

MEMO# 23347

March 24, 2009

SEC Provides No-Action Relief to ETF Using Affiliated Indices as Benchmarks

[23347]

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TO: ETF ADVISORY COMMITTEE No. 7-09 RE: SEC PROVIDES NO-ACTION RELIEF TO ETF USING AFFILIATED INDICES AS BENCHMARKS

The Securities and Exchange Commission issued a no-action letter confirming the oral no-action relief it had granted to Barclays Global Fund Advisors (“BGFA”) and certain funds in the iShares Trust (“Funds”) permitting the Funds to continue to use benchmark indices after the sponsor of the indices became an affiliated person. [\[1\]](#) The Funds, advised by BGFA, are exchange-traded funds (“ETFs”) operating pursuant to SEC exemptive orders. [\[2\]](#)

According to the no-action letter, the SEC granted the exemptive orders to BGFA based on, among other things, representations from the Funds that no entity that creates, compiles, sponsors, or maintains a benchmark index would be an affiliated person of the Funds or an affiliated person of an affiliated person of the Funds, BGFA, the promoter, or the distributor of the Funds. In September 2008, however, Barclays Capital Inc.’s purchased certain assets of Lehman Brothers Holdings, Inc. following Lehman’s petition for bankruptcy. [\[3\]](#) Lehman – as sponsor to certain indices the Funds used as benchmarks – thereby became an affiliated person of BGFA. Prior to the completion of the purchase, the SEC staff granted oral no-action relief to the Funds that it would not take any enforcement action against BGFA or the Funds under the Investment Company Act of 1940 (“1940 Act”) if they continued to rely on the exemptive orders, even though they could no longer adhere to the representation that index providers would not be affiliates.

In seeking no-action relief, BGFA argued that the Lehman indices were not created solely

for the Funds' use, were created well in advance of the launch of the Funds, and were used by other Funds that were not affiliated with the index sponsor. BGFA also agreed to the following conditions designed to protect against any improper exchange of information between BGFA and the index sponsor.

- BGFA and the index sponsor have been and will continue to be separate legal entities that have no overlapping officers, directors or employees;
- There is an effective information barrier between BGFA and the index sponsor, and BGFA has not been and will not be provided with information about a change in index methodology by the index sponsor before such information is provided to other persons outside of the index sponsor;
- BGFA has not had and will not have a preferential ability to influence the index methodology determined by the index sponsor over other institutional investors; and
- BGFA has not sought and will not seek to influence the index methodology determined by the index sponsor in a way that would disproportionately benefit the Barclays organization.

BGFA represented that it would comply with all other representations and conditions in the exemptive orders.

The no-action letter expires on the effective date of any SEC rule under the 1940 Act that provides relief permitting the operation of index-based ETFs. [\[4\]](#)

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endnotes

[\[1\]](#) See Response of the Office of Investment Company Regulation, Division of Investment Management, Ref. No. 2009-1-ICR, Barclays Global Fund Advisors, et al., March 12, 2009. The no-action letter may be found on the SEC's website at: <http://www.sec.gov/divisions/investment/noaction/2009/barclaysglobal031209.htm>.

[\[2\]](#) See Barclays Global Fund Advisors, et al., SEC Release No. IC-25622 (June 25, 2002), as subsequently amended by iShares Trust, et al., SEC Release No. IC-26006 (Apr. 15, 2003), Barclays Global Fund Advisors, et al., SEC Release No. IC-26175 (Sept. 8, 2003), Barclays Global Fund Advisors, et al., SEC Release No. IC-27417 (June 23, 2006) and Barclays Global Fund Advisors, et al., SEC Release No. IC-27661 (Jan. 17, 2007).

[\[3\]](#) BGFA advised the SEC that it wished to continue using the Lehman indices for the Funds, but it also explained the necessity of completion of the acquisition as quickly as

possible to maximize the value of Lehman's assets. BGFA explained to the SEC that it would be impractical to seek an amendment to the exemptive orders to permit the continued use of these indices before the date of the acquisition.

[\[4\]](#) See e.g., Proposed Rules: Exchange-Traded Funds, SEC Release Nos. 33-8901 and IC-28193 (March 11, 2008), 73 FR 14618 (March 18, 2008).

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