



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
TRADING AND MARKETS

August 23, 2012

Elliott R. Curzon, Esq.
Dechert LLP
1775 I St., NW
Washington, DC 20006-2401

RE: Request for Relief from Section 11(d)(1) of the Securities Exchange Act of 1934
for certain extensions of credit on ETF shares

Dear Mr. Curzon:

In your letter dated August 23, 2012, you request, on behalf of Charles Schwab & Co., Inc. ("Schwab"), that the staff of the Securities and Exchange Commission (the "Staff") expand relief previously granted from the requirements of Section 11(d)(1) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to broker-dealers providing extensions of credit on shares of exchange-traded funds ("ETFs").¹ You asked the Staff for assurances that it would not recommend enforcement action to the Commission under Section 11(d)(1) if Schwab receives certain payments in connection with its proposed ETF Alliance Program, as described further in your letter, made by a sponsor, adviser or other person associated with a Qualifying ETF (an "ETF Related Person"). You believe that receipt of such payments from an ETF Related Person would not disqualify Schwab from relying on the relief from Section 11(d)(1) granted in the 2005 Letter or the Custom Letters because they would not be a "payment, compensation or other economic incentive to promote or sell" ETF shares (a "Promotional Payment") that would disqualify the broker-dealer from relying on the class exemption granted in the 2005 Letter.

Based on the facts and representations in your letter, but without necessarily agreeing with your analysis, we confirm that the staff would not recommend enforcement action to the Commission under Section 11(d)(1) of the Exchange Act if Schwab receives payments in-kind, such as the donation of experts from an ETF's research team to speak at a webcast, and cash reimbursements to help defray the costs incurred in sponsoring educational and training seminars in connection with the ETF Alliance Program.

¹ See Letter from Catherine McGuire, Chief Counsel, Division of Trading and Markets to the Securities Industry Association (dated Nov. 21, 2005) (the "2005 Letter") and the "Custom Letters" as that term is defined in your request.

In granting this no-action relief, we note in particular your representations that:

- The ETF Alliance Program will not generate any profit or income for Schwab.
- No payment will be made, by Schwab or any ETF Related Person, to program participants, such as associated persons or registered investment advisers, in connection with conferences and other events sponsored by the ETF Alliance Program.
- Payments received by Schwab in connection with the ETF Alliance Program will not be tied to sales production, sales contests, client holdings or promotional efforts by Schwab.
- Topics for articles and speeches provided by ETF Related Persons will be product-neutral, and will not promote a particular ETF.
- A Schwab committee, as described in your letter, will vet all ETF-related articles, speeches and presentations submitted by third parties prior to a conference or prior to inclusion in a Schwab publication, and the committee or its representative will monitor ETF Related Person's speeches and presentations to ensure compliance with Schwab's policy concerning the ETF Alliance Program.
- The Schwab committee will: document any infraction of its ETF Alliance Program policy by ETF Related Person, maintain such documentation in a centralized location, and take appropriate action against the ETF Related Person.
- ETF Alliance Program conferences will be education focused only and will be held in locations which comply with the limitation in NASD Rule 2830(I)(5)(C)(iii).² Conferences will not provide for or arrange for entertainment, before, after or during conference operating hours.
- Admission to the conferences is not conditioned on achievement of a sales target or production level (in the case of investment professional invitees) or account size, level of ETF or other security holdings or number of transactions conducted through Schwab (in the case of client invitees).

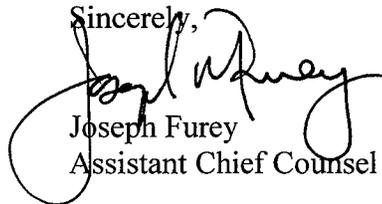
² NASD Rule 2830(I)(5)(C)(iii) provides that an investment company offeror may pay or reimburse members for meetings held by an offeror or a Financial Industry Regulatory Association member for the purpose of training or education of the members' associated persons, provided that, among other conditions, the location is "appropriate to the purpose of the meeting, which shall mean an office of the offeror or the member, or a facility located in the vicinity of such office, or a regional location with respect to regional meetings."

- Schwab will also comply with the record keeping requirements of NASD Rule 2830(l)(5)(C)(i) for any payments received from ETF Related Persons in connection with the ETF Alliance Program.

The foregoing no-action position is subject to modification or revocation as necessary or appropriate. The Staff expresses no view with respect to any other questions the proposed transactions may raise, including, but not limited to, the adequacy of disclosure concerning, and the applicability of other federal and state laws or rules of any self-regulatory organization to, the ETF Alliance Program.

If you have any questions regarding this letter, please call Darren Vieira, Special Counsel, or me at (202) 551-5550.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph Furey". The signature is stylized and written over the printed name and title.

Joseph Furey
Assistant Chief Counsel

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August 23, 2012

Mr. David Blass
Chief Counsel
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 "F" Street, N.E.
Washington, DC 20549

Re: Request for Relief from Section 11(d)(1) of the Securities Exchange Act of 1934 for certain extensions of credit on ETF shares

Dear Mr. Blass:

On behalf of Charles Schwab & Co., Inc. ("Schwab"), we are writing to request that the Securities and Exchange Commission ("SEC" or "Commission") staff (the "Staff") confirm that it would not recommend enforcement action for violation of Section 11(d)(1) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), if Schwab relies on the exemptive relief granted in the letter dated November 21, 2005, from the Commission to the Securities Industry Association (the "2005 Letter")¹ and in certain subsequent letters granted to particular ETFs (the "Custom Letters")² notwithstanding

¹ See Derivative Products Committee of the Securities Industry Association, SEC Exemptive Letter, 2005 WL 3311414 (Nov. 21, 2005).

² Certain actively-managed ETFs and ETFs formed as commodity pools sought and obtained relief from the Commission to the effect that, notwithstanding that they did not otherwise satisfy the definition of "Qualifying ETF" set forth in the 2005 Letter, they would be treated as Qualifying ETFs and broker-dealers could extend, maintain and arrange for the extension or maintenance of credit on their shares in reliance on exemptions from Section 11(d)(1). Euro Currency Trust, SEC No-Action Letter, 2005 WL 3695278 (Dec. 5, 2005); streetTRACKS Gold Trust, SEC No-Action Letter, 2005 WL 3695285 (Dec. 12, 2005); DB Commodity Index Tracking Fund, SEC No-Action Letter, 2006 WL 265088 (Jan. 19, 2006); Bear, Stearns & Co., SEC No-Action Letter, 2008 WL 944170 (Mar. 24, 2008); PowerShares Actively Managed Exchange Traded Fund Trust, SEC No-Action Letter, 2008 WL 944169 (Apr. 4, 2008); Index IQ ETF Trust, SEC No-Action Letter, 2009 WL 1677288 (Apr. 2, 2009); iShares Diversified Alternatives Trust Actively-Managed Commodity-Based Investment Vehicle, SEC No-Action Letter, 2009 WL 3855929 (Nov. 12, 2009); U.S. One Trust, SEC No-Action Letter, 2010 WL 1953492 (May 4, 2010).

Schwab's receipt of certain payments, described in this letter, made by a sponsor, adviser or other Qualifying ETF service provider (an "ETF Related Person") to broker-dealers to fund education and training programs for clients, prospective clients or investment professionals. Under the relief requested such payments would not be a "payment, compensation or other economic incentive to promote or sell"³ ETF shares (a "Promotional Payment") that would otherwise disqualify the broker-dealer from relying on the relief from Section 11(d)(1) granted in those letters.

I. Background.

A. Schwab and the Schwab Platform.

Schwab is registered with the Commission as a broker-dealer and has 304 domestic branch offices in 45 U.S. states, as well as branches in the Commonwealth of Puerto Rico and London, England. Schwab provides financial services to individuals and institutional clients through various divisions, including, in particular, Schwab's Investor Services and Institutional Services Divisions (collectively, the "Platform").

Schwab offers a wide variety of products and services through its Platform, including ETFs and managed accounts that invest in ETFs. ETFs available to brokerage clients and independent registered investment advisers ("RIAs") on the Platform currently include more than 1000 ETFs sponsored by third parties and 15 proprietary ETFs. Brokerage clients pay standard commission rates for third-party ETFs, but proprietary ETFs sold on-line at Schwab are available on a commission-free basis.

B. The proposed ETF Alliance Program.

Schwab provides a wide variety of educational events, conferences, publications, webcasts, analytical tools and information to assist clients, prospective clients and investment professionals, such as associated persons of the broker-dealer, RIAs and introducing broker-dealers, working on or through the Platform or other divisions of Schwab, to better understand the products and services available through Schwab. The goal of these programs is to enhance customer access to educational information and other resources about investing and the securities markets in general and to encourage use of the Platform; it is not intended to promote any particular product. Certain of the educational tools, publications, speeches or events provided by Schwab may come from or be funded in part by sponsors of products or services available through the Platform.

In connection with the increasing interest in ETFs by its clients, RIAs, registered representatives and introducing brokers, Schwab proposes to enhance its educational and training programs by adding information relating to ETFs to the existing programs targeting

³ 2005 Letter, footnote 1, *supra*.

these constituencies and seeking sponsorship from ETF Related Persons. ETF Related Persons would provide speakers, printed educational materials and other types of content for Schwab's educational and training programs as well as funding for educational and training tools, webcasts, publications, seminars and other educational programs. ETF Related Persons would provide support for general investment-related educational and training programs as well as for ETF-specific programs. All programs would discuss investment products and services generically and not discuss, describe or promote any particular ETF. Schwab refers to this initiative as the ETF Alliance Program.

The educational programs and tools offered as part of the ETF Alliance Program would address investment uses for ETFs (including general strategy ideas that may be implemented through ETFs), the risks and rewards of investing in ETFs, ETF trading best practices, the operations and economics of particular types of ETFs, asset allocation strategies using ETFs and topics that touch on ETFs as an asset class or on particular types of ETFs (e.g., use of commodity ETFs). In addition to ETF-related education and training, seminars, publications and other programs and tools offered under the ETF Alliance Program, the ETF Alliance Program could also offer general investment-related topics, such as market analyses, portfolio construction, estate planning, philanthropic advisory services and risk management tools, as well as practice management-related topics, such as leadership training, compliance requirements and regulatory developments.

The structure of the ETF Alliance Program takes into account regulatory guidance regarding education and training programs.⁴ Allowing broker-dealers, like Schwab, to obtain support to provide educational and training programs from ETF Related Persons would enhance the scope and delivery methods available for education and training. Similarly, the program will be structured so as not to present the types of abuses cited by the Financial Industry Regulatory Authority ("FINRA") in enforcement actions as problematic. Schwab's programs do not provide entertainment, reimbursement for expenses of guests or payments for attendees to stay for additional nights after the event is over.⁵ In addition, the

⁴ For example, the ETF Alliance Program would deliver educational and training content in a variety of ways, including webinars, paper publications, web-based information and tools, seminars, special educational brochures and panel discussions. This is consistent with FINRA's admonition that broker-dealers should deliver education and training using a variety of forums, media and methods to more effectively address the different types of products and services covered as well as the different types of user audiences. Non-Conventional Investments, NASD Notice to Members 03-71 (Nov. 2003) ("Educational brochures, videos, lectures, explanatory memoranda, and Web-based seminars are all appropriate ways of delivering training. The particular training methods will vary based upon the products themselves, as well as the size and client base of the firm.")

⁵ See *Wells Investment Securities, Inc.*, NASD Case No. CAF 030046 (Aug. 26, 2003) (sponsorship of conferences that included less than thirteen hours of training and education, entertainment such as a beach bash and a Civil War reenactment and payment of all expenses of guests of the attendees); *Putnam Retail Management Limited Partnership*, NASD Case No. SAF 2004016001 (Dec. 27, 2006) (sponsor provided impermissible compensation for meals and

sponsored seminars and conferences focus on educational content only for substantially all of the daily session (*i.e.*, day-long seminars will include between six to eight hours of educational events).⁶

In connection with the ETF Alliance Program, Schwab would receive from ETF Related Persons both payments in-kind, such as the donation of experts from the ETF's research team to speak at a webcast, and cash payments to help defray the costs incurred in sponsoring educational and training seminars. The ETF Alliance Program will not generate any profit or income for Schwab. No payment will be made, by Schwab or any ETF Related Person, to program participants, such as associated persons or RIAs, in connection with conferences and other events sponsored by the ETF Alliance Program. Payments received by Schwab in connection with the ETF Alliance Program will not be tied to sales production, sales contests, client holdings or promotional efforts by Schwab.

In connection with certain types of events, such as client-focused publications or webcasts, Schwab would seek support from ETF Related Persons in the form of a contribution of an article or speech by an investment expert. In most cases, Schwab would select the topic for the article or speech. Topics for these articles and speeches will be product-neutral. The articles and speeches will not promote a particular ETF, but as discussed earlier in this letter, may discuss ETF-specific topics, as well as more general topics, such as economic forecasts (*e.g.*, prospects for the U.S. bond market) or particular investment strategies (*e.g.*, Factor ETFs: Fad or the Future), to name a few. Schwab will reserve the right to veto any speaker or topic (in the less typical case where the ETF sponsor or other ETF Related Person proposes the topic).

Schwab has a committee that vets all ETF-related articles, speeches and presentations submitted by third parties prior to a conference or to inclusion in a Schwab publication. The committee is comprised of representatives from various groups within Schwab, including a subject matter expert on the ETF products offered through the Platform, Client Enterprises (for example, Retail or Advisor Services, as appropriate and relevant to upcoming events), Marketing/Events and Legal/Compliance. The committee will meet as needed prior to each event and publication opportunity to review ETF-related submissions

expenses of guests and tickets to a baseball game); *AllianceBernstein Investments, Inc.*, NASD Case No. SAF 2004016001 (Dec. 27, 2006) (sponsor provided impermissible payments for guests and tickets to Broadway plays for attendees and guests); *DWS Scudder Distributors, Inc.*, NASD Case No. EAF 0401460001 (Dec. 29, 2006) (sponsor paid for meals and entertainment for spouses and entertainment, including golfing, fishing, horseback riding and tickets to sporting events and theatres, and the costs for some attendees to stay for additional nights).

⁶ See *Wells Investment Securities, Inc.*, NASD Case No. CAF 030046 (Aug. 26, 2003). See also NASD Regulation, Inc., *Regulatory & Compliance Alert*, Summer 2000, at p. 13 ("NASD Regulation interprets the training or education exception as an event that is first and foremost intended to provide training or education to an associated person. Any training meeting should occupy substantially all of the work day.")

and confirm in advance that any speech or presentation to a conference or any material included in a Schwab publication is appropriate to the intended audience and would not promote a particular ETF. The committee or its representative will monitor ETF Related Persons' speeches and presentations to ensure compliance with this policy. If a presentation or speech by an ETF Sponsor or ETF Related Person differs from that approved by the committee and in fact promotes a particular ETF or ETFs, the committee will document the infraction, and based on the facts and circumstances, determine the appropriate course of action, which could range from a written warning to an ETF Related Person to deeming the ETF Related Person ineligible to participate in the ETF Alliance Program in the future. All actions taken by the committee will be documented and records will be maintained in a centralized location.

Schwab would seek financial sponsorship from ETF Related Persons in connection with a variety of educational and training conferences produced by Schwab in connection with the ETF Alliance Program. The conferences range from half day to several day events, are education focused only and will be held in locations which comply with the limitation in NASD⁷ Rule 2830(1)(5)(C)(iii).⁸ An all-day event would include six to eight hours of educational or training programs. Conferences do not provide for or arrange for entertainment, before, after or during conference operating hours.⁹ The range of topics

⁷ FINRA is in the process of consolidating the rules of its predecessor organizations, NASD, Inc. and NYSE Regulation, Inc. NASD Rule 2830 ("Rule 2830") has not yet been formally incorporated into the rules of FINRA and is referred to as an NASD Rule by the convention established by FINRA. See, December 8, 2008 FINRA Information Notice at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117506.pdf>

⁸ Rule 2830(1)(5)(C)(iii) imposes a limit that for meetings held by an offeror or by a member for the purpose of education or training "the location [of the meeting] is appropriate to the purpose of the meeting, which shall mean an office of the offeror or the member, or a facility located in the vicinity of such office, or a regional location with respect to regional meetings."

⁹ Outside of conference hours, Schwab may host a cocktail hour style event. These events are not part of the conference, but rather provided for and open to all attendees as a form of hospitality. While Schwab will arrange for the event, the cost may be offset by a sponsoring ETF Related Person.

With respect to attendees who are associated persons of a broker-dealer, FINRA has said that education and training events "laden with golf outings, cruises, tours, or other entertainment" are not consistent with the spirit of Rule 2830(1)(5)(C) (See May 7, 2001, letter to the NASD membership from NASD President Mary Schapiro). An NASD Regulatory and Compliance Alert issued in the summer of 2000 stated that:

NASD Regulation interprets the training or education exception as an event that is first and foremost intended to provide training or education to an associated person. Any training meeting should occupy substantially all of the work day. Payment or reimbursement for any associated meals, lodging, and transportation would be permissible but reimbursement or payment for golf outings, tours, or other forms of entertainment while at a location for the purpose of training or education would not be permissible.

covered in the programs may be general or ETF-related (though non-product specific). The programs are open to all similarly situated participants (*e.g.*, all RIAs or clients that are customers of Schwab), and admission is not conditioned on achievement of a sales target or production level (in the case of investment professional invitees) or account size, level of ETF or other security holdings or number of transactions conducted through Schwab (in the case of client invitees). Depending upon the seminar or event, sponsors may be entitled to place signage at the event, have a representative of the sponsor provide an educational or training presentation during a panel or a lunch, maintain an information booth outside of the room or rooms in which the speeches and presentations are given and have its name and logo listed in meeting materials. Sponsorship will generally be available on a first-come, first served basis and is not conditioned on the achievement of any sales target or production level; however, Schwab may assign sponsorships based on subject matter expertise and relevance to the anticipated audience. For example, Schwab may consider such factors as whether it would be appropriate to have an ETF Related Person known for its expertise in equity ETFs speak at a fixed income focused event.

As noted above, Schwab will monitor signage, information and presentations provided by ETF Related Persons to ensure that the educational and training aspects of the ETF Alliance Program are maintained.¹⁰

In addition to complying with the limitations of Rule 2830(l)(5)(C)(iii), Schwab will also comply with the record keeping requirements of Rule 2830(l)(5)(C)(i) for any payments received from ETF Related Persons in connection with the ETF Alliance Program.

C. Prior Commission guidance regarding Section 11(d)(1).

Section 11(d)(1) prohibits a person who is both a broker and a dealer from extending or maintaining or arranging for the extension or maintenance of credit to or for a client on any non-exempted security that is a part of a new issue in the distribution of which the broker-dealer participated as a member of a selling syndicate or group within the previous thirty days.¹¹ The Commission has taken the position that shares of ETFs that are open-end investment companies and unit investment trusts registered under the Investment Company Act of 1940 ("1940 Act") are distributed in a continuous manner and, as a result, broker-dealers selling the securities are participating in the "distribution" of a new issue for

In addition, FINRA has long recognized that reasonable business entertainment is permissible (See, June 10, 1999 letter from R. Clark Hooper to Henry H. Hopkins and Sarah McCafferty of T. Rowe Price Investment Services, Inc.)

Schwab will continue to adhere to FINRA's guidance and rules in its implementation of the ETF Alliance Program. Any cocktail hour or hospitality event will be consistent with FINRA's guidance concerning reimbursement and business entertainment.

¹⁰ See discussion above at pp. 3-5 and accompanying footnotes 4-6.

¹¹ 15 U.S.C. §78k(d)(1).

purposes of Section 11(d)(1).¹² The Staff has taken the same view with respect to ETFs that operate as commodity pools and are not registered with the Commission under the 1940 Act.¹³ Accordingly, absent relief, a broker-dealer would not be able to extend, maintain or arrange for the extension of credit on ETF shares purchased through the broker-dealer.

Prior to issuing the 2005 Letter, the Commission provided limited relief from the requirements of Section 11(d)(1) to non-“Authorized Participant”¹⁴ broker-dealers, trading in the secondary market, on shares of index-linked, 1940 Act ETFs.¹⁵ In addition, the Staff confirmed that broker-dealers may extend, maintain, or arrange for the extension or maintenance of credit on ETF shares pursuant to Rule 11d1-2 if the shares have been owned by the client for more than thirty days.¹⁶ In the 2005 Letter, among other things, the Commission granted relief to broker-dealers acting as APs to extend, maintain or arrange for financing for shares of “Qualifying ETFs” sold by the AP provided certain conditions were met. One of the conditions specified that neither the broker-dealer AP nor any natural person associated with the AP, directly or indirectly, receives from the “fund complex”¹⁷ any

¹² Investment Company Institute, SEC No-Action Letter, 1980 WL 17375 (Oct. 9, 1980) (“Section 11(d)(1) prohibits broker-dealers who distribute shares of a mutual fund as members of the selling group from selling such shares on margin or taking fully-paid for shares of such fund as collateral in an initial purchase of other securities on margin.”) (“1980 ICI Letter”). *See also*, Exchange Act Release No. 6726, 1962 WL 67483 (Feb. 8, 1962); Extension of Credit by Broker-Dealers on Investment Company Shares, Exchange Act Release No. 21,577, 32 SEC Docket 10 (Dec. 18, 1984), 49 Fed. Reg. 50,172 (Dec. 27, 1984) (adopting SEC Rule 11d1-2 permitting the extension of credit on shares of an open-end management investment company or unit investment trust provided the security has been owned for more than 30 days by the security holder.) (“11d1-2 Release”).

¹³ *See, e.g.*, DB Commodity Index Tracking Fund, SEC No-Action Letter, 2006 WL 265088 (Jan. 19, 2006).

¹⁴ Authorized Participants (“APs”) are broker-dealers that have entered into agreements with ETFs that permit them to place orders for large blocks of ETF shares – Creation Units – issued in exchange for in-kind deposits of securities that mirror the composition of ETF portfolios. APs are also permitted to redeem Creation Units. Although APs may pay fees to the ETF to cover transaction costs, APs benefit through the ability to arbitrage any differences between the market price of an ETF share and the NAV of the ETF share ensuring that ETF shares trade at or near their NAV. APs benefit investors and the marketplace by providing liquidity, market efficiency and reduced trading spreads. *See generally* SEC Release No. 40-25,258 (Nov. 8, 2001), 66 Fed. Reg. 57,613 (Nov. 15, 2001).

¹⁵ *See* American Stock Exchange LLC, SEC No-Action Letter, 2001 WL 940280 (August 17, 2001); NASDAQ Stock Market, Inc., SEC No-Action Letter, 2002 WL 31664460 (Nov. 13, 2002).

¹⁶ *Id.*

¹⁷ The Staff defined “fund complex” to mean “the issuer of the ETF shares, any other issuer of ETF shares that holds itself out to investors as a related company for purposes of investment or investor services, any investment adviser, Distributor ... [i.e., a “principal underwriter” for

payment, compensation or other economic incentive to promote or sell the shares of the ETF to persons outside the fund complex, other than non-cash compensation permitted under NASD Rule 2830(1)(5)(A), (B) or (C).¹⁸ The Commission confirmed in the 2005 Letter that the exemptive relief previously granted to non-AP broker-dealers was also subject to the condition that the broker-dealer extending, maintaining or arranging for the extension of credit on ETF shares not receive from the fund complex, any payment, compensation or other economic incentive to promote or sell the shares of the ETF to persons outside the fund complex other than compensation permitted under Rule 2830.¹⁹

In the 2005 Letter the Commission did not address the question of whether payments received from an ETF Related Person to sponsor an education or training event would constitute a Promotional Payment, *i.e.*, “*payment, compensation or other economic incentive to promote or sell the shares of the ETF to persons outside the fund complex.*”²⁰ As further discussed below, we do not believe that such payments are or should be deemed Promotional Payments under the 2005 Letter; however, we acknowledge that the 2005 Letter could be read to apply to the ETF Alliance Program so that Schwab’s receipt of such payments would preclude it from extending, maintaining or arranging for credit on ETF shares under Section 11(d)(1). Accordingly, because it is not clear under the 2005 Letter whether the payments from ETF Related Persons contemplated by the ETF Alliance Program would be deemed to be a Promotional Payment, absent interpretive guidance or relief Schwab is concerned that it may not be eligible to rely on the relief from Section 11(d)(1) granted in the 2005 Letter and the Custom Letters if it were to receive such payments.

D. Request for relief.

To address any possible characterization of payments received to support educational and training programs as a Promotional Payment, Schwab respectfully requests that the Commission confirm that compensation or other economic benefits received by a broker or dealer from an ETF Related Person solely to support or sponsor *bona fide* education and training programs for clients, prospective clients, investment professionals or introducing brokers would not constitute Promotional Payments that would disqualify the broker or dealer from relying on the relief from Section 11(d)(1) granted in the 2005 Letter and the Custom Letters.

purposes of the 1940 Act], sponsor, depositor, or trustee (in the case of a unit investment trust) of any such issuer or any “affiliated person” (as defined in the Investment Company Act) of any such issuer or any such investment adviser, Distributor, sponsor, depositor or trustee.” Derivative Products Committee of the Securities Industry Association, SEC No-Action Letter, 2005 WL 3311414, at *1 (Nov. 21, 2005).

¹⁸ *Id.* at *1.

¹⁹ *Id.* at *2.

²⁰ *Id.* at *1.

II. Rationale for Relief from Section 11(d)(1).

We respectfully submit that it would be in the public interest and consistent with the investor protection objectives of the Exchange Act for the Commission to clarify that payments received by broker-dealers to support educational and training programs would not constitute Promotional Payments, as that term is generally understood, because the primary purpose of such payments would be to enhance the availability of such programs by permitting ETF Related Persons to support or sponsor *bona fide* programs, not to promote or sell ETFs. Therefore, we request that the Staff expand relief previously granted from the requirements of Section 11(d)(1) under the Exchange Act, to broker-dealers providing extensions of credit on shares of ETFs in the 2005 Letter and in the Custom Letters. We are asking the Staff to confirm that it would not recommend enforcement action under Section 11(d)(1) of the Exchange Act to the Commission if Schwab relies on exemptive relief granted in the 2005 Letter notwithstanding Schwab's receipt of certain payments, described in this letter, made by ETF Related Persons to fund education and training programs for clients, prospective clients or investment professionals. We address these points in more detail below.

As noted above, in the 2005 Letter the Commission specified and confirmed that neither broker-dealers nor any natural person associated with a broker-dealer may directly or indirectly, "receive from a fund complex any payment, compensation or other economic incentive to promote or sell the shares of the ETF to persons outside the fund complex, other than non-cash compensation permitted under NASD Rule 2830."²¹ The reference to Promotional Payments in the 2005 Letter uses the term "promote" together with the word "sell." Thus, a Promotional Payment as described in the 2005 Letter would seem to refer to compensation resulting from sales of ETF shares or designed to help sell ETF shares.

The Commission's focus on sales-related activity is consistent with the concerns expressed regarding potential abuses by broker-dealers through financing activity in connection with mutual fund shares.²² However, payments made to support the type of educational or training programs to be offered by Schwab are not conditioned on or related to sales of ETFs, and they are not the type of payments about which the Commission

²¹ *Id.* at *1 and *2.

²² In prior guidance, the Staff has indicated that it is receipt of sales loads or Rule 12b-1 fees that create issues under Section 11(d)(1). In other words, the Staff equated the concept of a payment that is problematic in connection with Section 11(d)(1) relief with sales-related compensation. *See, e.g.*, Charles Schwab & Co., SEC No-Action Letter, 1983 No-Act. LEXIS 2730, *3 (Jul 29, 1983) (listing as a condition to relief granted to Schwab under Section 11(d)(1) in connection with the financing of mutual fund shares advised by unaffiliated advisers that Schwab "have no agreement with any such investment company, investment adviser or underwriter to distribute or sell shares issued by those investment companies; nor will Schwab receive any compensation from any of these persons in connection with the sale of investment company shares")(emphasis added)

expressed concern when it qualified relief from Section 11(d)(1) on non-receipt of any Promotional Payments. Accordingly, the Staff should clarify that payments made to a broker-dealer by ETF Related Persons exclusively to support educational and training programs and not tied in any way to sales of the ETF shares or achievement of sales targets, do not constitute the type of Promotional Payments referenced in the 2005 Letter.

- A. Compensation to fund training and education does not create incentives to engage in “share pushing,” which Section 11(d)(1) was intended to prevent.

Prior interpretations of Section 11(d)(1) in the context of mutual fund shares include the condition that broker-dealers relying on the relief not receive Promotional Payments from a member of the fund complex. The Staff’s concern appears to be that receipt of a Promotional Payment could incent a broker-dealer to finance purchases of ETF shares by clients who are unable or unwilling to meet margin calls.²³ For example, the letter to the Investment Company Institute in 1989 noted that brokers-dealers may extend or arrange for the extension of credit on fund shares to obtain a sales charge, sales load or Rule 12b-1 fees.²⁴ This type of activity by a broker-dealer is essentially the equivalent of “share pushing” described by Congress as the basis for adoption of Section 11(d)(1).²⁵ The Staff also has expressed concern that this type of share pushing could not only result in unwanted leverage by the client but could also lead to systemic risk through margin calls followed by fund redemptions.²⁶

Receipt of payments by a broker-dealer from an ETF Related Person to support educational and training programs does not present these concerns or incent a broker-dealer to “share push.” First, payments are not tied to execution of sales or achievement of sales targets and are paid by the ETF Related Person regardless of whether ETF shares are sold. Second, the payments do not generate a profit for the recipient, as a sales load or Rule 12b-1

²³ Investment Company Institute, SEC No-Action Letter, 1989 SEC No-Act. LEXIS 236, *4 (Jan. 9, 1989) (“The Staff remains concerned that broker-dealers selling fund shares at a price including a sales charge, which can be significantly larger than a standard commission, may have an incentive to extend or arrange for the extension of credit in connection with the purchase of fund shares by investors who may be unable to unwilling to meet margin calls. . . Further, the Staff remains concerned that, if the net asset value of a registered open-end investment company or unit investment trust were to decline rapidly, numerous and sudden redemptions of fund shares could result from forced close-outs of margin accounts if margin calls were not answered with respect to fund shares that were purchased on credit.”)

²⁴ *Id.*

²⁵ H.R. Rep. No. 73-1383, at 22 (1934) (arguing that Section 11(d)(1) is designed to protect investors against “one of the greatest potential evils inherent in the combination of the broker and dealer function in the same person, by assuring that [a broker-dealer] will not induce his clients to buy on credit securities which he has undertaken to distribute to the public.”)

²⁶ 1980 ICI Letter, footnote 12, *supra*.

fee would. Unlike receipt of a sales load by a broker-dealer, receipt of payments to help fund educational and training events primarily benefit the attendees of the educational or training event and not the broker-dealer. Third, any cash payments are specifically allocated to reimbursement of out-of-pocket expenses and non-cash compensation and are not paid to brokers, RIAs or other sales persons. As a result, the ETF Alliance Program will not create an incentive for the broker-dealer or its associated persons to extend credit or arrange for the extension of credit to clients to purchase the ETFs because they will not earn any additional compensation from doing so.²⁷ Accordingly, a broker-dealer receiving payments to fund education and training would not have an incentive to encourage clients to purchase or continue to hold ETFs, including through providing credit to the clients. For these reasons, we submit that the concerns previously expressed by the Staff concerning Section 11(d)(1)²⁸ would not be implicated by the receipt of payments in connection with the ETF Alliance Program.

- B. The ETF Alliance Program events are not sales events and will not promote any ETF.

The payments contemplated to reimburse Schwab for the costs of the ETF Alliance Program provide additional safeguards that may not be available in other circumstances because they support only one element of a much broader education and training initiative. The ETF Alliance Program, together with Schwab's broader suite of educational and training programs, is not designed to promote, market or sell any particular ETF or other product but, instead, provide investors access to educational and training resources and, more generally, to encourage use of the Schwab Platform by both investment professionals and clients. Speeches, articles and other presentations used at the events will be vetted by Schwab to ensure that they are ETF "product neutral" and do not describe, discuss or promote any particular ETF product or service. The events will typically cover a range of products, services and strategy ideas, but will not focus on specific products. Although program sponsors may obtain some visibility with participants as a result of signage, affiliation with speakers and recognition in the event program, the ETF Alliance Program events are designed exclusively to provide education and training to the participants and will be supervised by Schwab to ensure that those objectives are met.

²⁷ It should also be note that, unlike Rule 12b-1 fees, certain types of sales loads and other distribution payments that are paid as trails and, thus, incent a broker-dealer to encourage clients to continue to hold securities (including on margin) over long periods of time so that the broker-dealer may continue to earn the trail, payments related to the ETF Alliance Program are paid once, at or about the time of the event, regardless of whether any ETF sales are ever made or ETF shares are held by clients through the Platform.

²⁸ See, e.g., Investment Company Institute, SEC No-Action Letter, 1989 SEC No-Act. LEXIS 236, *4 (Jan. 9, 1989).

- C. Educational and training programs are beneficial from a public policy perspective and should be encouraged.

The Commission and other securities regulators, such as FINRA, have emphasized the importance of broker-dealers providing education both to clients and to investment professionals. Commissioner Cynthia A. Glassman, for example, noted in a speech in 2006 that “investor education programs are critical in helping investors make wise investment choices with their hard-earned money.”²⁹ Former Chairman Arthur Levitt similarly emphasized the importance of providing training and education to brokers and their supervisors noting “[t]he pace of innovation in our industry shows no sign of slowing – we need to educate and re-educate ourselves about new products, new regulations and new problems that may emerge.”³⁰ In the context of leveraged and inverse ETFs, FINRA emphasized that broker-dealers should provide robust product training to associated persons as a condition to offering the product.³¹

In light of the importance of investor education and training, FINRA and, before it the NASD, excepted from the usual prohibitions on receipt of compensation from mutual fund and variable contract product sponsors, compensation received for education and training purposes.³² The same logic that applies to those products and to the need to provide

²⁹ Cynthia A. Glassman, SEC Commissioner, Remarks before the NASD Investor Education Foundation’s Military Financial Education Campaign Launch, 2006 WL 458052 (Feb. 16, 2006). *See also* Lori Richards, SEC Dir., Office of Compliance Inspections and Examinations, *The New Internet Economy – A Compliance Imperative*, 2000 WL 382858 (Apr. 17, 2000) (“... securities firms have always been, and remain, investors’ primary point of contact and primary source of information. . . . In the new economy, investor education is even more important.”); *Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors*, FINRA Investor Alert (Aug. 18, 2009) (“The best form of investor protection is to clearly understand leveraged or inverse ETFs before investing in them.”)

³⁰ Arthur Levitt, SEC Chairman, Remarks at the Meeting of the National Association of Securities Dealers, 1994 WL 744621 (May 19, 1994).

³¹ *Non-Traditional ETFs*, FINRA Regulatory Notice 09-31 (Jun. 2009) (“Firms must train registered persons about the terms, features and risks of all ETFs that they sell, as well as the factors that would make such products either suitable or unsuitable for certain investors.”); *Non-Conventional Investments*, NASD Notice to Members 03-71 (Nov. 2003) (“Members must train registered persons about the characteristics, risks, and rewards of each product before they allow registered persons to sell that product to investors.”)

³² NASD Regulation, Inc., *Regulatory & Compliance Alert*, Summer 2000, at p. 13 (“This exception to the non-cash compensation rules [i.e., Rule 2830(l)(5)(C)] recognizes the importance of ongoing education, which may include seminars concerning portfolio or structural changes to a product and explanations of new products.”); *see also* Letter from Mary L. Schapiro, President, NASD (Mar. 7, 2001) (“...in 1998 NASD Regulation amended its rules to prohibit most forms of non-cash compensation for the sale of variable contracts and investment company securities. The amendments reflected more than ten years of work by our member

education and training to associated persons would apply to ETFs and education and training targeting clients and the broad range of investment professionals.

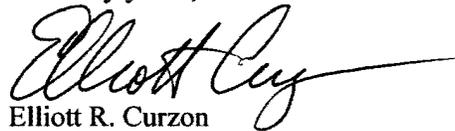
Educational and training programs, such as those to be offered through the ETF Alliance Program, benefit the investing public and the investment professionals who serve those investors by allowing both clients and their advisers to make more informed investment decisions and recommendations. A determination by the Staff that would allow Schwab to receive payments from ETF Related Persons to provide education and training and still finance client ETF purchases in reliance on an exemption from Section 11(d)(1) would encourage Schwab to offer such programs and will likely lead to an increase in education and training programs offered by Schwab and others in the industry. As a policy matter, we believe the requested relief is consistent with the 2005 Letter and would provide the same incentives to broker-dealers to offer high quality education and training products and services to clients and RIAs as it offers to its associated persons.

III. Conclusion.

For the foregoing reasons, we respectfully request that the Staff provide the relief described above.

If you have any questions, please do not hesitate to contact David J. Lekich, Vice President of Charles Schwab & Co., Inc., at 415-667-0660 (david.lekich@schwab.com), the undersigned, counsel to Schwab in this matter, at 202-261-3341 (elliott.curzon@dechert.com), or William J. Bielefeld at 202-261-3386 (william.bielefeld@dechert.com).

Sincerely yours,



Elliott R. Curzon

cc: Robert W. Cook, Division Director
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committees and staff, and represented the consensus of the broker/dealer community that most forms of non-cash compensation offered by product sponsors are inappropriate. One exception to the prohibition allows an "offeror" (such as an insurance company or mutual fund sponsor) to pay the expenses of an associated person for certain training or education meetings.")