>®</sup> Morningstar Emerging Markets Factor Tilt Index Fund (the “EM Underlying ETF” or an “Underlying ETF”), an ETF whose investment objective is to seek investment results that correspond generally to the performance, before fees and expenses, of the

EM Underlying Index, instead of the EM Fund investing directly in the shares of issuers of the individual securities of the EM Underlying Index, and (b) entering into forward currency contracts. Accordingly, the EM Fund intends to operate as an “ETF of ETFs.” Except for the fact that the EM Fund intends to operate as an ETF of ETFs, and enter into forward currency contracts, the EM Fund will operate in a manner substantially identical to the EM Underlying ETF.

The Requestors represent, among other things, the following:

- Shares of the Funds will be issued by the Trust, an open-end management investment company that is registered with the Commission;
- The Trust will continuously redeem Creation Units at net asset value (“NAV”), and the secondary market price of the Shares of each Fund should not vary substantially from the NAV of such Shares;
- Shares of the Funds will be listed and traded on the NYSE Arca (the “Exchange”) or other exchange in accordance with exchange listing standards that are, or will become, effective pursuant to Section 19(b) of the Exchange Act;
- Each ETF in which each Fund is invested will meet all conditions set forth in a relevant class relief letter;<sup>1</sup>

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<sup>1</sup> See, e.g., Letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Stuart M. Strauss, Esq., Clifford Chance US LLP (October 24, 2006) regarding class relief for exchange traded index funds; Letter from Catherine McGuire, Esq., Chief Counsel, Division of Market Regulation, to the Securities Industry Association Derivative Products Committee (November 21, 2005); Letter from Racquel L. Russell, Branch Chief, Division of Market Regulation, to George T. Simon, Esq., Foley & Lardner LLP (June 21, 2006); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Benjamin Haskin, Esq., Willkie Farr & Gallagher LLP (April 9, 2007); or Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to Domenick Pugliese, Esq., Paul, Hastings, Janofsky & Walker LLP (June 27, 2007).

- At least 70% of each Fund (not including the very small portion<sup>2</sup> of each Fund represented by the foreign currency contracts) is comprised of component securities that will 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 formation of the Funds;
- All the components of each Index (except for each Index’s currency hedging component)<sup>3</sup> will have publicly available last sale trade information;
- The intra-day proxy value of each Fund per share and the value of each Index will be publicly disseminated by a major market data vendor throughout the trading day;
- On each business day before the opening of business on the Exchange, the Funds’ custodian, through the National Securities Clearing Corporation, will make available publicly the list of the names and the numbers of securities and other assets (except the forward currency contracts) of each Fund’s portfolio that will be applicable that day to creation and redemption requests;
- 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 current value of the securities and cash to be deposited as consideration for the purchase of Creation Units;

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<sup>2</sup> While exact percentages are dependent on how the currency markets move, as a practical matter, each Fund is likely to have the vast majority of its assets invested in equities (i.e., investments in each Underlying ETF) rather than in forward currency contracts.

<sup>3</sup> While each Index’s currency hedging component does not have last sale information in the manner associated with equities, the prices for the relevant currency hedging contracts are publicly available.

- Each Fund will invest at least 80% of its total assets (but typically far more) in component securities of its Index by indirect investments through its Underlying ETF and by entering into forward currency contracts designed solely to hedge against its Fund’s exposure to fluctuations between the Foreign Currencies and the U.S. dollar;
- Each Fund will invest in securities that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges;
- The Requestors believe that arbitrageurs are expected to take advantage of price variations between each Fund’s market price and its NAV;
- The arbitrage mechanism will be facilitated by the transparency of each Fund’s portfolio and the availability of the intra-day indicative value, the liquidity of securities and other assets held by each Fund, and the ability to acquire such securities, as well as arbitrageurs’ ability to create workable hedges; and
- A close alignment between the market price of Shares of each Fund and that Fund’s NAV is expected.

### Regulation M

While redeemable securities issued by an open-end management investment company are excepted from the provisions of Rule 101 and 102 of Regulation M, the Requestors may not rely upon that exception for the Shares.<sup>4</sup> However, we find that it is appropriate in the public interest and is consistent with the protection of investors to grant a conditional exemption from Rules 101 and 102 to persons who may be deemed to be participating in a distribution of Shares and the Funds as described in more detail below.

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<sup>4</sup> While ETFs operate under exemptions from the definitions of “open-end company” under Section 5(a)(1) of the 1940 Act and “redeemable security” under Section 2(a)(32) of the 1940 Act, the Funds and their securities do not meet those definitions.

## Rule 101 of Regulation M

Generally, Rule 101 of Regulation M is an anti-manipulation rule 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 rule. 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. 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. The Shares are in a continuous distribution, and, as such, the restricted period in which distribution participants and their affiliated purchasers are prohibited from bidding for, purchasing, or attempting to induce others to bid for or purchase extends indefinitely.

Based on the representations and facts presented in the Letter, 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 each Fund and that a close alignment between the market price of Shares of each Fund and that Fund’s NAV is expected, the Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant the Trust an exemption under paragraph (d) of Rule 101 of Regulation M with

respect to the Funds, thus permitting persons participating in a distribution of Shares of each Fund to bid for or purchase such Shares during their participation in such distribution.<sup>5</sup>

#### 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.

Based on the representations and facts presented in the Letter, particularly that the Trust is a registered open-end management investment company that will redeem at the NAV Creation Units of Shares of each Fund and that a close alignment between the market price of Shares of each Fund and that Fund's NAV is expected, the Commission finds that it is appropriate in the public interest and consistent with the protection of investors to grant the Trust an exemption under paragraph (e) of Rule 102 of Regulation M with respect to the Funds, thus permitting each Fund to redeem Shares of such 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) relating to such class of securities in accordance with Rule 10b-17(b). Based on the representations and facts in the Letter, and subject to the conditions below, we find that it is

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<sup>5</sup> Additionally, we confirm the interpretation that a redemption of Creation Unit size aggregations of Shares of each Fund and the receipt of securities in exchange by a participant in a distribution of Shares of each 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 Rule 101 of Regulation M and, therefore, would not violate that rule.

appropriate in the public interest, and consistent with the protection of investors, to grant the Trust a conditional exemption from Rule 10b-17 because market participants will receive timely notification of the existence and timing of a pending distribution, and thus the concerns that the Commission raised in adopting Rule 10b-17 will not be implicated.<sup>6</sup>

### Conclusion

IT IS HEREBY ORDERED, pursuant to Rule 101(d) of Regulation M, that the Trust, based on the representations and the facts presented in the Letter, is exempt from the requirements of Rule 101 with respect to each Fund, thus permitting persons who may be deemed to be participating in a distribution of Shares of each Fund to bid for or purchase such Shares during their participation in such distribution.

IT IS FURTHER ORDERED, pursuant to Rule 102(e) of Regulation M, that the Trust, based on the representations and the facts presented in the Letter, is exempt from the requirements of Rule 102 with respect to each Fund, thus permitting each Fund to redeem Shares of each Fund during the continuous offering of such Shares.

IT IS FURTHER ORDERED, pursuant to Rule 10b-17(b)(2), that the Trust, based on the representations and the facts presented in the Letter, and subject to the conditions below, is exempt from the requirements of Rule 10b-17 with respect to transactions in the Shares of each Fund.

This exemptive relief is subject to the following conditions:

- The Trust will comply with Rule 10b-17, except for Rule 10b-17(b)(1)(v)(a) and (b); and

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<sup>6</sup> Timely compliance with Rule 10b-17(b)(1)(v)(a) and (b) would be impractical in light of the nature of each Fund as it is not possible for either Fund to accurately project ten days in advance what dividend, if any, would be paid on a particular record date.

- The Trust will provide the information required by Rule 10b-17(b)(1)(v)(a) and (b) to the Exchange as soon as practicable before trading begins on the ex-dividend date, but in no event later than the time when the Exchange last accepts information relating to distributions on the day before the ex-dividend date.

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. This exemptive relief is based on the facts presented and the representations made in the Letter. Any different facts or representations may require a different response. Persons relying upon this exemptive relief shall discontinue transactions involving the Shares of such Fund, pending presentation of the facts for the Commission's consideration, in the event that any material change occurs with respect to any of the facts or representations made by the Requestors, and as is the case with all preceding letters, particularly with respect to the close alignment between the market price of Shares and each Fund's NAV. In addition, persons relying on this exemptive relief 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 exemptive relief.

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.<sup>7</sup>

Robert W. Errett  
Deputy Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(6) and (9).