



July 23, 2012

Via email to: [Pubcom@FINRA.org](mailto:Pubcom@FINRA.org)

Mr. Joseph E. Price  
Senior Vice President, Corporate Financing/Advertising Regulation  
c/o Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K St NW  
Washington, DC 20006-1506

Dear Mr. Price:

ALPS Distributors, Inc. (CRD#16853) writes for the express purpose of endorsing certain provisions of FINRA's proposed amendment to Rule 5110 that would eliminate the filing requirement for exchange traded funds ("ETFs") structured as grantor trusts. As noted within Regulatory Notice 12-27, many of the provisions within the Corporate Financing Rule regarding underwriting terms and arrangements are not designed for the typical ETF distribution methodology by which a basket of underlying assets is exchanged for creation units of shares of the ETF. We note specifically as follows:

- The information requested by the staff of the FINRA Department of Corporate financing ("the Staff") within Rule 5110 is not reflective of the process by which shares of ETFs structured as grantor trusts are brought to market. Specifically, the following rule sections do not appear applicable to ETFs within the spirit of the rule:
  - 5110(a)(3) Offering Proceeds: Public offering price ("POP") of all securities offered to the public... : The creation and redemption process does not contemplate a specific public offering price. The price at which ETF shares trade is market-driven and the primary method of share issuance contemplates an in-kind exchange of shares for creation units, rather than the traditional POP of an open-end or closed-end mutual fund. In addition, there are no securities received by an "underwriter" as contemplated by the rule.
  - 5110(a)(6) Underwriter and Related Persons: Because ETFs are not sold through a traditional underwriting syndicate, this definition may not apply to these products.
  - 5110(b)(4)(C) Requirements for Filing: This section of the rule specifically contemplates a managing underwriter and any other members that propose to participate in the

offering. As noted above, the basic structure of an ETF and the methodology by which shares come to market does not support a managing underwriter and supporting syndicate of broker-dealers.

- 5110(b)(5)(A)(ii) Documents to be Filed: This section of the rule specifically requests copies of “any proposed underwriting agreement, agreement among underwriters, selected dealers agreement, agency agreement, purchase agreement...” The documents required to be filed under this rule section are applicable to a more traditional means of bringing shares to market, rather than the primary means by which ETF shares are created and redeemed via in-kind exchange of existing shares for creation units.
- 5110(b)(6): Information Required to be Filed: This section contemplates information such as maximum POP, underwriting discount and commission, transfer of issuer securities to the underwriter, all of which do not apply to most situations regarding ETF launches.
- 5110(c)(2)(D) Amount of Underwriting Compensation: For purposes of determining the currently effective guidelines of the maximum amount of underwriting compensation, factors listed include “the amount of risk assumed by the underwriter and related persons, which is determined by: a) whether the offering is being underwritten on a “firm commitment” basis or “best efforts” basis; and b) whether the offering is an initial or secondary offering.” This language clearly contemplates a traditional underwriting model, whereas for ETFs, there is no risk to a member firm that acts to promote the fund, as there is no traditional underwriting process on a firm commitment or best efforts basis.
- 5110(c)(3)(A) Items of Value: Items of value to be included in the determination of underwriter compensation encompass traditional underwriter compensation, such as underwriter discounts and commissions, as well as securities received by a firm in exchange for private placement-related services. Many of the items within this section do not apply to the process by which ETFs are brought to market.
- 5110(c)(3)(B) Exemptions from the definition of Items of Value: This rule section specifically lists those expenses typically incurred by broker-dealers that assist an issuer in raising awareness of the fund prior to launch and afterward. Examples include printing costs, “blue sky” registration costs, FINRA licensing and filing fees and cash compensation. As FINRA has already eliminated many of the costs related to ETF initial distribution from its list of “items of value,” the proposed rule change is consistent with these exclusions.

As the Staff notes within the text of Regulatory Notice 12-27, ETFs, which are unique in their methodology and do not mirror those other products contemplated for filing by Rule 5110, should be approached consistently in their regulation, without regard to the chosen legal structure. The primary reason that these products are not currently exempted from the filing and approval requirements of the Corporate Financing Rule is due to the nature of the products in which they invest, which do not qualify the ETFs for registration as Registered Investment Companies under the Investment Company Act of 1940 (“1940 Act”). However, these ETFs structured as grantor trusts operate in much the same way as

those ETFs registered under the 1940 Act and their shares are routed into the public markets in much the same manner. While there are certain differences in registration requirements under the various securities acts, the mechanism by which ETF shares are brought to the public markets, via in-kind exchange of securities for creation units, is consistent amongst ETFs. Equally relevant, it does not mimic the mechanisms of other securities contemplated by Rule 5110, or the more traditional method of underwriting applicable to those products.

As proposed, the language of revised Rule 5110 would exempt ETFs that are structured as grantor trusts and include in their portfolios commodities, currencies or other assets that are not securities. While the language, as worded, is consistent with FINRA's statement that "ETFs should be treated consistently, without regard to the chosen legal structure," the qualifying language regarding portfolio holdings may serve to limit the proposed exemption for future ETF structures not yet contemplated within the markets. We suggest removing the limitation on portfolio holdings and including all ETFs within the filing exemption.

For the reasons listed above, ALPS Distributors, Inc. supports FINRA's proposed elimination of the requirement for filing with the Department of Corporate Financing those ETFs registered as grantor trusts under the Securities Act of 1933. Should you have any additional questions, please feel free to contact or Steven Price or Bradley Swenson at (303) 623-2577.

Sincerely,



**Bradley J. Swenson, Chief Compliance Officer**  
ALPS Distributors, Inc.

cc: **Steven B. Price, Deputy Chief Compliance Officer**  
ALPS Distributors, Inc.