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3500 Lacey Road, Suite 700  
Downers Grove, IL 60515

January 29, 2018

Jennifer Piorko Mitchell  
Office of the Corporate Secretary  
FINRA  
1735 K Street, N.W.  
Washington, D.C. 20006-1506

Re: Regulatory Notice 17-41

Dear Ms. Mitchell:

Invesco PowerShares Capital Management LLC (“PowerShares” or “we”) is pleased to submit this letter in response to Financial Industry Regulatory Authority (“FINRA”) Notice 17-41 requesting comment on FINRA Retrospective Rule Review on the Effectiveness and Efficiency of Its Payments for Market Making Rule (“Rule 5250”). PowerShares is the sponsor of 319 domestic and international exchange-traded funds (“ETFs”) that trade on the NYSE ARCA, NASDAQ and BATS exchanges and that comprise in excess of \$171 billion in assets.<sup>1</sup>

First and foremost, we applaud FINRA for seeking input from the industry on a variety of questions, including particularly whether the *“original purposes of and need for the rule [have] been affected by subsequent changes to the markets, the delivery of financial services, the applicable regulatory framework or other consideration.”*

In response to that and the other questions raised by FINRA, we submit that Rule 5250’s prescriptions should not be applicable to, and are not designed for, publicly traded shares issued by ETFs.

### **Background**

Rule 5250 was enacted, in part, to address concerns about an operating company paying a market maker to improperly influence the price of that issuer’s stock. Specifically, in approving Rule 5250, the Securities and Exchange Commission (the “SEC”) found that the rule is designed to preserve the integrity of the marketplace by ensuring that quotations accurately reflect a broker-dealer’s

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<sup>1</sup> As of December 31, 2017.

interest in buying or selling a security.<sup>2</sup> We believe that mitigating the risk of price manipulation is a critical component in the regulation of financial markets and we strongly support the policy consideration behind Rule 5250. However, we note that Rule 5250 was adopted for, and its prophylactic provisions were originally designed to protect, a market that is markedly different than the current marketplace. While the Rule was designed to govern financial instruments that share certain commonalities with ETFs (for example, their exchange-traded nature), the Rule was not formulated to address the unique needs of innovative and transparent financial instruments like ETFs.

Unlike common stocks, ETFs are fully transparent (portfolio holdings are published on the issuer's website every day) and their price discovery mechanism (which is built to support and create an effective arbitrage mechanism) make the protection under Rule 5250 unnecessary. In other words, the market price of an ETF is derived from the price of its underlying holdings and if a market maker were to misprice an ETF based upon any "improper" payment, the arbitrage mechanism so fundamental to the market price of an ETF would immediately counteract that attempt. This arbitrage safeguard helps prevent the market price of an ETF from straying significantly from the value of the ETF's underlying assets, and thus makes the prohibitions of Rule 5250 superfluous with respect to ETFs.

On the other hand, we believe that the current formulation of Rule 5250 may potentially hurt investors, since the prohibition inhibits the ability of ETF sponsors to financially incentivize market makers and enhance liquidity in the marketplace for smaller ETFs. As such, while supportive of the public policy rationale behind Rule 5250 in general, we believe that an appropriate exemption for ETFs should be built into the Rule in order to appropriately reflect changes in financial markets.

In fact, we believe that payments to market makers could enhance liquidity in the marketplace for certain ETFs – particularly smaller or newer ETFs, or those without sufficient two-way flow - by incentivizing market makers to provide liquidity, which would have the added benefit of creating narrower spreads, reducing transaction costs and creating an overall more efficient trading environment for investors. We firmly believe that portfolio and pricing transparency, coupled with an active and effective arbitrage mechanism does, and

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<sup>2</sup> See Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (SR-NASD-97-29) ("If payments to broker-dealers by promoters and issuers were permitted, investors would not be able to ascertain which quotations in the marketplace are based on actual interest and which quotations are supported by issuers or promoters. This structure would harm investor confidence in the overall integrity of the marketplace.")

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would, ameliorate concerns about “created” liquidity. This type of carve-out would not be inconsistent with so-called “market quality programs,” which already are administered by applicable exchanges and have been approved by the SEC because an ETF’s structure inherently protects against the opportunity for price manipulation by a market maker.

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We very much appreciate the opportunity to provide our views on Rule 5250, and would be pleased to discuss this matter in greater detail if you would find it helpful. Please do not hesitate to contact us if you have any questions.

Very truly yours,



Anna Paglia  
Head of Legal  
Invesco PowerShares Capital Management LLC