OnPoint Dechert LLP

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A legal update from Dechert's Financial Services Group

Update on Lifting of SEC Moratorium on Active ETF Use of Derivatives

The staff of the U.S. Securities and Exchange Commission (the "SEC") released[1] no action relief (the "Letter") addressed to recipients of 18 prior orders (the "Prior Orders") granting exemptive relief to launch actively-managed exchange-traded funds ("ETFs") on December 7, 2012. The Prior Orders were issued during the SEC's moratorium on actively-managed ETFs' use of derivatives[2], and thus required actively-managed ETFs offered in reliance thereon to refrain from any investments in options contracts, futures contracts or swap agreements. The Letter allows these ETFs to invest in such derivatives notwithstanding the contrary representations contained in their exemptive applications.

The Letter thus confirms that the SEC has lifted its moratorium on the use of derivatives by active ETFs offered pursuant to the Prior Orders, and not just with respect to active ETFs offered pursuant to new exemptive applications. In his speech[3] announcing the lifting of the moratorium, the Director of the SEC's Division of Investment Management, Norm Champ, had only specified that the moratorium was being lifted with respect to the SEC staff's consideration of new exemptive applications. As confirmed in the Letter, though, the SEC has indeed lifted the moratorium with respect to all actively-managed ETFs (other than new applications for leveraged and inverse ETFs, as stated by Mr. Champ).[4]

The relief granted in the Letter is subject to compliance with two additional representations: (1) 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 (2) that the ETF's disclosure of its use of derivatives in offering documents and periodic reports is consistent with relevant SEC and staff guidance. These representations are identical to the ones the SEC will require on the part of new applicants for exemptive relief to offer actively-managed ETFs which intend to utilize derivatives.[5]

As was also true of Mr. Champ's speech, the Letter did not address whether the lifting of the moratorium would affect the standards imposed by the SEC's Division of Trading and Markets with respect to actively-managed ETFs' investments in order for a listing exchange to obtain the rule change required under Rule 19b-4 under the Securities Exchange Act of 1934, as amended, for such active ETFs to be listed on the exchange.

Footnotes

[1] The letter was dated December 6, 2012, but was not released until December 7.

[2] *See* Letter Dated December 6, 2012 by Elizabeth G. Osterman, Associate Director, Office of Exemptive Applications, Office of Investment Company Regulation, Division of Investment Management. The 18 prior orders are listed in Attachment A of the Letter and includes those issued from November 10, 2009 through November 27, 2012.

[3] *See* Remarks to the ALI CLE 2012 Conference on Investment Adviser Regulation: Legal and Compliance Forum on Institutional Advisory Services (December 6, 2012).

[4] *Id.*

[5] *Id.*

We look forward to discussing these issues with you in greater detail. Please feel free to contact Stuart Strauss, Allison Fumai, Jeremy Senderowicz, Christopher Carlson or the Dechert attorney with whom you work if you have any questions.

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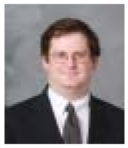

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