

Defined Outcome Series

Considerations for index providers to, or hedge providers to, ETFs

Agenda

- Defined outcome products
- The role of the index and index provider
- The role of a swap counterparty

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 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 like a structured note) 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

The role of the index and index provider

Reference index

- Generally, a defined outcome ETF will be organized as an active ETF
- To the extent that the ETF references an index, it will reference a rules-based dynamic index (typically benchmark indices or an overlay on one or more benchmark indices)
- Many indices are now being constructed with defined outcome products in mind, but the reference index may be a reference index for other products as well, including swaps, structured products, and fixed index annuities, among others
 - These indices may embed a “ladder” or “roll” feature
- Many of the indices that are being used as the reference indices for defined outcome ETFs have particular characteristics
 - Rules-based (to avoid being viewed as “discretionary”)
 - Dynamic—containing an adjustment feature such that the index adjusts its exposure or rebalances as between asset classes—may be between equities and cash, or between equities and another asset class
 - Volatility-adjusted—may contain a volatility adjustment feature or a “price” targeting feature

Reference index *(cont'd)*

- The registration statement will:
 - Identify the index
 - Discuss the index methodology in sufficient detail for an investor to understand the principal features of the index
 - Provide a discussion of the index rebalancing
 - To the extent that the index has a volatility control feature, describe it
 - Describe any other notable features of the index—for example, a decrement feature
 - Contain some discussion regarding index performance, which complies with applicable rules. The index performance may include hypothetical backtested performance, which, if included, will be appropriately qualified and be accompanied by disclaimers and disclosures explaining the presentation and calculations
- Generally, the index description will not contain very much information regarding the index provider

Reference index *(cont'd)*

- Index related risks, which might include risks related to:
 - Limited history
 - Decrement feature, if any
 - Volatility target index risk
 - Asset class(es)
 - Risks related to the backtested performance data
 - Risks related to lack of transparency of index methodology or changes thereto
 - Risks associated with the license to the index being terminated
 - To the extent a swap or other derivative is tracking the index, failure to track index (tracking error)

Reference index *(cont'd)*

- The adviser (or portfolio manager) and the ETF board of directors will have conducted diligence related to the index provider and the index
- During the course of the diligence, among other things, they will consider:
 - How the index provider is regulated, if at all
 - The index provider's experience and the overall scope of its index business and its compliance policies and procedures
 - Whether the provider complies with the EU Benchmark Regulation or the IOSCO Principles or other standards
 - In the case of the board, how the index was selected and the principal characteristics of the index
 - In the case of the board, how or whether the adviser tested the methodology and how it seeks to replicate it
 - The risks associated with the index provider, the index and its methodology, and any providers associated with the index (for example, any administrator or calculation agent)
 - Any element of discretion that might be a factor in the index, the market disruption events and any other significant events that would affect the index

Reference index *(cont'd)*

- ETF will enter into a license agreement with the index provider
- The license agreement will address
 - The license fee, the term, termination provisions
 - Use of the name, mark, approval of license description
 - Compliance with applicable laws
 - Addresses regulatory status of parties
 - Indemnification provisions
 - Confidentiality provisions
 - Other general matters, such as governing law, addressing disputes

Liability considerations

- Index provider is not a “distribution participant” in the ETF offering for securities purposes; index provider also not involved in preparing, furnishing or reviewing the index related disclosures
- Index provider would not be a “control person”
- The SEC has considered a number of actions involving index providers—these largely have involved instances in which there were undisclosed features of an index that affected published index values; the index provider failed to have in place effective policies and procedures and these affected the operation of the index; etc.
- Also, little concern that an index provider would be viewed as a “promoter” under the Investment Company Act

Regulation of index providers

- Unlike Europe, in the US there is no uniform regulation that is applicable to indices, although these are subject to various different regulatory schemes and guidelines (for example, generic listing rules of the securities exchanges, to the extent a product that references the index will be listed; to the extent the index is developed by a broker-dealer, then, subject to various regulations; etc.)
- In the US, also, index providers are not subject to a specific regulation—an index provider may be a broker-dealer, a registered investment adviser, or may be a data provider or other non-regulated person
- Since 2022 SEC Request for Comment on Certain Information Providers there has not been any proposed regulation

The role of a swap counterparty

Swap counterparty

- Many defined outcome ETFs will replicate the index returns through a derivative—this might be an option contract or a swap that will reference the index
- The ETF registration statement will refer to a swap counterparty that is a financial institution
- The ETF registration will disclose risk factors that relate to
 - The swap agreement
 - The swap agreement termination
 - The counterparty and its credit
- However, the swap counterparty is not identified
- Interestingly, in the context of a securitization registered in compliance with Reg AB II, a swap counterparty would be required to be identified depending upon certain significance percentages

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

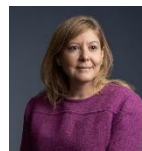


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Marla Matusic advises clients on the structuring and trading of complex derivatives and structured financial products. Her practice focuses on bespoke structures designed for institutional and sophisticated investors, proprietary indices and structured 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.



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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 Webinar ([Register Here](#)):

- Understanding the regulation of SMAs (May 19)



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