



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

DIVISION OF  
CORPORATION FINANCE

November 30, 2016

**Response of the Office of Mergers and Acquisitions  
Division of Corporation Finance**

Vadim Avdeychik, Esq.  
Paul Hastings LLP  
200 Park Avenue  
New York, NY 10166

**Re: Gabelli NextShares Trust  
Request for Exemption from Exchange Act Rule 14e-5**

Dear Mr. Avdeychik:

We are responding to your letter dated November 30, 2016, addressed to Ted Yu and Tiffany Posil, as supplemented by telephone conversations with the staff, with regard to your request for an exemption from Exchange Act Rule 14e-5. To avoid having to recite or summarize the facts set forth in your letter, we attach the enclosed copy of your letter. Unless otherwise noted, capitalized terms in this response letter have the same meaning as in your letter dated November 30, 2016.

On the basis of the representations and the facts presented in your letter, the Division of Corporation Finance, acting for the Commission pursuant to delegated authority, by separate order is granting an exemption from Rule 14e-5. The exemption operates to permit any broker-dealer acting as a dealer manager of a tender offer for a security in which any of the NextShares Funds invests to redeem Shares in Creation Unit size aggregations for a redemption Basket that may include a subject security or related security as defined under Rule 14e-5(c). The exemption also operates to permit such persons, described in your letter as covered persons within the meaning of Rule 14e-5(c)(3)(ii), to engage in secondary market transactions with respect to Shares after the first public announcement of and during such tender offer, given that such transactions could include, or be deemed to include, purchases of, or arrangements to purchase, subject securities or related securities. In addition, the exemption permits such covered persons to make purchases of, or arrangements to purchase, subject securities or related securities in the secondary market for the purpose of transferring such securities to purchase one or more Creation Units of Shares.

To the extent that the Trust or any of the NextShares Funds constitute a covered person within the meaning of Rule 14e-5(c)(3)(iv), each also may rely upon the exemption granted. We note in particular that our grant of an exemption is conditioned upon the following:

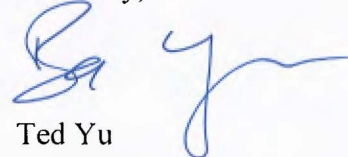
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- no purchases of subject securities or related securities made by broker-dealers acting as dealer-managers of a tender offer would be effected for the purpose of facilitating a tender offer;
- any purchases of a portfolio security by a dealer-manager during a tender offer will be effected as adjustments to a basket of securities in the ordinary course of business as a result of a change in the composition of the NextShares Fund's portfolio; and
- except for the relief specifically granted herein, any broker-dealer acting as a dealer-manager of a tender offer will comply with Rule 14e-5.

The foregoing exemption is based solely on the representations and the facts presented in your letter dated November 30, 2016 and does not represent a legal conclusion with respect to the applicability of the statutory or regulatory provisions of the federal securities laws. The relief is strictly limited to the application of Rule 14e-5 to this transaction. You should discontinue this transaction pending further consultations with the staff if any of the representations or facts set forth in your letter change. In addition, this exemption is subject to modification or revocation if at any time the Commission or the Division of Corporation Finance determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act.

We also direct your attention to the anti-fraud and anti-manipulation provisions of the federal securities laws, including Sections 10(b) and 14(e) of the Exchange Act and Rule 10b-5 thereunder. Responsibility for compliance with these and any other applicable provisions of the federal securities laws rests with the participants in this transaction. The Division of Corporation Finance expresses no view with respect to any other questions that this transaction may raise, including, but not limited to, the adequacy of the disclosure concerning, and the applicability of any other federal or state laws to, this transaction.

Sincerely,



Ted Yu  
Chief, Office of Mergers & Acquisitions  
Division of Corporation Finance

**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**

November 30, 2016

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In the Matter of Gabelli NextShares Trust

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**ORDER GRANTING EXEMPTION FROM  
SECURITIES EXCHANGE ACT RULE 14E-5**

Gabelli NextShares Trust submitted a letter dated November 30, 2016 requesting that the Securities and Exchange Commission (“Commission”) grant an exemption from Securities Exchange Act Rule 14e-5 for the transactions described in its letter (“Request”).

Based on the representations and the facts presented in the Request, and subject to the terms and conditions described in the letter from the Division of Corporation Finance dated November 30, 2016, it is ORDERED that the request for an exemption from Securities Exchange Act Rule 14e-5 is hereby granted.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Brent J. Fields  
Secretary

Action as set forth or recommended herein APPROVED  
pursuant to authority delegated by the Commission under  
Public Law 87-592.

For: Division of Corporation Finance

By:     *Jed Yu*    

Date:     11/30/2016

# PAUL HASTINGS

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November 30, 2016

Mr. Ted Yu, Chief  
Ms. Tiffany Posil, Special Counsel  
Office of Mergers and Acquisitions  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-2000

**Re: Request for Exemptive Relief from Rule 14e-5 under the Securities Exchange Act of 1934**

Dear Mr. Yu and Ms. Posil:

Gabelli NextShares Trust (the “Trust”) is a Delaware statutory trust registered as an open-end management investment company under the Investment Company Act of 1940 (“1940 Act”). The Trust requests exemptive relief under the Securities Exchange Act of 1934 (the “Exchange Act”) on behalf of itself, the market participants discussed below, and the following series of the Trust (each such series, a “NextShares Fund”): Gabelli ESG NextShares; Gabelli All Cap NextShares; Gabelli Equity Income NextShares; Gabelli Small and Mid Cap Value NextShares; and Gabelli Media Mogul NextShares (each a “NextShares Fund” and collectively, “NextShares Funds”). Each NextShares Fund will operate as an exchange-traded managed fund (“ETMF”), as described below.

Each NextShares Fund will continuously issue and redeem shares (“Shares”) in specified aggregations (each aggregation of Shares, a “Creation Unit”) at net asset value (“NAV”). The Trust has filed a registration statement on Form N-1A, and Shares of each NextShares Fund will be listed on a national securities exchange or national securities association (an “Exchange”) and

will trade in the secondary market.<sup>1</sup> The trading price of Shares will be directly linked to the NextShares Fund's end-of-day NAV.<sup>2</sup> In connection with this "NAV-Based Trading," all bids, offers and execution prices will be expressed as a market-determined premium or discount (*e.g.*, +\$0.01, -\$0.02) to that day's NAV.<sup>3</sup> For each trade, the premium or discount to NAV (which may be zero) is locked in at trade execution and the final transaction price (*i.e.*, NAV plus or minus the market-determined premium/discount to NAV) is determined at the end of the day when the NextShares Fund's NAV is computed. Because all transaction prices are based on an end-of-day NAV, NextShares Funds will not need to disclose portfolio holdings on a daily basis in order to maintain a close relationship between Share trading prices and NAV.

The Trust, on behalf of itself, each NextShares Fund, and Authorized Participants (as defined below) that act as dealer-managers of tender offers, as applicable, requests that the U.S. Securities and Exchange Commission (the "Commission" or the "SEC") grant exemptive relief from Rule 14e-5 under the Exchange Act in connection with transactions that involve "subject securities" and "related securities" (as defined in Rule 14e-5(c)(6) and (7)) that are included in a "Basket," as described below.

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<sup>1</sup> The Commission has approved Nasdaq Rule 5745 governing the listing and trading of Shares. *See* Exchange Act Release No. 73562 (Nov. 7, 2014).

<sup>2</sup> Aspects of NAV-Based Trading are protected intellectual property described in one or more of U.S. Patent Nos. 7,444,300, 7,496,531, 7,689,501, 8,131,621, 8,306,901, 8,332,307 and 8,452,682 and in pending patent applications. The methodology for calculating NAV will be fully disclosed in the prospectus. Additionally, any modification to the methodology used to calculate NAV will be fully disclosed to current and prospective investors prior to implementation.

<sup>3</sup> Market data feeds underlying quotation and transaction systems may report bids, offers and execution prices in NAV-Based Trading with reference to a numeric base value (*e.g.*, 100), depending upon system parameters.

The SEC staff (“SEC Staff”) has previously issued relief substantially similar to that requested herein to other ETMFs listed and traded on an Exchange that meet certain conditions.<sup>4</sup> In addition, the SEC Staff has previously issued relief similar to that requested herein to certain actively managed exchange-traded funds (“ETFs”) listed and traded on an Exchange that meet certain conditions.<sup>5</sup> The Trust does not believe that the relief requested raises any significant new regulatory issues.

#### **I. The NextShares Funds**

The Trust intends to offer the following NextShares Funds that would be subject to the requested relief:<sup>6</sup>

##### Gabelli ESG NextShares

The investment objective of this NextShares Fund is to provide capital appreciation. This NextShares Fund normally will invest at least 80% of its net assets, plus borrowings for investment purposes, in common and preferred stocks of companies that meet this NextShares Fund’s guidelines for social responsibility at the time of investment.

##### Gabelli All Cap NextShares

The investment objective of this NextShares Fund is to provide capital appreciation. This NextShares Fund normally will invest at least 80% of its net assets, plus borrowings for investment purposes, in common and preferred stocks of companies of all capitalization ranges

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<sup>4</sup> See Letter from Ted Yu to Eaton Vance Management regarding Eaton Vance ETMF Trust, dated February 26, 2016; Letter from Ted Yu to Ivy NextShares regarding Ivy NextShares, dated October 20, 2016.

<sup>5</sup> See, e.g., Letter from Ted Yu to Chapman and Cutler LLP regarding First Trust Exchange-Traded Fund III, dated April 27, 2016.

<sup>6</sup> The Trust will operate pursuant to an exemptive order issued by the Commission under the 1940 Act. See Investment Company Act of 1940 Rel. No. 31608 (May 19, 2015).

that are listed on a recognized securities exchange or similar market. This NextShares Fund may also invest in common and preferred securities of foreign issuers.

Gabelli Equity Income NextShares

The investment objective of this NextShares Fund is to provide a high level of total return on its assets with an emphasis on income. This NextShares Fund normally will invest at least 80% of its net assets, plus borrowings for investment purposes, in income producing equity securities.

Gabelli Small and Mid Cap Value NextShares

The investment objective of this NextShares Fund is to provide long term capital growth. This NextShares Fund normally will invest at least 80% of its net assets, plus borrowings for investment purposes, in equity securities (such as common stock and preferred stock) of companies with small or medium sized market capitalizations.

Gabelli Media Mogul NextShares

The investment objective of this NextShares Fund is to provide capital appreciation. This NextShares Fund normally will invest at least 80% of its net assets, plus borrowings for investment purposes, in the media industry. Media industry companies are companies that are primarily engaged in the production, sale and distribution of goods or services used in the media industry. Media industry companies are companies that derive at least 50% of their revenue from the production or distribution of information and entertainment content, and may include television and radio stations, motion picture companies, print publishing and providers of internet content, as well as satellite service providers, cable service providers and advertising service providers. The Fund will specifically invest in companies that were spun-off from Liberty Media Corporation (“Liberty Media”) as constituted in 2001, as well as in companies

that resulted from subsequent mergers of any such spin-offs or stocks that track performance of such spin-offs or companies that resulted from subsequent mergers of any such spin-offs, and in public companies in which Liberty Media and its successor companies invest. Liberty Media was spun off from AT&T Corporation in August 2001, as an amalgamation of, among others, media and telecommunications related assets. The company's chairman and largest shareholder since inception has been Dr. John C. Malone. Since 2001, Liberty Media has engaged in a series of spin-offs, split-offs, mergers, and tracking stock issuances.

## **II. NextShares Funds Operations**

### **Sales and Redemptions of Creation Units**

Each NextShares Fund will issue and redeem Shares in Creation Units through a broker-dealer registered under the Exchange Act (the "Distributor") acting on an agency basis and serving as each NextShares Fund's "principal underwriter" as defined in Section 2(a)(29) of the 1940 Act.<sup>7</sup> Subject to certain exceptions described below, Creation Units of a NextShares Fund will be purchased by making a deposit of the instruments specified by the NextShares Fund for making a purchase ("Deposit Instruments"), and shareholders redeeming Creation Units will receive a transfer of instruments specified by the NextShares Fund for meeting a redemption ("Redemption Instruments").<sup>8</sup> On any given business day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments are expected to be identical and are

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<sup>7</sup> The number of Shares constituting a Creation Unit will be set by the investment adviser to the Trust ("Adviser"). The Trust expects a Creation Unit to consist of a specified number of Shares between 5,000 and 50,000 Shares. The anticipated Creation Unit size is somewhat smaller than customary for ETFs and should support secondary market trading efficiency by facilitating tighter market maker inventory management.

<sup>8</sup> Creation Units of Shares will be redeemable at the next determined NAV of each NextShares Fund on each business day in accordance with the 1940 Act.



referred to herein as the “Basket.” Deposit Instruments and Redemption Instruments may include cash, securities and/or other transferable investment assets. To the extent there is a difference between the NAV of a Creation Unit and the aggregate market value of the Basket exchanged for the Creation Unit, the party conveying the lower value will pay to the other an amount in cash equal to that difference (the “Balancing Amount”).

To preserve the confidentiality of a NextShares Fund’s trading activities, the Trust anticipates that the Basket will normally not be a *pro rata* slice of the positions in the NextShares Fund’s portfolio (“Portfolio Positions”). Rather, instruments being acquired by the Adviser for the NextShares Fund’s portfolio will generally be excluded from the Basket until their purchase is completed, and instruments being sold may not be removed from the Basket until the sale program is completed. Further, when deemed by the Adviser to be in the best interest of a NextShares Fund and its shareholders, other Portfolio Positions may be excluded from the Basket. Whenever Portfolio Positions are excluded from the Basket, the Basket may include proportionately more cash than is in the portfolio, with such additional cash substituting for the excluded Portfolio Positions.

A NextShares Fund may permit an Authorized Participant (as defined below) to deposit or receive, as applicable, cash in lieu of some or all of the Basket instruments, solely because: (a) such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (b) such instruments are not eligible for trading by the Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (c) a holder of Shares of a NextShares Fund investing in foreign instruments would be subject to unfavorable income tax treatment if the holder received redemption proceeds in kind. No other Basket substitutions will be permitted.

In addition, a NextShares Fund that normally issues and redeems Creation Units in kind may require purchases and redemptions to be made entirely on a cash basis. In such an instance, the NextShares Fund will announce, before the open of trading on a given business day, that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash. A NextShares Fund may also determine, upon receiving a purchase or redemption order from an Authorized Participant, to require the purchase or redemption, as applicable, to be made entirely in cash.

Each business day, before the open of trading on the listing Exchange, the Adviser will cause the Basket, including the names and quantities of the securities and other instruments in the Basket and the estimated Balancing Amount, for that day to be disseminated through the National Securities Clearing Corporation (“NSCC”), a clearing agency registered with the Commission and affiliated with the Depository Trust Company (“DTC”). The published Basket will apply until a new Basket is announced, and there will be no intra-day changes to the Basket except to correct errors in the published Basket. The Adviser will also make available on a daily basis information about the previous day’s Balancing Amount.

All orders to purchase or redeem Creation Units must be placed with the Distributor by or through an “Authorized Participant,” which is either: (a) a “participating party” (*i.e.*, a broker or other participant in the Continuous Net Settlement (“CNS”) System of the NSCC) or (b) a DTC participant (“DTC Participant”), which in any case has executed an agreement with the Distributor (“Participant Agreement”). An investor does not have to be an Authorized Participant to transact in Creation Units, but must place an order through and make appropriate arrangements with an Authorized Participant.

### **Intraday Indicative Values**

The Trust will arrange for the continuous calculation by an independent third party and publication through the NASDAQ OMX Global Index Data Service throughout the regular trading session of the listing Exchange (generally 9:30 a.m. to 4:00 p.m. ET) each business day of an intraday indicative value (“IIV”) of each NextShares Fund’s Shares.<sup>9</sup> IIVs will be disseminated by one or more major market data vendors at intervals of not more than 15 minutes during trading on an Exchange.<sup>10</sup> The sole purpose of IIVs in the context of NextShares Funds is to help investors determine the number of Shares to buy or sell if they want to transact in an approximate dollar amount (*i.e.*, if an investor wants to acquire approximately \$5,000 of a NextShares Fund, how many Shares should the investor buy?).<sup>11</sup>

### **Portfolio Holdings Disclosure**

NextShares Funds will not make their full Portfolio Positions available on a daily basis. Instead, NextShares Funds will disclose their holdings only at periodic intervals, and with a lag. All NextShares Funds will disclose their holdings in full at least once quarterly, with a lag of not more than 60 days, in compliance with the requirements applicable to open-end investment

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<sup>9</sup> Neither the Trust nor any NextShares Fund will be involved in, or responsible for, the calculation or dissemination of any such IIV and will make no warranty as to its accuracy.

<sup>10</sup> Unlike for ETFs, which arrange for IIVs to be disseminated every 15 seconds, IIVs for NextShares Funds will not provide pricing signals for market intermediaries or other buyers and sellers of Shares seeking to estimate the difference between the value of the NextShares Fund’s portfolio and the price at which Shares are currently trading. In NAV-Based Trading, the secondary market premium/discount that applies to a NextShares Fund is always fully transparent and does not depend on dissemination of IIVs.

<sup>11</sup> Because IIVs will generally differ from end-of-day NAV, they cannot be used to calculate with precision the dollar value of a prescribed number of Shares to be bought or sold. Especially during periods of volatile market conditions and for transactions executed early in the trading day, buyers and sellers of NextShares Funds face the risk that the value of their purchases and sales may differ materially from intended levels. To seek to ensure that NextShares Fund investors understand the risk that the value of their purchases and sales may differ from intended levels, each NextShares Fund’s registration statement, website, and advertising and marketing materials will include prominent disclosure of this risk. In addition, when a retail NextShares Fund order is submitted electronically, the investor will receive a prompt reminding the investor of the contingent pricing nature of Shares and the other principal distinctions of investing in NextShares Funds, and will be required to acknowledge that he or she has read and understood this information before the order is finalized.

companies. As a matter of practice, many mutual funds provide public disclosure of their holdings more frequently, and on a more timely basis (such as monthly with a 30-day lag). The disclosure practices of NextShares Funds are expected to be similar to those of mutual funds holding similar types of investments.

The mechanism that connects trading prices of Shares to NAV in NAV-Based Trading does not require contemporaneous disclosure of Portfolio Positions to function effectively, as described below. Because disclosing holdings in real-time can facilitate front-running of portfolio trades and enable copycat investors to replicate a fund's portfolio positioning, active managers have to date largely avoided the transparent active ETF model. By removing the requirement for portfolio transparency, NextShares Funds have the potential to provide investors with access to a broad range of active strategies.

#### **Buying and Selling Shares on the Exchange**

Shares will be purchased and sold in the secondary market at prices based on the next-determined NAV. All bids, offers and execution prices will be expressed as a premium/discount (which may be zero) to the NextShares Fund's next-determined NAV (*e.g.*, NAV-\$0.01, NAV+\$0.01). A NextShares Fund's NAV will be determined each business day, normally as of 4:00 p.m. Eastern Time. Trade executions will be binding at the time orders are matched on the Exchange's facilities, with the transaction prices contingent upon the determination of NAV.

- *Trading Premiums and Discounts.* Bid and offer prices for Shares will be quoted throughout the day relative to NAV. The premium or discount to NAV at which Share prices are quoted and transactions are executed will vary depending on market factors, including the balance of supply and demand for Shares among investors, transaction fees and other costs in connection with creating and redeeming Creation Units of Shares, the cost and availability of

borrowing Shares, competition among market makers, the Share inventory positions and inventory strategies of market makers and other market participants, the profitability requirements and business objectives of market makers, and the volume of Share trading. Reflecting such market factors, prices for Shares in the secondary market may be above, at or below NAV.

- *Transmitting and Processing Orders.* Member firms will utilize existing order types and interfaces to transmit Share bids and offers to the Exchange, which will process Share trades like trades in shares of conventional ETFs and other listed securities. In the systems used to transmit and process transactions in Shares, a NextShares Fund's next-determined NAV will be represented by a proxy price (e.g., 100.00) and a premium/discount of a stated amount to the next-determined NAV to be represented by the same increment/decrement from the proxy price used to denote NAV (e.g., NAV-\$0.01 would be represented as 99.99; NAV+\$0.01 as 100.01). At the start of each trading day, the price will be reset to the proxy price.

To avoid potential investor confusion, the listing Exchange will work with member firms and providers of market data services to seek to ensure that representations of intraday bids, offers and execution prices for NextShares Funds that are made available to the investing public follow the "NAV-\$0.01/NAV+\$0.01" (or similar) display format, rather than displaying proxy prices. All NextShares Funds listed on the Exchange will have a unique identifier associated with their ticker symbols, which will indicate that their Shares are traded using NAV-Based Trading. The listing Exchange makes available to member firms and market data services certain proprietary data feeds ("Exchange Data Feeds") that are designed to supplement the market information disseminated through the consolidated tape ("Consolidated Tape"). The Exchange will use an Exchange Data Feed to disseminate intraday price and quote data for

NextShares Funds in real time in the “NAV- $\$0.01$ /NAV+ $\$0.01$ ” (or similar) display format.

Member firms could use the Exchange Data Feed to source intraday NextShares Fund prices for presentation to the investing public in the “NAV- $\$0.01$ /NAV+ $\$0.01$ ” (or similar) display format.

Alternatively, member firms could source intraday NextShares Fund prices in proxy price format from the Consolidated Tape and use a simple algorithm to convert prices into the “NAV- $\$0.01$ /NAV+ $\$0.01$ ” (or similar) display format.

- *Intraday Reporting of Quotes and Trades.* All bids and offers for Shares and all Share trade executions will be reported intraday in real time by the Exchange to the Consolidated Tape<sup>12</sup> and separately disseminated to member firms and market data services through an Exchange Data Feed. The Exchange will also provide the member firms participating in each Share trade with a contemporaneous notice of trade execution, indicating the number of Shares bought or sold and the executed premium/discount to NAV.<sup>13</sup>

- *Final Trade Pricing, Reporting and Settlement.* All executed Share trades will be recorded and stored intraday by the Exchange to await the calculation of the NextShares Fund’s end-of-day NAV and the determination of final trade pricing. After a NextShares Fund’s NAV is calculated and provided to the Exchange, the Exchange will price each Share trade entered into during the day at the NextShares Fund’s NAV plus/minus the trade’s executed premium/discount. Using the final trade price, each executed Share trade will then be disseminated to member firms and market data services through the Exchange Data Feed used to

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<sup>12</sup> Due to systems limitations, the Consolidated Tape will report intraday execution prices and quotes for NextShares Funds using a proxy price format. As noted, the listing Exchange will separately report real-time execution prices and quotes to member firms and providers of market data services in the “NAV- $\$0.01$ /NAV+ $\$0.01$ ” (or similar) display format, and otherwise seek to ensure that representations of intraday bids, offers and execution prices for NextShares Funds that are made available to the investing public follow the same display format.

<sup>13</sup> All orders to buy or sell Shares that are not executed on the day the order is submitted will be automatically cancelled as of the close of trading on such day.

report Share trades, and confirmed to the member firms participating in the trade to supplement the previously provided information to include final pricing. After the pricing is finalized, the Exchange will deliver the Share trading data to NSCC for clearance and settlement, following the same processes used for the clearance and settlement of trades in conventional ETFs and other exchange-traded securities.

### **Trading Efficiency**

In NAV-Based Trading, a market maker assumes no intraday market risk in connection with its Share inventory positions because all Share transaction prices are based on the next-determined NAV. Whether a NextShares Fund's underlying value goes up or down over the course of a trading day will not affect how much a market maker earns by selling (or buying) Shares in the market at a net premium (discount) to NAV, and then purchasing (redeeming) an offsetting number of Shares at the end of the day in transactions with the NextShares Fund. No intraday market risk means no requirement for intraday hedging, and therefore no associated requirement for portfolio holdings disclosure to maintain a tight relationship between Share trading prices and NAV.

A market maker that purchases (or redeems) a Creation Unit at the end of a trading day to offset its net intraday sales (purchases) of a Creation Unit quantity of Shares will earn profits to the extent that it either sells (buys) Shares at an aggregate premium (discount) to NAV or buys (sells) a Creation Unit-equivalent quantity of Basket instruments at an aggregate discount (premium) to their end-of-day values, and the net amount of Share premium (discount) plus

Basket discount (premium) exceeds the transaction fee that applies to a purchase (redemption) of a Creation Unit.<sup>14</sup>

Different from conventionally traded ETFs, trading in Shares offers market makers a profit opportunity that is not based on the ability to arbitrage differences between share trading prices and underlying portfolio values or requiring the management of intraday market risk.<sup>15</sup> To realize profits from market making in Shares, a market maker holding short (or long) positions in Shares accumulated intraday need only transact with the NextShares Fund to purchase (redeem) a corresponding number of Creation Units of Shares, buy (sell) the equivalent quantities of Basket instruments at market-closing or better prices, and offload any remaining sub-Creation Unit Share inventory through secondary market transactions prior to the close.<sup>16</sup>

Because making markets in Shares will be simple to manage and low risk, competition among market makers seeking to earn reliable, low-risk profits should enable NextShares Funds to routinely trade at tight bid-ask spreads and narrow premiums/discounts to NAV. Further, because the mechanism that underlies efficient trading of Shares does not involve arbitrage or

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<sup>14</sup> The market maker profit equation is simplified for cash creations and redemptions. A market maker who purchases (or redeems) a Creation Unit in cash to offset its net intraday sales (purchases) of a Creation Unit quantity of Shares will earn profits to the extent that it sells (buys) Shares in the secondary market at an aggregate premium (discount) to NAV that exceeds the transaction fee that applies to a cash creation (redemption) of a Creation Unit.

<sup>15</sup> In a typical ETF, intermediaries enter into arbitrage transactions to take advantage of deviations between market price and NAV, and that arbitrage is the mechanism that is understood to keep the market price and the NAV of ETFs aligned.

<sup>16</sup> Market makers in Shares are expected generally to seek to minimize their exposure to price risk by holding little or no overnight Share inventory. By establishing Creation Unit sizes that are somewhat smaller (*i.e.*, in a range of 5,000 to 50,000 Shares) than is customary for ETFs, NextShares Funds will support secondary market trading efficiency by facilitating tighter market maker inventory management because it facilitates closing out positions at the end of each trading day. To the extent that market makers hold small positions in Shares overnight, they are expected to aggregate such holdings with other risk positions and transact at or near the market close to buy or sell offsetting positions in appropriate, broad-based hedging instruments, such as S&P 500 and other index futures and ETFs. Such hedging of overnight inventory risk on a macro basis does not require disclosure of portfolio positions that are not included in the daily Basket.



trading in portfolio positions that are not included in the Basket, the need for daily portfolio holdings disclosure to achieve tight markets in Shares is eliminated.

The mechanisms supporting efficient trading of Shares are equally applicable across different asset classes and investment strategies. A NextShares Fund can hold relatively illiquid assets and still trade with tight bid-offer spreads and narrow premiums/discounts to NAV by creating and redeeming Shares in cash. Unlike for ETFs, portfolio holdings that are not included in a Basket will not influence how tightly the Shares will trade.

### **III. Legal Analysis Under Rule 14e-5**

Rule 14e-5 was originally promulgated as Rule 10b-13 under the Exchange Act to safeguard the interests of persons who sell their securities in response to a tender offer.<sup>17</sup> Rule 14e-5 prohibits a “covered person” from directly or indirectly purchasing or arranging to purchase any equity securities that are the subject of a tender offer (“subject securities”) or any securities immediately convertible into, exchangeable for, or exercisable for subject securities (“related securities”) except as part of such tender offer. The term “covered person” includes, among others, a dealer-manager of a tender offer. The fact that most Authorized Participants are broker-dealers implicates Rule 14e-5 because the term “covered person” includes a dealer-manager of a tender offer. The term “covered person” also includes any person acting, directly or indirectly, in concert with other covered persons in connection with any purchase or arrangement to purchase any subject securities or any related securities. Therefore, the Trust

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<sup>17</sup> Exchange Act Release No. 8712 (Oct. 8, 1969) (the “1969 Adopting Release”). In this regard, the 1969 Adopting Release noted that “[w]hen securities are purchased for a consideration greater than that of the tender offer price, this operates to the disadvantage of the security holders who have already deposited their securities and who are unable to withdraw them in order to obtain the advantage of possible resulting higher market prices.”

also is seeking relief in the event it or the NextShares Fund may be deemed to be a “covered person” by virtue of the Participant Agreements pertaining to the Trust and the NextShares Fund.

In order to address situations in which an Authorized Participant acts as a dealer-manager of a tender offer, and a subject security or a related security is part of a group of securities that is received by the NextShares Fund when it issues a Creation Unit or part of a group of securities that the NextShares Fund distributes when it redeems a Creation Unit (*i.e.*, Deposit Instruments or Redemption Instruments in the Basket), the Trust respectfully requests that the Commission grant an exemption from Rule 14e-5 as it applies to such Authorized Participants. The exemption would permit any such Authorized Participant to execute transactions that include, or are deemed to include, purchases of, or arrangements to purchase, subject securities or related securities, but that are not effected for the purposes of facilitating a tender offer and that are conducted in the ordinary course of business (in each case, from the time of the public announcement of the tender offer until the tender offer expires). In this regard, an Authorized Participant's ordinary course of business includes: (1) redeeming Shares of the NextShares Fund in Creation Unit size aggregations for Redemption Instruments in the Basket that may include a subject security or a related security; and (2) engaging in secondary market transactions in Shares. With respect to redemptions, the Trust notes that the acquisition of individual securities held by the NextShares Fund by means of redemptions of Shares would be impractical and extremely inefficient in view of the relatively small number of shares of any one security included in a Basket and the requirement that a minimum number of Shares (*i.e.*, a Creation Unit) be redeemed. Redemptions of and secondary market transactions in Shares under the circumstances described would not appear to result in the abuses at which Rule 14e-5 is directed.

In addition to the above request for relief, the Trust also is requesting exemptive relief in connection with purchases of Creation Units of Shares by an Authorized Participant acting as a dealer-manager of a tender offer. In this regard, in connection with purchasing Creation Units pursuant to the terms of its Participant Agreement, an Authorized Participant may seek to purchase in the secondary market securities comprising a Basket that includes, with respect to a tender offer for which it acts as a dealer-manager, subject securities or related securities. The Trust acknowledges that Rule 14e-5(b)(5) provides an exception to its prohibition for purchases or arrangements to purchase a basket of securities containing a subject security or a related security if: (i) the purchase or arrangement is made in the ordinary course of business and not to facilitate the tender offer; (ii) the basket contains 20 or more securities; and (iii) covered securities and related securities do not comprise more than 5% of the value of the basket (the “Basket Exception”).

As indicated by the Commission in the release replacing former Rule 10b-13 with Rule 14e-5,<sup>18</sup> transactions in baskets in accordance with the Basket Exception provide little opportunity for a covered person to facilitate an offer<sup>19</sup> or for a security holder to exact a premium from the offeror. Given that the purchases and redemptions of Creation Units of NextShares Funds in general involve baskets of securities, Authorized Participants acting as dealer-managers of tender offers for relevant securities may, in certain cases, be able to rely on the Basket Exception in purchasing Creation Units of Shares. From time to time, however, a

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<sup>18</sup> See Exchange Act Release No. 42055 (Oct. 22, 1999) (the “1999 Release”).

<sup>19</sup> As discussed in the 1999 Release, “facilitation of an offer” includes purchases intended to bid up the market price of the covered or related security, and includes buying a basket to strip out the covered security in an effort to get the offeror the number of shares it is seeking. In this regard, the Trust believes that it would be inefficient to facilitate a tender offer in a particular security by means of purchasing all of the securities in a Basket.

change in the composition of the portfolio securities of the NextShares Fund may result in a change in the basket that has been established for purposes of purchasing its Creation Units. As a consequence, the basket could contain less than 20 securities and/or covered securities and related securities could comprise more than 5% of the value of the basket. For example, a liquidation of the issuer of one of the securities or a merger involving the acquisition of the issuer of one of the securities could cause the number of securities in the basket to fall below 20 and/or could cause covered securities and related securities to comprise more than 5% of the value of the basket. Additionally, as a result of fluctuations in the market value of the securities held in the basket, covered securities and related securities could, at times, comprise more than 5% of the value of the basket. This composition would result in the unavailability of the Basket Exception for an Authorized Participant acting as a dealer-manager of a tender offer for the applicable securities and, in particular, may preclude an Authorized Participant from being able to rely on the Basket Exception.

In order to address situations (including but not limited to the foregoing examples) where the basket contains less than 20 securities and/or covered securities and related securities comprise more than 5% of the value of the basket, the Trust respectfully requests that the Commission provide an exemption under Rule 14e-5 if an Authorized Participant acting as a dealer-manager of a tender offer purchases or arranges to purchase subject securities or related securities in the secondary market for the purpose of transferring such securities to purchase one or more Creation Units of Shares, if such purchases are not effected for the purpose of facilitating such tender offer and are made in the ordinary course of business. Relief would be necessary in order to permit such Authorized Participants to effect purchases of subject and related securities under such circumstances given that the Basket Exception would not be

available. This extension of the Basket Exception would accommodate a potential factual circumstance associated with the operation of NextShares Funds and would be consistent with the rationale underlying the adoption of the Basket Exception. The Trust notes, in particular, that purchases would not be effected for the purpose of facilitating a tender offer.

The Trust understands that, except as permitted by the relief from Rule 14e-5 requested herein, any Authorized Participant acting as a dealer-manager is required to comply with the requirements of Rule 14e-5.

### **Conclusion**

Based on the foregoing, we respectfully request that the Commission and the SEC Staff grant the requested relief. The form of relief requested is substantially similar to those actions that the Commission and the SEC Staff have taken in similar circumstances for other ETMFs and for ETFs.<sup>20</sup> If the Commission or the SEC Staff believes that a different format is appropriate (for example, a no-action position rather than an exemption), we would appreciate the opportunity to revise this request for relief accordingly. Should you have any questions please call me at (212) 318-6054.

Sincerely,



Vadim Avdeychik

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<sup>20</sup> See *supra*, notes 4 and 5.