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## Alerts

### SEC Lifts Moratorium on Actively Managed Exchange-Traded Funds' Use of Derivatives

December 2012

#### *Derivatives Insight*

On December 6, 2012, the U.S. Securities and Exchange Commission (the "SEC") announced that it will no longer defer consideration of exemptive requests relating to actively managed exchange-traded funds ("ETFs") seeking to invest in derivatives, including futures, options and swaps.

The announcement lifts a moratorium that has been in place since March 2010 on consideration of such exemptive requests. A March 2010 press release announced that the SEC staff was reviewing the use of derivatives by mutual funds, ETFs and other investment companies. In the press release the SEC indicated that until completion of its review, SEC staff would not consider exemptive applications for ETFs that planned to make significant investment in derivatives. As a result, for over two and a half years the SEC staff refused to consider all actively-managed and leveraged ETF applications that did not expressly state they would not invest in futures, options or swaps.

The moratorium will remain in place for leveraged ETF applications, but the SEC staff will now process exemptive applications from actively-managed ETFs. The applications must include representations designed to address concerns expressed in the March 2010 press release announcing the moratorium. Specifically the representations are: (1) the EFT's board will periodically 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) the EFT's disclosure of its use of derivatives in its offering documents and periodic reports is consistent with relevant SEC and staff guidance.

The lifting of the moratorium applies not only to new exemptive applications but also to actively-managed EFTs that previously submitted exemptive applications. The no-action letter was addressed to recipients of 18 prior orders that required them to refrain from investing in derivatives.

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