

**MEMO# 26746**

December 10, 2012

## **ETF Moratorium Update**

[26746]

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TO: ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 43-12  
ETF ADVISORY COMMITTEE No. 49-12  
ICI GLOBAL EXCHANGE TRADED FUNDS COMMITTEE No. 4-12  
INVESTMENT COMPANY DIRECTORS No. 11-12  
SEC RULES COMMITTEE No. 80-12 RE: ETF MORATORIUM UPDATE

In a speech last Thursday, SEC Division of Investment Management Director Norm Champ announced the lifting of the moratorium on exemptive applications for actively-managed ETFs that make use of derivatives (other than leveraged ETFs). [\[1\]](#) The key passage is below.

Although the Division continues its ongoing review of the use of derivatives by funds, Division staff will no longer defer consideration of exemptive requests under the Investment Company Act relating to actively-managed ETFs that make use of derivatives provided any such exemptive request includes two specific representations to address some of the concerns that led to the Division's decision to defer consideration of these types of applications. These representations are: (i) that the ETF's board periodically will review and approve the ETF's use of derivatives and how the ETF's investment adviser assesses and manages risk with respect to the ETF's use of derivatives; and (ii) that the ETF's disclosure of its use of derivatives in its offering documents and periodic reports is consistent with relevant Commission and staff guidance. Because of concerns regarding leveraged ETFs, however, we continue not to support new exemptive relief for such ETFs.

In addition, the SEC staff issued no-action relief to certain actively-managed ETFs operating pursuant to exemptive orders granted during the moratorium, which were based on a representation that the ETFs would refrain from investing in options contracts, futures contracts, or swap agreements. [\[2\]](#) The staff stated that it would not recommend enforcement action if actively-managed ETFs operating in reliance on those exemptive orders invest in options contracts, futures contracts, or swap agreements provided that they comply with the representations stated above.

Mara Shreck  
Associate Counsel

**endnotes**

[1] The full speech is available on the SEC's website at <http://sec.gov/news/speech/2012/spch120612nc.htm>.

[2] The no-action position, which is available at <http://www.sec.gov/divisions/investment/noaction/2012/moratorium-lift-120612-etf.pdf>, includes an attachment listing these exemptive orders.

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