In March of 2010, the Commission announced in a press release that the staff was conducting a review to evaluate the use of derivatives by mutual funds, exchange-traded funds (“ETFs”), and other investment companies.\(^1\) The press release also indicated that, pending completion of this review, the staff would defer consideration of exemptive requests under the 1940 Act (the “Act”) relating to, among others, actively-managed ETFs that would make significant investments in derivatives.

The staff announced today that it will no longer defer consideration of exemptive requests under the Act relating to actively-managed ETFs that make use of derivatives provided that they include representations to address some of the concerns expressed in the March 2010 press release.\(^2\) 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.

The Commission issued the orders listed on Attachment A based on, among other representations, a representation that no actively-managed ETF relying on the relief would invest in options contracts, futures contracts or swap agreements. Consistent with today’s statement, we would not recommend enforcement action to the Commission under sections 2(a)(32), 5(a)(1), 17(a), 22(d), and 22(e) of the Act, or rule 22c-1 under the Act if actively-managed ETFs operating in reliance on such orders invest in options contracts, futures contracts or swap agreements provided that they comply with the representations stated above.

This position is provided to actively-managed ETFs relying on the orders listed on Attachment A for enforcement purposes only and does not express any position with respect to any other representation or condition of those orders, or application of the federal securities laws.

Elizabeth G. Osterman  
Associate Director  
Office of Exemptive Applications  
Office of Investment Company Regulation  
December 6, 2012

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Attachment A


