

Defined Outcome Series

Comparing disclosure and other requirements applicable to ETFs with those applicable to structured notes and ETNs

Agenda

- Defined outcome products
- A little background on ETFs
- Defined outcome ETFs and disclosures
- Structured products
- A comparison

Defined outcome products

Defined outcome products

- Defined outcome products may be offered in a number of different “wrappers” or “packages”: fixed index annuities and RILAs; structured products; SMAs; and ETFs, among others
- Products provide equity exposure generally to a cap with some downside protection in exchange for a cap on gains
- Defined outcome ETFs use option strategies in an ETF vehicle (instead of relying on a debt security, as would a structured note referencing the performance of an underlying asset) to provide targeted downside protection; income; or enhanced growth
- Defined outcome ETFs achieve the exposure through options-based strategies
 - Option prices move in response to movements in, or volatility of, the reference asset
 - The defined outcome is intended to be delivered over a hold period

Background on ETFs

ETFs

- ETFs generally are subject to overarching regulatory framework of the Investment Company Act, which is quite comprehensive; in this respect, similar to open-end mutual funds
- So, like a mutual fund,
 - Each fund would be series of a trust
 - Fund liability generally would be limited each fund
 - Subject to Investment Company Act provisions, including board governance and oversight requirements
 - Managed by an SEC-registered investment adviser
 - Subject to compliance programs under 38a-1 and 206(4)-7

ETFs *(cont'd)*

- Unlike a mutual fund, an ETF is subject to
 - Intraday liquidity and trading;
 - Transparent and typically lower fee pricing;
 - Daily public disclosure of holdings;
 - In-kind redemptions;
 - Primary market transactions at NAV

ETFs *(cont'd)*

- Prior to adoption of Rule 6c-11 individual exemptive relief was needed
- Rule applies to actively managed, fully transparent ETFs and to index-based ETFs; introduced daily disclosure requirements
- Mandates specific website disclosures and format for disclosures, including:
 - Premiums, discounts; in table and line graph form for specified periods
 - Additional disclosure triggered if premium/discount exceeds 2% for more than seven consecutive days
 - Median bid-ask spread calculated over past 30 calendar days
- Internal fund documentation required of:
 - Basket construction methodology
 - Custom basket acceptance processes
 - Representative sampling, if applicable
 - Compliance testing procedures
 - Control mechanisms to prevent unauthorized basket modifications

ETFs *(cont'd)*

- All the documentation is subject to record retention requirements
- In addition to the daily disclosures, an ETF must file
 - For its initial SEC registration, a Form N-1A
 - On a periodic basis, to comply with its ongoing reporting requirements:
 - The annual report, Form N-CEN, within 75 days of fiscal year-end
 - Quarterly, the Form N-PORT, on third-month portfolio holdings
 - Proxy voting records, on Form N-PX

ETFs *(cont'd)*

- As a registered investment company, the entity also will be subject to, among other things:
 - Limitations on use of leverage
 - Restrictions on affiliate transactions
 - Asset diversification requirements
 - Custody requirements for assets
 - A fidelity bond requirement
 - Books and records requirements

Defined outcome ETFs and disclosures

Defined outcome ETFs and disclosures

- Defined outcome ETFs are subject to a number of disclosure requirements, many of which are fairly prescriptive
- The website disclosure requirements, which we discussed
- In the registration statement, a presentation of fees and expenses of the fund that complies with specific requirements
- Specific performance reporting requirements
- The registration statement also must discuss the index, including:
 - The methodology of the index
 - Rebalancing or reallocation
 - The index construction and calculation

Defined outcome ETFs and disclosures *(cont'd)*

- Offering documents and website disclosures also will include prominent risk disclosures
- For defined outcome products, these will discuss ETF structure and related risks, as well as risks that are specific to these types of products, such as:
 - Correlation risk
 - Counterparty risk related to the derivatives—the swap counterparty
 - Derivatives risks, swap agreement risk, swap agreement termination risk
 - Index related risks

Structured products

SEC Registration

- Whether a financial institution is offering and selling a structured product that is SEC-registered and not listed (the vast majority of the market) or listed (ETNs), the approach to SEC registration is well-understood and the SEC Staff has provided guidance over the years regarding its expectations insofar as disclosures
- Ideally, an issuer of SEC-registered structured products will qualify as a WKSI, which would provide for the most flexibility in terms of the ability to rely on pay-as-you-go for registration fees, as well as the opportunity to add additional products to its shelf by amendment
- In addition, a WKSI has the greatest flexibility to use all manner of free writing prospectuses, or FWPs. For structured products, this is extremely important. Market participants use educational materials, FWPs about payoffs, FWPs about indices, etc.
- Frequent issuers tend to rely on either:
 - A standalone structured products shelf (separate from the shelf that they use for their benchmark funding deals); or
 - The same shelf that is used for the benchmark deals, but in that event, then layer on to that shelf a separate MTN pro supp, and top that off with separate individual product supplements, as we will discuss

SEC Registration *(cont'd)*

- **Structured products disclosures tend to be provided through a layered disclosure approach.** Issuers provide investors a stack of documents, with the more basic provisions of the debt securities at the bottom of the stack (the prospectus) and the detailed provisions of the terms of the note being offered at the top of the stack (pricing supplement). The goal is to have a shorter pricing supplement, including the terms of the notes and with links to underlying documents where details are disclosed.
- **Base prospectus:** included in the registration statement, has a description of the notes covering all matters required to be disclosed
- **MTN prospectus supplement:** the MTN prospectus supplement contains more detailed provisions of the debt securities to be offered, generally including fixed and floating rate note descriptions
- **Product supplements:** structure-focused or underlier-focused product supplements
- **Preliminary pricing supplement or free writing prospectus:** with the background disclosures in the base prospectus, MTN supplement and product supplement, the pricing supplement or free writing prospectus for the offering will be a short document
- Following the 2012 "Sweep Letter," estimated initial value, or EIV, disclosure has been a fixture on the cover pages of, and throughout the offering documents for, structured products. The SEC Staff provided guidance regarding the "components" of EIV

SEC Staff Guidance

- For reference assets, issuers of SEC-registered structured products turn to the Morgan Stanley no-action letter for guidance regarding permissible underliers as well as the type of acceptable abbreviated disclosure relating to such underlying issuers
- While technically inapplicable to indices as such, practitioners analogize this guidance to indices and, in certain cases, to index constituents
- Unlike ETFs, no equivalent of Rule 6c-11
- Finally, the SEC Staff, as well as FINRA notices relating to complex products, have provided guidance and a roadmap concerning the types of risk factors that are expected to be addressed in the offering documents relating to structured products
- Although there is guidance, Regulation S-K and materiality standards are the guideposts; the requirements are not prescriptive as they are in relation to certain ETF disclosures—this is the case with respect to fees, performance, etc.

Comparison

Distinguishing among products

	ETF	ETP (33 Act)
Securities registration	40 Act	33 Act
Issuer	Issuer is a series	Issuer is a financial institution, which is issuing and offering and selling senior, unsecured deb
Assets	Generally, 40% of the portfolio must consist of securities	The issuer is offering and selling debt; not a secured note. The debt security, whether an unlisted structured note or a listed note (an ETN), will reference an underlying asset. No ownership interest in the underlying
Registration or Disclosure	Form N-1A	Form S-3 (or S-3ASR)
Transparency	Daily portfolio holdings	Varies; daily; periodic NAV
Redemption	In-kind or Cash	Generally not redeemable
Tax	RIC for the purposes	Tax treatment will depend on note payoff
Custodian	Qualified custodian; asset segregation	N/A

Distinguishing among products *(cont'd)*

	ETF	ETP (33 Act)
Credit exposure	Not applicable	Subject to the issuer's credit risk
Pricing	Required fee and expense disclosure	SEC required EIV disclosure; secondary market pricing less transparent
Liquidity	Intraday liquidity (though intended to be held to realize desired defined outcome)	No secondary market
Maturity of market	Defined outcome ETFs still relatively new	Structured products at this point fairly well understood by broker-dealers
FINRA characterization	Complex product	Complex product
Ongoing maintenance	Requires significant ongoing expense; ongoing reporting	The issuer is not required to undertake much incremental reporting (other than tax) in connection with the notes
Other considerations	Overarching Investment Company framework; imposes governance, compliance and other requirements	The issuer will generally be an SEC-reporting company

Speakers

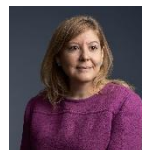


Marla L. Matusic

Partner, New York
mmatusic@mayerbrown.com
 +1 212 506 2437

Marla Matusic advises clients on the structuring and trading of complex derivatives and structured financial products. Her practice focuses on bespoke structures designed for institutional and sophisticated investors, proprietary indices and structured product automation. She also counsels on issues arising under the federal securities laws, advises clients in the negotiation of ISDA and equity derivative transactions, and assists with the setup and ongoing operation of structured note, warrant, certificate of deposit and commercial paper programs and the ongoing maintenance of and issuances under covered bond programs.

Marla is ranked as an “Up and Coming” lawyer by Chambers USA for Capital Markets: Structured Products (Nationwide). The Legal 500 US ranks Marla as a “Rising Star” for Structured Finance: Derivatives and Structured Products. The IFLR1000 guide also ranks Marla as a “Rising Star” in the US for Capital Markets: Derivatives. She was named a “Rising Star” in the capital markets category by Euromoney’s 2021 Rising Stars Americas Awards, and was shortlisted by Euromoney for its 2020 Rising Star Awards for the same. Euromoney’s Expert Guides includes Marla in its Rising Star guide for Structured Finance and Securitisation in the United States for 2021 and 2022.



Anna Pinedo

Partner, New York
apinedo@mayerbrown.com
 +1 212 506 2275

Anna Pinedo represents issuers, investment banks and other financial intermediaries as well as investors in financing transactions, including public offerings and private placements of equity, equity-linked and debt securities. She also advises on structured products and derivatives matters.

She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. Anna also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.

In the derivatives area, Anna counsels a number of major financial institutions acting as dealers and participants in the commodities and derivatives markets. She advises on structuring issues as well as on regulatory issues, including those arising under the Dodd-Frank Act. Her work focuses on foreign exchange, equity and credit derivatives products, and structured derivatives transactions. Anna has experience with a wide range of transactions and structures, including collars, swaps, forward and accelerated repurchases, forward sales, hybrid preferred stock and off-balance sheet structures. She also has advised derivatives dealers regarding their Internet sites and other Internet and electronic signature/delivery issues, as well as on compliance matters.

Resources

Legal Update: [CFTC Issues Request for Comment and Staff Advisory on Prediction Markets](#) (March 13, 2026)

Legal Update: [CFTC Staff Partially Reinstate CPO Exemption for RIAs](#) (December 24, 2025)

Legal Update: [CFTC Harmonizes US Person and Guarantee Definitions in Swap Requirements](#) (December 15, 2025)

Legal Update: [Risk Transfer Market Receives CPO Registration Relief from CFTC](#) (December 1, 2025)

Upcoming Defined Outcome Webinars ([Register Here](#)):

- Considerations for index providers to, or hedge providers to, ETFs
- Understanding the regulation of SMAs



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