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REGULATORY DEVELOPMENTS  
RELATING TO ACTIVELY MANAGED ETFs

*Developments designed to eliminate regulatory disadvantages faced by actively managed ETFs include the adoption of generic listing standards on the major exchanges, and the provision of exemptive and no-action relief from Exchange Act trading rules. The author discusses these changes and concludes with a description of various proposed and actual methodologies for actively managed ETFs to avoid disclosing their daily portfolio holdings.*

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Since its inception, the exchange-traded fund (“ETF”)<sup>1</sup> industry has largely consisted of funds that seek to track the performance of specified indexes, and with recent investor sentiment favoring such passively managed funds, the ETF industry has been seeing record inflows.<sup>2</sup> A small but growing subset of the ETF industry consists of funds that do not seek to replicate the performance of an index, but rather seek to outperform their benchmarks based on investment decisions of management (“actively managed ETFs”). After being initially approved by the

Securities and Exchange Commission (“SEC”) in 2008,<sup>3</sup> actively managed ETFs, especially equity funds, have been slower to accumulate assets than their index-based counterparts.<sup>4</sup>

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<sup>1</sup> While there are many types of exchange-traded pooled investment vehicles, the use of the term “ETF” in this article refers to open-end investment companies registered under the Investment Company Act of 1940, as amended (the “1940 Act”).

<sup>2</sup> Joe Morris, *ETF Flows Zoom Past Last Year’s Record*, ignites.com, September 7, 2017.

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<sup>3</sup> For a discussion of the regulation of ETFs, generally, and the early evolution of actively managed ETFs, see Stacy L. Fuller, *The Evolution of Actively Managed Exchange-Traded Funds*, Rev. of Sec. & Comm. Reg., Vol. 41, No. 8 (April 16, 2008).

<sup>4</sup> As of July 2015, assets in actively managed ETFs accounted for less than 1% of the approximately \$2 trillion under management in ETFs. Cinthia Murphy, *When, If Ever, Will Active ETFs Take Off?*, etf.com, July 7, 2015. As of the end of September 2017, approximately 190 of the over 2,000 U.S.-listed ETFs were actively managed, with the majority of those coming to market since 2014. *Active Management ETF Overview*, etf.com, last visited, October 1, 2017; Cinthia Murphy, *What US ETF Market Looks Like Today*, etf.com, April 13, 2017.

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