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Via Electronic Submission (rule-comments@sec.gov)
Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Request for Comment on Novel ETFs (Release No. 33-11426; File No. S7-2026-24)

Dear Secretary Countryman:

I. INTRODUCTION

Chapman and Cutler LLP submits this letter on behalf of The Digital Chamber (*"TDC"*) in response to the Securities and Exchange Commission's (the *"Commission"*) Request for Comment on Novel Exchange-Traded Funds (the *"Novel ETF RFI"* or *"RFI"*).[1] TDC appreciates the opportunity to provide its views on the important questions raised by the RFI.

TDC is the leading global trade association dedicated to the digital asset and blockchain industry, representing more than 250 diverse member companies across the ecosystem, including digital asset exchanges, leading banks and investment firms, and other market participants who build, use, and custodially support blockchain-based technologies. TDC's mission is to advocate for a clear and workable legal environment for the digital asset industry so that market participants understand their regulatory obligations and feel safe to develop and deploy digital asset and blockchain solutions across commercial, technological, and social use cases, promoting growth and responsible innovation, particularly in the United States.

1 Request for Comment on Novel Exchange-Traded Funds, Securities Act Release No. 33-11426, Investment Company Act Release No. 36228 (June 30, 2026), 91 Fed. Reg. 40647 (July 2, 2026) (File No. S7-2026-24; RIN 3235-AN81).

TDC commends the Commission for undertaking this comprehensive review of the regulatory landscape for exchange-traded products. The extraordinary growth of the ETF market, from approximately $4 trillion in assets under management and 1,900 ETFs in 2019 to more than $12 trillion in assets and 4,600 ETFs by the end of 2025,[2] reflects the central role these products play in American capital markets. Innovation in this space should be encouraged through clear, principles-based regulation that provides market certainty while maintaining robust investor protections.

This letter addresses five principal topics: (1) the regulatory status of novel exchange-traded products under the Investment Company Act of 1940 (the *"40 Act"*) versus the Securities Act of 1933 (the *"33 Act"*); (2) whether the Commission should adopt a formal definition of "novel" exchange-traded products; (3) the expansion of confidential filing procedures for exchange-traded products; (4) reforms to the Rule 485 registration process to address abuses that disadvantage innovative sponsors; and (5) the treatment of event contract products as matters of first impression.

II. THE 40 ACT VERSUS 33 ACT STATUS

The RFI raises fundamental questions regarding the appropriate registration framework for novel exchange-traded products, including whether products currently registered only under the 33 Act should have the option to register as investment companies under the 40 Act.[3] TDC submits that the Commission should provide issuers with maximum flexibility in selecting their registration framework and should not preclude issuers from electing 40 Act registration where the statutory requirements are satisfied.

The choice of registration framework has significant practical consequences for both issuers and investors. Products registered under the 40 Act benefit from the comprehensive governance framework of that statute, including independent board oversight, custody requirements, daily valuation, and the full panoply of investor protections Congress established in 1940 and that the Commission has developed over eight decades of rulemaking. Investors in 40 Act funds enjoy the protections of Sections 13, 15, 17, and 18, among others, which regulate fund governance, advisory agreements, affiliated transactions, and capital structure in ways that 33 Act-only registration does not replicate. For products that can satisfy the statutory definition

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2 RFI at page 3.

3 See RFI, Section II ("Investment Company Status"), Questions 1–4.

of "investment company," registration under the 40 Act provides an alternative framework that well serves the interests of both issuers and investors.

A. Issuers Should Have the Option to Register Under the 40 Act

The Commission should not preclude issuers providing exposure to non-security assets (including digital commodities and event contracts) from registering as investment companies if such products qualify under existing statutory tests. The 40 Act defines an "investment company" through two principal tests: the Subjective Test under Section 3(a)(1)(A) and the Objective Test under Section 3(a)(1)(C).[4]

TDC submits that many novel ETFs providing exposure to non-security assets already satisfy, or can be structured to satisfy, these tests because their portfolios consist principally of securities. Consider, for example, a fund providing exposure to digital commodities through derivative arrangements collateralized by U.S. Treasury securities, or a fund holding digital commodity positions through a controlled foreign corporation (*"CFC"*), such as a wholly-owned Cayman Islands exempted company. In each case, the fund's portfolio consists principally of securities: Treasury securities are securities under the 40 Act, and equity interests in a CFC are securities issued by the fund's subsidiary.

This structure is not hypothetical. It reflects the architecture commonly employed by regulated investment companies seeking exposure to commodities markets, including existing commodity-focused mutual funds and ETFs that register under the 40 Act. The CFC structure, in particular, has a well-established history in the investment company context. The Commission and its staff have permitted registered investment companies to use wholly-owned offshore subsidiaries to gain commodity exposure for decades, subject to conditions designed to preserve the protections of the 40 Act for fund investors. Novel ETFs seeking exposure to digital commodities or event contract outcomes through analogous structures should not be denied the same registration pathway.

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4 Investment Company Act of 1940, Section 3(a)(1), 15 U.S.C. § 80a-3(a)(1). The Subjective Test under Section 3(a)(1)(A) defines an investment company as any issuer that "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities." The Objective Test under Section 3(a)(1)(C) defines an investment company as any issuer "which is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets."

An important distinction arises under Section 3(a)(2) of the 40 Act. While Section 3(a)(2) excludes from "investment securities" those securities issued by majority-owned subsidiaries that are not themselves investment companies, this exclusion is relevant only to the Objective Test's 40% threshold calculation. It does not alter the character of the CFC's equity as a "security" for purposes of the Subjective Test or the broader question of whether the fund is "engaged primarily" in investing in securities.

With respect to the Objective Test, whether it is satisfied depends on portfolio composition. A fund collateralizing derivative exposure exclusively with U.S. Government securities may not hold "investment securities" in excess of 40% of total assets, because Government securities and securities issued by majority-owned non-investment company subsidiaries are excluded from "investment securities" under Section 3(a)(2). However, such a fund could restructure its collateral arrangements to utilize assets that qualify as "investment securities," thereby satisfying the Objective Test. Neither the Objective Test nor the definition of "investment securities" should serve as a barrier to registration for funds that are, in substance, engaged in the business of investing in securities.

The policy rationale supporting this position is compelling. Congress enacted the 40 Act to provide a comprehensive regulatory framework for pooled investment vehicles, including disclosure, governance, and substantive protections against overreaching by investment advisers, affiliated persons, and underwriters. Where an issuer elects to subject itself to these enhanced requirements voluntarily, and where it satisfies the statutory definition, the Commission should welcome rather than resist that election. The alternative, forcing novel products into 33 Act-only registration, deprives investors of protections Congress determined appropriate for pooled investment vehicles and fragments the regulatory landscape unnecessarily.

In addition, the Subjective Test under Section 3(a)(1)(A) offers a clear pathway.[5] As articulated in *In the Matter of Tonopah Mining Co.*,[6] the Subjective Test examines the totality of circumstances to determine whether an issuer is engaged primarily in, or holds itself out as being engaged primarily in, the business of investing in securities. The Commission has identified five factors relevant to this determination: (1) the issuer's historical development; (2) public representations of policy; (3) activities of officers and directors; (4) the nature of assets; and (5) sources of income.

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5 15 U.S.C. § 80a-3(a)(1)(A).

6 *In the Matter of Tonopah Mining Co.*, 26 S.E.C. 426 (1947). The Commission identified five factors: (1) the issuer's historical development; (2) public representations of policy; (3) activities of officers and directors; (4) nature of assets; and (5) sources of income.

Critically, the "holding out" prong of the Subjective Test is tied to investing primarily in securities, not in the underlying economic exposure those securities provide. A fund investing in derivative contracts, CFC equity interests, Treasury securities, and similar instruments is investing in securities regardless of whether those securities provide exposure to digital commodities, event contract outcomes, or other non-security assets. The economic purpose of the investment (gaining exposure to Bitcoin price movements, for example) does not alter the legal character of the instruments the fund holds (swap contracts, CFC equity, and Treasury collateral).

TDC submits that, for novel ETFs providing exposure to digital commodities or other non-security assets, the Commission should accept that an issuer's voluntary decision to register under the 40 Act, and to hold itself out as being engaged primarily in investing in securities that provide such exposure, satisfies the Subjective Test even where the fund's ultimate economic exposure is to assets that are not themselves securities. This approach is consistent with the Commission's historical treatment of commodity-focused registered investment companies and provides issuers with the certainty they need to develop novel products within the 40 Act framework.

1. Addressing Concerns Regarding Intermediate Entity Structures

TDC acknowledges that the Commission may harbor concerns about permitting issuers to qualify for 40 Act registration through the holding of securities issued by intermediate entities, such as CFCs. The concern, broadly stated, is that a liberal reading of Section 3(a)(1)(A) could improperly sweep in operating companies (such as diversified conglomerates that hold multiple operating subsidiaries) that have never been subject to the 40 Act and that, at the parent level, are engaged only in holding those securities and performing related administrative functions rather than in the core operations of the subsidiaries' businesses. TDC submits that this concern, while facially plausible, is addressed by the statutory text itself when properly construed and does not justify denying 40 Act registration to legitimate investment vehicles that hold securities through intermediate structures.

The critical textual distinction lies in the differing language Congress employed in Sections 3(a)(1)(A) and 3(a)(1)(C). The Subjective Test under Section 3(a)(1)(A) applies to an issuer that "is or holds itself out as being engaged primarily . . . in the business of *investing, reinvesting, or trading* in securities." The Objective Test under Section 3(a)(1)(C) applies to an issuer that "is engaged or proposes to engage in the business of *investing, reinvesting, owning, holding, or trading* in securities" and meets the 40% investment securities threshold. The deliberate inclusion of "owning" and "holding" in Section 3(a)(1)(C), and their equally deliberate omission from Section 3(a)(1)(A), is legally significant and must be given effect.

Basic principles of statutory construction demand that every word in a statute be given independent meaning and that no term be rendered superfluous. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("A cardinal principle of statutory construction is to give effect to every clause and word of a statute."). Where Congress uses certain language in one subsection but omits it from another, that omission must be presumed intentional and given effect. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

Applying these canons to Sections 3(a)(1)(A) and 3(a)(1)(C), the omission of "owning" and "holding" from the Subjective Test compels the conclusion that Congress intended to distinguish between issuers whose business consists of "investing, reinvesting, or trading" (*i.e.,* the acquisition and disposition of securities for passive financial return) and issuers whose activities also include the "owning" and "holding" of securities for purposes other than passive investment. The latter category encompasses operating companies that own equity interests in subsidiaries as a means of conducting business operations, not as passive financial investments. Section 3(a)(1)(C) addresses these issuers through an objective, asset-based test, whereas Section 3(a)(1)(A) does not.

2. A Proposed Interpretive Framework

TDC proposes that the Commission adopt an interpretive framework that gives effect to this statutory distinction. Specifically, the terms "owning" and "holding" as used in Section 3(a)(1)(C) should be understood to refer to the holding of securities for business-purpose control, that is, the acquisition and retention of equity interests with an intent to exercise managerial control over, or provide managerial assistance to, the issuer of those securities. By contrast, "investing, reinvesting, or trading" as used in both Sections 3(a)(1)(A) and 3(a)(1)(C) should be understood to refer to passive holdings acquired for financial return, where the holder relies on the managerial efforts of others rather than exercising direct control over the enterprise.

This distinction finds support in the broader federal securities law framework. The Supreme Court's articulation of the "investment contract" definition in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), famously identified as a hallmark of an investment contract the expectation of profits "solely from the efforts of the promoter or a third party." *Id.* at 299. While the *Howey* test defines what constitutes a "security" rather than the scope of the 40 Act, its conceptual framework illuminates the distinction Congress drew between passive investment and active business operations. An issuer that acquires subsidiary equity to operate a business through that

subsidiary is not relying on the managerial efforts of others but rather *is* the manager. Such an issuer is "owning" and "holding" securities in the business-purpose sense, not "investing" in them in the passive financial sense.

The Commission itself recognized this distinction in adopting the "primarily engaged" test for business development companies under Section 2(a)(48) of the 40 Act, which requires a business development company ("BDC") to make available "significant managerial assistance" to its portfolio companies. *See* 15 U.S.C. § 80a-2(a)(48)(B). The managerial assistance requirement distinguishes BDCs, which are investment companies providing capital to small and developing businesses, from operating companies that control subsidiaries for business rather than investment purposes. The same conceptual line separates "investing" from "owning and holding" for purposes of Sections 3(a)(1)(A) and 3(a)(1)(C).

3. Preservation of True Operating Companies

This interpretive framework properly excludes from the scope of Section 3(a)(1)(A) those issuers that execute legitimate business strategies through subsidiaries, preserving the original congressional intent to regulate pooled investment vehicles without inadvertently capturing operating companies. A diversified conglomerate that holds the stock of manufacturing, retail, technology, and service subsidiaries is "owning" and "holding" those securities for business-purpose control, not "investing" in them in the passive sense contemplated by Section 3(a)(1)(A). Such an issuer does not satisfy the Subjective Test regardless of its portfolio composition because it is not "in the business of investing, reinvesting, or trading in securities" but rather is in the business of operating its subsidiaries through the securities it holds.

By contrast, a fund that acquires CFC equity for the sole purpose of obtaining exposure to commodity price movements, and that does not exercise or intend to exercise managerial control over the CFC beyond the ministerial acts necessary to effectuate its investment strategy, is "investing" in securities in the passive financial sense. The fund acquires the CFC interests for the financial return they provide (*i.e.,* exposure to commodity price appreciation), not to operate a business through the CFC. That the fund wholly owns the CFC does not transform passive investment into active business operation. The CFC is a conduit for investment exposure, not a platform for operating an independent enterprise.

The Commission's long-standing practice of permitting registered investment companies to use wholly-owned CFCs for commodity exposure implicitly confirms this distinction. If the mere holding of subsidiary equity categorically excluded an issuer from Section 3(a)(1)(A), the CFC structure would be unavailable to registered investment companies, yet the Commission and its staff have consistently permitted it. The relevant inquiry is not whether the issuer holds equity

in a subsidiary, but whether the issuer's business consists of passive investment (in which case Section 3(a)(1)(A) may apply) or active business operations conducted through controlled entities (in which case only Section 3(a)(1)(C)'s objective test applies).

4. Plain Language Reinforcement

Finally, TDC submits that any contrary interpretation, one that would deny Section 3(a)(1)(A) qualification to an issuer that is, by its own admission, engaged primarily in the business of investing in securities merely because those securities are issued by subsidiaries, is inconsistent with the express statutory language. Section 3(a)(1)(A) requires only that the issuer "is or holds itself out as being engaged primarily . . . in the business of investing, reinvesting, or trading in securities." The statute does not require that the Commission look through the issuer's direct securities holdings to examine the character of the underlying assets held by the issuer's subsidiaries. A fund that acquires CFC equity, Treasury securities, and derivative contracts is investing in securities on its face; the plain language of Section 3(a)(1)(A) is satisfied without further inquiry.

Where an issuer is acquiring interests for investment purposes, relying on the financial return those securities provide rather than using them as instruments of operational control, the Commission should not look through to whether the underlying assets of a subsidiary are or are not securities. A plain reading of Section 3(a)(1)(A) is sufficient to establish qualification. The statutory text asks whether the issuer is in the business of "investing" in "securities," and where the answer to both questions is yes, the Subjective Test is satisfied. The nature of the subsidiary's assets, the economic exposure those assets provide, and the classification of those assets under other federal statutes are irrelevant to the Section 3(a)(1)(A) inquiry.

In sum, the Commission should interpret Section 3(a)(1)(A) in accordance with its plain language and the broader statutory structure of the 40 Act. An issuer that is engaged primarily in the business of investing in securities, including CFC equity, Treasury securities, and derivative instruments, satisfies the Subjective Test and should be eligible for 40 Act registration. The omission of "owning" and "holding" from Section 3(a)(1)(A) provides the textual basis for distinguishing true investment vehicles from operating companies, and the proposed interpretive framework preserves congressional intent while providing issuers with a clear pathway to registration. The Commission should confirm that novel ETFs employing CFC and similar structures qualify for 40 Act registration where they satisfy these requirements.

B. The "ETF" Versus "ETP" Nomenclature Question

The RFI questions whether products registered solely under the 33 Act, which are not technically "exchange-traded funds" as defined by Rule 6c-11 under the 40 Act,[7] should be permitted to use "ETF" terminology in their names and marketing materials. TDC recognizes that the "ETF" label carries significant investor familiarity and market recognition, while "ETP" (exchange-traded product) is technically more accurate for non-investment company products.

TDC recommends a pragmatic approach. While technical precision favors reserving "ETF" for 40 Act products operating under Rule 6c-11, investor confusion may be minimized by permitting reasonable use of the ETF label where a product operates with substantially similar mechanics, including creation and redemption through authorized participants, intraday exchange trading, and daily portfolio transparency or indicative value publication. The distinction between an "ETF" and an "ETP" is not well understood by retail investors, and forcing products with ETF-like mechanics to adopt unfamiliar terminology may itself create confusion rather than clarity.

The Commission should consider whether clear disclosure, rather than nomenclature prohibition, adequately addresses investor protection concerns. A product's prospectus and marketing materials can explain that the product is registered under the 33 Act rather than the 40 Act, describe the differences in regulatory framework, and alert investors to any reduced protections, without requiring the product to abandon a term that accurately describes its trading mechanics from an investor's functional perspective.

III. DEFINING "NOVEL"

TDC respectfully submits that the Commission should not establish a formal regulatory category or definition of "novel" exchange-traded products. Rather, the Commission should consider adopting an alternative approach for "matters of first impression".

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7 Rule 6c-11 under the 40 Act defines an "exchange-traded fund" as "a registered open-end management investment company" that, inter alia, "issues (or redeems) creation units to (or from) authorized participants" and "has shares that are listed on a national securities exchange." 17 CFR § 270.6c-11(a). See also Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019) [84 FR 57162] (the "Rule 6c-11 Adopting Release").

A. The Commission Should Decline to Adopt a Formal Definition

The RFI uses "Novel ETF" as an organizing concept, encompassing products involving crypto assets, commodity exposure, single-stock strategies, leveraged and inverse structures, blockchain-related holdings, private assets, and event contracts,[8] without proposing a precise regulatory definition. In lieu of a separate categorization for "novel" ETFs, TDC urges the Commission to consider alternative disclosure review processes for ETFs that present investment strategies and structures that have not yet been reviewed by the Commission's staff.

The risks of establishing a formal "novel" category are significant. First, any definition will inevitably prove over-inclusive or under-inclusive as markets evolve. Second, a formal designation could create a two-tier regulatory system that imposes enhanced burdens and market stigma on products classified as "novel." Third, classification ambiguity at the margins could impede innovation by forcing sponsors to expend resources on threshold definitional questions rather than substantive product development.

B. The "Matter of First Impression" Framework Is Superior

A Commission policy of engaging with novel proposals as "matters of first impression" provides the flexibility necessary for innovation while maintaining investor protection. Under this framework, staff would engage substantively with first impression proposals on their merits, examining specific risks, market structure implications, and investor protection questions, without requiring a threshold classification determination.[9]

This approach has served the markets well. The development of the ETF market, from the first equity index ETFs through actively managed funds, leveraged and inverse products, and spot crypto asset ETFs, demonstrates the framework's capacity to accommodate innovation across a wide range of product types and underlying asset classes.

TDC proposes the Commission explicitly decline to adopt a formal "novel" definition while affirming its commitment to the matter-of-first-impression approach as the primary mechanism for staff engagement with innovative exchange-traded products.

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8 RFI at 5.

9 *See, e.g.,* SEC Chairman Paul S. Atkins, Statement on Novel Exchange-Traded Funds (ETFs) (May 20, 2026) (describing the Commission's engagement with event-contract ETF sponsors as consistent with the matter-of-first-impression approach).

IV. CONFIDENTIAL FILINGS

TDC recommends that the Commission expand confidential filing options for exchange-traded products broadly, not limited to first-impression products. This approach addresses the RFI's concerns regarding additional staff review time and imitative filings without imposing blanket delays on the effectiveness of routine filings.

A. Confidential Review

Filings presenting first-impression regulatory questions will naturally require additional staff review time. However, a blanket extension of effectiveness periods is not the appropriate solution. Such an approach would penalize straightforward filings while failing to provide meaningful additional time for truly complex matters requiring substantive staff engagement.

TDC proposes expanding confidential filing procedures for all exchange-traded products, with particular utility for first-impression products. The Division of Corporation Finance expanded its non-public review accommodations for non-investment company issuers in March 2025,[10] and a similar approach should be available for ETF filings under Rule 485. The confidential filing mechanism currently available to 33 Act-only issuers provides a proven model. Combined with faithfully adhered-to review periods by the staff, a confidential treatment program would balance the interests of sponsors, investors, and the Commission alike.

Confidential review offers multiple advantages. First, it provides staff adequate time for thorough analysis without a publicly visible delay that may signal unwarranted regulatory concern to the market. Second, it protects the unique and valuable ideas and processes of sponsors that invest significant resources in innovative strategies. Third, it reduces the opportunity for imitative filings by competitors who can rapidly replicate an innovative idea or approach once it becomes publicly available through EDGAR, a concern the RFI itself identifies.

B. A Structured Review Framework

If timing concerns persist, TDC proposes defined staff review periods within the confidential filing framework. A commitment by staff to provide initial comments within a specified period (for example, 45 days of confidential submission) would provide sponsors with predictability while affording staff time for substantive engagement. This mirrors the Division of

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10 See Division of Corporation Finance, Enhanced Accommodations for Issuers Submitting Draft Registration Statements (March 3, 2025).

Corporation Finance's existing confidential review program and ensures that a confidential filing does not become an indefinite hold on product development.

Where staff affirmatively determines that a filing presents a matter of first impression, additional review time beyond the standard period is warranted. Outside that determination, standard timelines should apply without modification.

C. A First-Impression Review Window Under Rule 485

TDC proposes that Rule 485 be amended to create an additional review window of between 30 and 50 days beyond the standard 75-day or 60-day effectiveness period, triggered only when staff affirmatively determines that a filing presents a matter of first impression requiring additional time for analysis. Under this proposal, automatic effectiveness is preserved (not eliminated), but extended for a defined, limited period when the staff makes a threshold first-impression determination.

Critically, this determination would apply not only to the initial filer but to all substantially similar products filed after that initial filing. This creates an orderly queue in which subsequent filers are subject to the same extended review period, eliminating the first-mover disadvantage that currently results when copycat filings submitted after the initial filer can achieve effectiveness at the same time or earlier than the originating sponsor. Effectiveness for queued filings would be staggered, with priority given to the initial filer and subsequent filers progressing in the order in which they respond to staff comments. This protects the sponsor that invests significant resources to originate a novel concept while ensuring all filers receive substantive staff engagement.

This proposal draws on the model established by the CFTC under Regulation 40.3, where an initial 45-day review period may be extended by an additional 45 days for products presenting "novel or complex issues." A similar mechanism under Rule 485 would provide the Commission with a principled basis for extending review only where warranted, while maintaining automatic effectiveness for the vast majority of filings that do not present first-impression questions.

V. Fixing the Rule 485 Registration Process

TDC urges the Commission to address significant abuses of the current Rule 485 process that disadvantage smaller and newer market entrants, often the very sponsors that originate novel product ideas. The RFI correctly identifies these concerns, noting that "IM Staff has observed several Novel ETF filings submitted in rapid succession that are largely identical" and that "the

use of artificial intelligence may be significantly accelerating the speed at which a filing can be mimicked."[11]

A. Copycat Filings and Dormant Series Abuse

Two principal forms of abuse have emerged under the current framework. The first involves copycat filings submitted in rapid succession after an initial filer's registration statement becomes publicly available. Once a pioneering sponsor's filing appears on EDGAR, competitors quickly replicate it, often with minimal substantive modification, free-riding on the original sponsor's investment in product development, legal structuring, and regulatory engagement.

The second involves established sponsors repurposing dormant or unused 40 Act fund series to circumvent the 75-day effectiveness period under Rule 485(a)(2).[12] Because a post-effective amendment that does not add a new series receives the shorter 60-day effectiveness period under Rule 485(a)(1), sponsors with previously registered but unlaunched series can effectively "skip the line" by converting a dormant series into a novel product. This creates a structural advantage for large fund platforms with accumulated shell registrations over smaller entrants that must file new series, and endure the corresponding 75-day period, for every novel product.

These abuses undermine innovation by reducing the incentive for sponsors to invest the substantial resources required to develop genuinely novel products when competitors can rapidly replicate or accelerate past them through structural advantages unrelated to product merit.

B. Specific Reform Proposals

TDC opposes extending the 75-day or 60-day effectiveness periods as a blanket measure.[13] However, TDC supports the targeted, staff-triggered extension of 30 to 50 days for first-impression filings as described in Section IV.C above. This provides additional time only where warranted, preserves standard timelines for other filings, and triggers the queue mechanism protecting initial filers from copycat submissions.

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11 RFI at page 13 n.19.

12 See 17 CFR § 230.485(a). Rule 485(a)(2) provides a 75-day effectiveness period for post-effective amendments that add a new series. Rule 485(a)(1) provides a 60-day effectiveness period for other post-effective amendments.

13 See RFI, Question 10.

TDC also supports provisions to automatically deregister funds that become effective but do not launch within a finite time period.[14] The accumulation of dormant series creates the structural imbalance described above, permitting large sponsors to stockpile "empty" registrations for later repurposing. A mandatory deregistration mechanism would eliminate this advantage and ensure the registration framework operates as intended.

Finally, TDC supports making filings non-public for a portion of the pre-effectiveness period.[15] Confidential treatment during the initial review period directly addresses the copycat problem by limiting competitors' ability to replicate innovative filings before the originating sponsor's product reaches market. Combined with the queue mechanism and staggered effectiveness described in Section IV.C, this approach creates a comprehensive framework that rewards innovation while maintaining orderly market development.

VI. Event Contracts as a Matter of First Impression

Event contracts represent a clear example of a product category that should initially be treated as a "matter of first impression". The multiple event-contract ETF filings paused in May 2026 underscore both significant market interest in these products and genuinely unprecedented regulatory questions warranting careful Commission engagement. We would expect that after these significant questions have been considered by the Commission, future event contracts would no longer by deemed matters of first impression warranting additional review time before effectiveness.

A. Unresolved Investment Company Act Questions

Event contracts listed on CFTC-regulated designated contract markets are currently subject to CFTC jurisdiction under the Commodity Exchange Act. It is not clear whether event contracts themselves constitute "securities" for purposes of Section 3(a)(1) of the Investment Company Act[16] and, if not, whether a fund holding event contracts directly can satisfy the "investment company" definition. This threshold question has not been addressed by the Commission or its staff in any published guidance, and it presents significant interpretive issues that distinguish event-contract ETFs from other products the Commission has considered.

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14 See RFI, Question 21.

15 See RFI, Question 18.

16 Investment Company Act of 1940, Section 3(a)(1), 15 U.S.C. § 80a-3(a)(1).

TDC submits that this concern can be addressed through portfolio structuring. A fund seeking exposure to event contract outcomes need not hold event contracts directly. Instead, it could gain exposure through derivative instruments or structured notes linked to event contract outcomes, which are themselves securities. A total return swap referencing an event contract, for example, is a securities-based swap subject to Commission jurisdiction regardless of the nature of the underlying reference asset. Similarly, a structured note issued by a counterparty and linked to event contract outcomes is a debt security under the 33 Act and a security under the 40 Act.

As discussed in Section II, a fund consisting primarily of securities, including derivative contracts and subsidiary interests, can satisfy the investment company definition regardless of the underlying economic exposure those securities provide. This approach resolves the 40 Act status question while preserving Commission jurisdiction over the product and providing investors with the full protections of the 40 Act governance framework. It also avoids the need for the Commission to resolve the novel and potentially contentious question of whether event contracts are themselves securities, a determination that could have far-reaching consequences beyond the ETF context.

These unresolved questions are precisely the type of issue warranting matter-of-first-impression treatment, with careful staff engagement and ultimately formal Commission guidance.

B. Overlapping Federal Regulatory Jurisdiction

Event contracts present uniquely complex jurisdictional questions involving both the Commission and the CFTC. Under the Commodity Exchange Act, the CFTC has express authority to determine that certain event contracts are contrary to the public interest, specifically contracts involving "activity that is unlawful under any Federal or State law," "terrorism," "assassination," or "gaming."[17] This authority permits the CFTC to prohibit or suspend trading in event contracts that implicate these statutory categories, raising the prospect that an ETF's underlying positions could be subject to regulatory action by an agency other than the Commission.

For an ETF proposing to hold event contracts (whether directly or through derivative instruments referencing event contracts), this jurisdictional overlap raises significant questions. An ETF registered under the 33 Act or 40 Act remains subject to Commission oversight regarding disclosure, registration, and investor protection, while the underlying event contracts may simultaneously be subject to CFTC jurisdiction regarding contract terms, market integrity, and

17 Commodity Exchange Act, 7 U.S.C. § 7a-2(c)(5)(C).

public interest determinations. The potential for conflicting regulatory actions, or for CFTC action to effectively unwind an ETF's portfolio positions, requires careful analysis that can only occur through the type of sustained, substantive engagement the matter-of-first-impression framework provides.

Moreover, the Commission and the CFTC have overlapping authority with respect to certain products at the intersection of their respective jurisdictions. The Dodd-Frank Wall Street Reform and Consumer Protection Act established a framework for securities-based swaps (subject to SEC jurisdiction) and other swaps (subject to CFTC jurisdiction), but event contracts referenced by derivative instruments may not fit neatly within either category. Careful interagency coordination is required to ensure that event-contract ETFs are not subject to contradictory requirements or regulatory gaps.

Commission Chairman Atkins acknowledged these complexities in his May 20, 2026 statement on Novel ETFs, recognizing the need for careful coordination between the agencies in addressing novel product structures that span traditional jurisdictional boundaries.[18]

C. State Gaming Law Implications[19]

Certain event contracts may implicate state gambling statutes, particularly contracts structured as binary wagers on events unrelated to traditional financial or economic variables. State regulators may characterize such contracts as gaming instruments subject to state-level prohibition or licensing requirements, creating an additional layer of regulatory complexity for ETF sponsors seeking to offer products providing exposure to such contracts.

The distinction between a regulated financial instrument and a prohibited gaming contract varies significantly across state jurisdictions. While CFTC-regulated event contracts listed on designated contract markets benefit from federal preemption arguments under the Commodity Exchange Act, the scope of that preemption as applied to event contracts is untested in most jurisdictions. An ETF providing exposure to event contracts could face challenges from state

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18 SEC Chairman Paul S. Atkins, Statement on Novel Exchange-Traded Funds (ETFs) (May 20, 2026).

19 TDC has been a strong proponent of the CFTC's exclusivity over the markets it regulates, including event-contract markets with potential gaming law implications. *See* The Digital Chamber, *Comment Letter on CFTC Notice of Proposed Rulemaking: Prediction Markets; Public Interest Determinations* (RIN 3038-AF65) (July 27, 2026); The Digital Chamber, Comment Letter on Prediction Markets Advance Notice of Proposed Rulemaking (RIN 3038–AF65) (Apr. 30, 2026); Brief of Amicus Curiae The Digital Chamber in Support of Plaintiff-Appellee at 22, *KalshiEX LLC v. Orgel*, No. 26-5235, Doc. 67 (6th Cir. June 24, 2026).

regulators asserting that the fund is facilitating participation in prohibited gaming activity, regardless of the federal regulatory status of the underlying contracts.

This multi-layered jurisdictional landscape, encompassing federal securities regulation, federal commodity regulation, and state gaming law, reinforces TDC's position that event-contract ETFs should be evaluated under the matter-of-first-impression framework rather than through a formal "novel" classification that cannot capture the unique jurisdictional considerations these products present.

D. A Clear Path Forward

TDC urges the Commission to provide a clear path forward for event-contract ETF filings. Indefinite suspension of pending filings creates market uncertainty and may harm the competitive position of U.S. capital markets relative to jurisdictions that provide greater regulatory clarity for innovative financial products. The United States should lead in the development of regulated event-contract markets, and the regulatory framework for ETFs providing exposure to those markets should facilitate rather than impede that leadership.

TDC recommends that the Commission engage with event-contract ETF sponsors through the confidential, structured process described in Section IV, providing staff adequate time for substantive review of genuinely novel questions while offering sponsors a defined engagement framework with predictable timelines. This approach balances the Commission's legitimate interest in thorough analysis with sponsors' need for regulatory certainty and allows the Commission to develop a coherent policy framework for event-contract ETFs through iterative engagement rather than ad hoc responses to individual filings.

VII. CONCLUSION

TDC commends the Commission for this comprehensive review of the regulatory framework for exchange-traded products. The RFI reflects a thoughtful approach to balancing innovation with investor protection, a balance that is essential to the continued growth and competitiveness of U.S. capital markets.

In summary, TDC respectfully urges the Commission to:

(1) Provide issuers of all ETFs that provide exposure to non-securities with the option to register under the 40 Act, recognizing that funds providing exposure to non-security assets through securities-based portfolio structures (including derivative

instruments, CFC equity interests, and Treasury securities) can satisfy the statutory definition of "investment company" under existing tests;

(2) Decline to adopt a formal regulatory definition of "novel" exchange-traded products, instead adopt matter-of-first-impression approach as the appropriate framework for staff engagement with innovative concepts;

(3) Expand confidential filing options for all exchange-traded products, coupled with a structured review framework featuring defined staff response periods and a targeted first-impression review window of 30 to 50 additional days (triggered by staff determination) with queue management and staggered effectiveness to protect innovative sponsors, rather than imposing blanket extensions of effectiveness periods;

(4) Address abuses of the Rule 485 registration process, including copycat filings and dormant series exploitation, through targeted reforms that protect innovative smaller sponsors from structural disadvantages unrelated to product merit; and

(5) Provide a clear path forward for event-contract ETF filings through the matter-of-first-impression framework, recognizing the uniquely complex jurisdictional questions these products present and engaging with sponsors through a defined, confidential process.

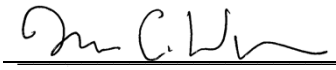
TDC and its members remain committed to working constructively with the Commission and its staff to develop a regulatory framework that fosters innovation while maintaining the investor protections that are the foundation of U.S. capital markets.

TDC thanks Morrison Warren, James Audette, and Callum Parker of Chapman and Cutler for their leadership and significant efforts in developing this letter. TDC also thanks the other TDC members who contributed their time and expertise towards the development of this letter, including but not limited to, Kelley Howes, Partner, Morrison Foerster.

We welcome the opportunity to meet with Commission staff to discuss these issues in greater detail.

Very truly yours,

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