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Submitted via SEC Website

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: Request for Comment on Novel ETFs, Release Nos. 33-11426; 34-105808; IC-36228; File No. S7-2026-24

Dear Ms. Countryman:

Bitwise Asset Management, Inc. ("Bitwise")[1] respectfully submits this comment letter (the "Response") in response to the request for public comment issued by the Securities and Exchange Commission ("SEC" or the "Commission") published in the Federal Register on July 2, 2026, titled "Request for Comment on Novel ETFs" (the "Request").[2]

Bitwise commends the Commission for seeking public comment on the questions raised by novel ETFs (as defined in the Request, "Novel ETFs")[3] before these questions are resolved, and for inviting the views of funds, advisers, investors, and other market participants. We share the Commission's aim of facilitating innovation while protecting investors, maintaining fair, orderly,

[1] Bitwise's comments are provided by Johanna Collins-Wood, General Counsel and Head of Compliance, U.S. Asset Management. The author thanks Noelle Henry, Assistant Counsel, for her substantial contributions in drafting the response to Question 2.

[2] *Request for Comment on Novel ETFs*, Release Nos. 33-11426; 34-105808; IC-36228; File No. S7-2026-24 (June 30, 2026), 91 Fed. Reg. 40,647 (July 2, 2026), available at https://www.sec.gov/files/rules/other/2026/33-11426.pdf.

[3] *See* Request at 5 (defining "Novel ETFs").

and efficient markets, and facilitating capital formation. To that end, we write to respond to certain of the Commission's questions in the Request, explain the legal basis on which we have sought to register certain products as investment companies, and provide our view, based on our experience as a market participant and provider of asset management services, on why structuring such products as series of a registered investment company benefits investors and the market.

Founded in 2016, Bitwise is one of the largest crypto index fund managers in the world and has historically focused on helping institutional investors understand and access opportunities in cryptocurrencies. As part of its growth and expansion, Bitwise now seeks to bring its professional expertise and management to new investment opportunities for these investors.

Bitwise is the parent company of Bitwise Investment Manager, LLC ("BIM"), an investment adviser registered with the Commission since September 2022 that serves as adviser to Bitwise Funds Trust, an investment company registered under the Investment Company Act of 1940, as amended (the "1940 Act"). In February, April, and May of this year, Bitwise Funds Trust filed with the Commission registration statements (the "Registration Statements") for a total of sixteen exchange-traded funds (the "Bitwise ETFs") registered under the 1940 Act and the Securities Act of 1933, as amended (the "Securities Act").[4] The Bitwise ETFs fit the Commission's definition of a novel ETF because each Bitwise ETF seeks to provide economic exposure to certain event contracts.[5]

In the Request, the Commission posed twenty-seven questions covering a broad range of considerations with regard to Novel ETFs. In this Response, we have chosen to focus on the first four questions, as we believe those are the ones on which Bitwise can speak most usefully. Our discussions of questions one, four, and three, in that order, allow us to present to the Commission's

[4] Bitwise Funds Trust, Post-Effective Amendment No. 46 to Registration Statement on Form N-1A (Feb. 17, 2026) (Registration Nos. 333-264900; 811-23801), available at https://www.sec.gov/Archives/edgar/data/1928561/000121390026017412/ea0277256-01_485apos.htm; Bitwise Funds Trust, Post-Effective Amendment No. 53 (Apr. 23, 2026) (Registration Nos. 333-264900; 811-23801), available at https://www.sec.gov/Archives/edgar/data/1928561/000121390026047140/ea0287498-01_485apos.htm; and Bitwise Funds Trust, Post-Effective Amendment No. 57 (May 1, 2026) (Registration Nos. 333-264900; 811-23801), available at https://www.sec.gov/Archives/edgar/data/1928561/000121390026051014/ea0288397-01_485apos.htm.

[5] *See* Request at 5 (noting that "[o]ver the past several years, sponsors of ETFs have expressed interest in providing exposure to innovative asset classes or using novel investment strategies ("Novel ETFs"). To date, these include…event contracts").

staff (the "Staff") the statutory analysis we engaged in prior to submitting the Bitwise ETF products, and our discussion of question two allows us to present to the Staff our experience as an active market participant in structuring and offering these products.

I. Question 1: Would a Novel ETF meet the Subjective Test by "hold[ing] itself out" as an "investment company," and/or as "engaged primarily, or propos[ing] to engage primarily, in the business of investing, reinvesting, or trading in securities," notwithstanding that its principal investment strategy is to invest in assets that may not be securities? Is there a need for greater clarity about this aspect of the Subjective Test? Why or why not?

A Novel ETF may meet the Subjective Test, the test set out in Section 3(a)(1)(A) of the 1940 Act,[6] regardless of how it states its principal investment strategy. The principal investment strategy statement alone cannot resolve the question in either direction. Under the "is" prong, whether an issuer is engaged primarily in the business of investing, reinvesting, or trading in securities is a factual matter that depends on the issuer's actual business activities.[7] A statement of principal investment strategy speaks to intent, and "is" does not imply intent.[8] Under the "holding out" prong, the required intent is different: the clause speaks in the present tense and asks whether the issuer currently intends, through public statements, public actions, or some other public fashion, for the market to treat it as an investment company.[9] That intent may be express or inferred.[10] The relevant test is whether the issuer makes public statements about its business from which a reasonable person might conclude that the issuer is in the business of investing,

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[6] This Response uses the terms "Subjective Test" and "Objective Test" as they are defined in the Request. *See* Request at 6 (defining the "Subjective Test" as the test under Section 3(a)(1)(A) of the 1940 Act, 15 U.S.C. § 80a-3(a)(1)(A), and the "Objective Test" as the test under Section 3(a)(1)(C) of the 1940 Act, 15 U.S.C. § 80a-3(a)(1)(C)).

[7] *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 28 (S.D.N.Y. 1968) (construing Section 3(a)(1) of the 1940 Act, the predecessor to Section 3(a)(1)(A)) ("To determine whether a company is engaged primarily in the business of investing, its total activities of all sorts must be considered."), *aff'd*, 435 F.2d 510 (2d Cir. 1970).

[8] *Id.* at 27 ("'Holding out' and 'proposing' imply intent, but 'is' does not necessarily imply it.").

[9] *See* Robert Rosenblum & Benjamin D. Rosenblum, *Investment Company Determination Under the 1940 Act* § 3.2, at 70–71 (3d ed. 2025) (concluding, based on *Fifth Ave. Coach Lines*, that the intent required under the "holding out" clause is a current intent for the market to treat the issuer as an investment company, and observing that the clause speaks in the present tense).

[10] *See id.* at 71 (concluding that the required intent can be express or can be inferred from the issuer's actions).

reinvesting, or trading in securities.[11] That test involves two inquiries: whether the issuer's statements are sufficiently public, and whether they are sufficiently specific to support that conclusion.[12] A statement of principal investment strategy may indicate that a Novel ETF seeks to reflect the value of a position in something that is not a security. That single statement does not control when the issuer's public statements, taken together, are specific enough to cause a reasonable person to conclude that the issuer is in the business of investing, reinvesting, or trading in securities.[13]

As an example, consider a Novel ETF that: 1) has filed with the Commission on Form N-1A a registration statement registering it as a new series of a statutory trust that is an open-end management investment company registered under the 1940 Act; 2) whose registration statement has been signed by a majority of the trust's board of trustees, including independent trustees, and whose investment management agreement has been approved by that board, including each of its independent trustees; 3) that states in the registration statement that it is regulated as an "investment company" under the 1940 Act; 4) that states that it complies with the provisions of the 1940 Act governing its investment policies and capital structure; and 5) that invests in shares of its wholly-owned subsidiary, government treasuries, and shares of money market funds (such a Novel ETF, the "Registrant Fund").[14]

The fifth fact establishes that the Registrant Fund, on an unconsolidated basis, invests, reinvests, and trades in securities, and therefore "is" engaged in the relevant activities.[15] The first four facts establish holding out. The Registrant Fund has undertaken precise, public actions that clearly establish the required intent. Its registration statement says expressly that it is regulated as an investment company, and each of its public acts, from the Form N-1A filing to the trustees'

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[11] *See id.* § 3.2, at 71–72 (framing the holding-out inquiry as whether the issuer makes public statements about its business from which a reasonable person might conclude that the issuer is in the business of investing, reinvesting, or trading in securities).

[12] *See id.* at 71–72 (identifying the two inquiries); *see also Fifth Ave. Coach Lines*, 289 F. Supp. at 28 (holding that statements predicting what a company plans to do in the future were too general to amount to holding out or proposing).

[13] *See Fifth Ave. Coach Lines*, 289 F. Supp. at 28.

[14] *See* Post-Effective Amendment No. 46, *supra* note 4.

[15] For a discussion of why the Registrant Fund's activities constitute "investing, reinvesting, or trading in securities" within the meaning of Section 3(a)(1)(A), see our response to Question 4.

signatures to ongoing compliance, tells the market to treat it as one. These statements are public, and they are specific. A reasonable person reading them would conclude that the Registrant Fund is in the business of investing, reinvesting, or trading in securities.

A prospectus may disclose that a fund's returns will turn on something that is not a security, but the holding-out clause does not test what drives an issuer's returns. It tests whether the issuer's public statements would lead a reasonable person to conclude that the issuer is in the business of investing, reinvesting, or trading in securities, and it exists because investors dealing with such an issuer reasonably expect the protections of the 1940 Act.[16] A registration statement that repeatedly states that a fund is regulated as an investment company under the 1940 Act creates exactly that expectation. The strategy statement does its work, if anywhere, in the analysis of the issuer's business, and that analysis is made on the basis of what the issuer actually holds and does.[17] A statement of principal investment strategy must be considered as one public statement among many and cannot alone tilt the balance of the issuer's activities.

Finally, there is no need for greater clarity about this aspect of the Subjective Test, as its framework is already supplied by the Staff's positions, case law, and the statute itself. The "is" prong looks at the issuer's actual business activities. The holding-out prong looks at whether the issuer's public statements would lead a reasonable person to conclude that the issuer is in the business of investing, reinvesting, or trading in securities. Each of those standards resolves the question of whether a Novel ETF meets the Subjective Test without requiring new guidance. Should the Commission conclude that new guidance would, nonetheless, be useful, such new guidance should confirm what has already been established by the existing authorities: a statement of principal investment strategy is one public statement among many, and a single statement on its

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[16] *See* Rosenblum & Rosenblum, *supra* note 9, § 3.2, at 73 (observing that investors reasonably may expect the protections of the 1940 Act to apply to a company that holds itself out as an investment company, regardless of whether an analysis of the company's securities portfolio would by itself require the company to register under the 1940 Act).

[17] *See* Letter from Brent J. Fields, Associate Director, Disclosure Review and Accounting Office, Division of Investment Management, SEC, to Jacob E. Comer, Cipher Technologies Management LP, re: Cipher Technologies Bitcoin Fund, File No. 811-23443 (Oct. 1, 2019) (concluding that bitcoin is not a security and that a fund intending to invest substantially all of its assets in bitcoin "as currently structured" did not meet the definition of an investment company). The Staff's reasoning turned on what the fund actually proposed to hold, not on any failure of the fund to hold itself out as an investment company. In contrast, the Registrant Fund's unconsolidated holdings are securities. *See infra* our response to Question 4.

own does not control the analysis.

II. Question 4: Would a Novel ETF that holds on an unconsolidated basis "securities" (i.e., shares or other equity interests) issued by one or more wholly-owned subsidiaries that are not themselves primarily invested in securities meet the Subjective Test, notwithstanding that its principal investment strategy is to invest in assets that are not securities? Why or why not? Under what circumstances, if any, should the Commission consider investments in securities issued by wholly-owned subsidiaries (or by other subsidiaries generally consolidated with the issuer) to comprise part of a securities investment business under the Subjective Test? Should the analysis differ for holding companies that are engaged in various operating businesses through wholly-owned and majority-owned subsidiaries? Why or why not?

A Novel ETF that is structured as the Registrant Fund is structured does meet the Subjective Test. On an unconsolidated basis, every asset that it holds is a security. Further, its activities with respect to those assets are investing, reinvesting, and trading. Finally, its statement of principal investment strategy does not change that conclusion, because the Subjective Test looks to what an issuer holds and does, not to the economic exposure that the issuer seeks. Sections II.A through II.C address each point in turn.

A. The Registrant Fund's Assets Are Securities and Its Activities Are Investing, Reinvesting, and Trading

The Registrant Fund's activities consist of holding shares in a wholly-owned subsidiary and purchasing, selling, and holding government treasuries and shares of money market funds, which act as collateral for the Registrant Fund's exposure to certain assets obtained through the wholly-owned subsidiary and whose purchase and sale facilitate the Registrant Fund's creation and redemption activity. It is notable here that Section 3(a)(1)(A) uses the term "securities," in contrast to Section 3(a)(1)(C), which is concerned with "investment securities." The Staff has recognized that securities which are not "investment securities" for purposes of Section 3(a)(1)(C) can still be considered securities for purposes of Section 3(a)(1)(A).[18] As a result, the questions are: first,

[18] Great American Management and Investment, Inc., SEC Staff No-Action Letter (Sept. 27, 1982), [1982–1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,304 (concluding that an issuer "could be an

whether shares in a wholly-owned subsidiary, government treasuries, and shares of money market funds are each securities, and second, whether the holding of the first asset and purchase, sale, and holding of the latter two assets is considered to be "investing, reinvesting, or trading" activity.

The answer to the first question is yes for each holding. A security is clearly defined in the 1940 Act as including "any note, stock, treasury stock, security future, bond, debenture," and, in general, "any interest or instrument commonly known as a 'security.'"[19] Shares in a wholly-owned subsidiary are stock and fall squarely within that definition. In addition, the Commission specifically noted that an issuer may hold virtually all of its assets in securities of majority-owned subsidiaries, fall outside Section 3(a)(1)(C), and nevertheless meet the definition of an investment company under Section 3(a)(1)(A).[20] Government treasuries are securities as well. The 1940 Act defines a "Government security" as a security issued or guaranteed as to principal or interest by the United States, and the Section 2(a)(36) definition is broad enough to reach it.[21] The Staff has said so directly. Treasuries, as Government securities, "are securities for purposes of determining, under section 3(a)(1)[(A)], whether an issuer is engaged primarily in the business of investing in securities," and an issuer holding them exclusively may be an investment company under that Section while owning no investment securities at all.[22] Shares of money market funds are securities as well. The Staff permits an issuer to treat such shares as cash items for purposes of Section 3(a)(1)

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investment company" under what is now Section 3(a)(1)(A) "if its primary business consisted of investing, reinvesting, or trading in securities issued by its majority-owned subsidiaries . . . even though such securities were not 'investment securities'" for purposes of what is now Section 3(a)(1)(C)). A wholly-owned subsidiary is, by definition, a majority-owned subsidiary.

[19] 15 U.S.C. § 80a-2(a)(36).

[20] Treatment of Asset-Backed Issuers Under the Investment Company Act, Release No. IC-29779, 76 Fed. Reg. 55,308, 55,321 n.104 (Sept. 7, 2011) (noting that an issuer may have "virtually all of its assets invested in securities of [majority-owned subsidiaries]" and not meet the definition of investment company under Section 3(a)(1)(C) "but nevertheless meet the definition of an investment company under Section 3(a)(1)(A)").

[21] 15 U.S.C. § 80a-2(a)(16); *see* 15 U.S.C. § 80a-2(a)(36).

[22] Baker, Watts & Co., SEC Staff No-Action Letter (May 6, 1982); *see also* Financial Funding Group, Inc., SEC Staff No-Action Letter (Mar. 3, 1982) (the fact that securities "may also be United States Government securities is irrelevant for purposes of section 3(a)(1)[(A)]"); League Central Credit Union, SEC Staff No-Action Letter (Aug. 21, 1987). *See also* Special Purpose Acquisition Companies, Shell Companies, and Projections, Release Nos. 33-11265; 34-99418; IC-35096 (Jan. 24, 2024), 89 Fed. Reg. 14,158, 14,260 (Feb. 26, 2024) (the "SPAC Rules Adopting Release") ("While U.S. Government securities and [shares of] money market funds are securities for purposes of section 3(a)(1)(A), asset composition is only one of the factors that should be considered in analyzing a SPAC's status under the [1940 Act].").

(C), but it has stated that the issuer nevertheless "may be an investment company under section 3(a)(1)(A) of the Investment Company Act if its *primary* business is investing, reinvesting, or trading in shares of money market funds (or in shares of money market funds and other securities)."[23]

With regard to the second question, the answer is also yes for both activities. In *SEC v. Fifth Avenue Coach Lines*, the court held that the term "invest" in Section 3(a)(1)(A) "must be given its normal meaning, i.e., to put out money at risk in the hope of gain."[24] The term includes "buying a stock for dividends or for capital gain."[25] The Registrant Fund's activity with regard to government treasuries and shares of money market funds clearly meets that standard.[26] The Registrant Fund purchases these instruments with the proceeds of creations, sells them to meet redemptions, and holds them at risk in the interim. Each purchase puts money at risk in hope of gain, and the recurring purchase and sale is reinvesting and trading in the ordinary sense of those terms. The holding of shares in the wholly-owned subsidiary meets the standard as well, as the Registrant Fund holds those shares in hope of gain; the shares are the source of the investment return the Registrant Fund offers its shareholders. The Registrant Fund is the sole shareholder of the subsidiary. It invests a portion of its own total assets in the subsidiary and manages the size of that investment against a 25% ceiling, measured at each fiscal quarter end. That the Registrant Fund holds the shares rather than trades them does not change the analysis.[27] The Staff has stated that

[23] Willkie Farr & Gallagher, SEC Staff No-Action Letter (Oct. 23, 2000) (emphasis in original). *See also* SPAC Rules Adopting Release, *supra* note 22, at 14,260 (confirming that shares of money market funds are securities for purposes of Section 3(a)(1)(A)).

[24] *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 30 (S.D.N.Y. 1968), *aff'd*, 435 F.2d 510 (2d Cir. 1970).

[25] *Id.* at 30.

[26] *Cf.* SPAC Rules Adopting Release, *supra* note 22, at 14,260 (stating that an issuer holding only Government securities, shares of money market funds, and cash items "but whose primary business is to achieve investment returns on such assets would still be an investment company under section 3(a)(1)(A)"). The Registrant Fund holds these instruments as collateral for the exposure it obtains through its subsidiary, and it earns a return on them while they are held. The Commission's statement confirms that the purchase, sale, and holding of these instruments is activity within Section 3(a)(1)(A). The Registrant Fund's status does not depend on these instruments being its primary business, as its business also includes its investment in the subsidiary. The Commission's caution in the same passage that asset composition is only one of the factors addresses issuers with a competing non-investment business, and the Registrant Fund has none.

[27] We note that the Commission has published a contrary view. In the release proposing Rule 3a-1, the Commission stated that Section 3(a)(1), now Section 3(a)(1)(A), "does not apply to companies which merely 'own or hold' securities," while then-Section 3(a)(3), now Section 3(a)(1)(C), applies to such companies. Certain Prima Facie Investment Companies, Release No. IC-10937, [1979–1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,348, at 82,463 n.8 (Nov. 13, 1979). The Staff has since rejected that

"even a completely passive trust may be considered to be engaged primarily in the business of investing in securities within the meaning of [Section 3(a)(1)(A)] if it had an investment purpose in acquiring the securities that it holds, and engages in no business other than investing in securities that may be considered 'primary.'"[28] The Registrant Fund acquired the shares of its wholly-owned subsidiary with an investment purpose. It organized and capitalized the subsidiary, taking the shares in exchange for its capital contribution, and that contribution is money placed at risk; the shares appreciate or decline in value, and the Registrant Fund bears that risk and receives that gain. Further, the Registrant Fund engages in no other business outside of its investment activity.

B. The Registrant Fund's Holdings Are Evaluated on an Unconsolidated Basis Because the Subjective Test Contains No Look-Through

The Staff should evaluate the holdings of the Registrant Fund on an unconsolidated basis, because to do so is consistent with the language of Section 3(a)(1)(A), the instrument-level approach the Supreme Court takes to what counts as a security, and the reason the subsidiary entity is included in the Registrant Fund's structure. First, the statute itself prescribes when to look through a subsidiary and when not to, and it places that direction in the Objective Test alone. Second, Section 3(a)(1)(A) asks what business an issuer is engaged primarily in, and the answer begins with what the issuer owns. Here, the Registrant Fund owns stock of its subsidiary, government treasuries, and shares of money market funds, and in each case, these are instruments that are securities in their own right. Therefore, the inquiry stops with the instrument. Third, the subsidiary reflects the requirements of the tax law governing regulated investment companies, not

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reading on several occasions. The Staff has stated that a completely passive trust may be engaged primarily in the business of investing in securities under Section 3(a)(1)(A) where it had an investment purpose in acquiring the securities it holds and has no other business. Credit Suisse First Boston Corp., SEC Staff No-Action Letter (Sept. 9, 1998). The Staff has also refuted the argument that the absence of trading or active management places an issuer outside the provision, pointing to the inclusion of unit investment trusts, whose portfolios are fixed and unmanaged, among the investment companies the 1940 Act regulates. *See* Centex Corp., SEC Staff No-Action Letter (Oct. 10, 1986); Gem Savings Ass'n, SEC Staff No-Action Letter (Aug. 12, 1983); Merrill Lynch, Pierce, Fenner & Smith Inc., SEC Staff No-Action Letter (Oct. 28, 1982). The Staff later granted no-action relief on Centex's amended facts while stating that its response "expresses only our position on enforcement action; it is not based on the analysis of the law you have presented." Centex Corp., SEC Staff No-Action Letter (Nov. 20, 1986). In any event, the Registrant Fund does not merely own or hold the subsidiary's shares. It acquired them by putting money at risk in hope of gain, which is investing under *Fifth Avenue Coach Lines*.

[28] Credit Suisse First Boston Corp., *supra* note 27.

an effort to dress a non-security up as a security, and therefore, there is no reason to look through the subsidiary.

The statute prescribes when to look through a subsidiary and when not to. Where Congress addressed subsidiary holdings, it did so in the Objective Test, and it did so with care. Section 3(a)(1)(C) directs an issuer to measure its investment securities "on an unconsolidated basis," treating each subsidiary as a separate entity whose securities are classified in the parent's hands.[29] Section 3(a)(2) then supplies the only look-through Congress wrote: securities issued by a majority-owned subsidiary fall outside "investment securities" only if the subsidiary is not itself an investment company and is not relying on Section 3(c)(1) or Section 3(c)(7).[30] That conditional classification serves the Objective Test and nothing else. The Subjective Test contains no counterpart. Section 3(a)(1)(A) speaks of "securities" without qualification, and the Tonopah Factors the Commission applies under it, which are discussed later in this letter, contain no consolidation direction.[31] Reading a look-through into the Subjective Test would add words Congress did not enact. The courts have refused to rewrite Section 3(a)(1)(A) by subtraction, declining to read the word "primarily" out of the provision.[32] The same discipline forbids rewriting it by addition.[33]

An instrument bearing the ordinary characteristics of stock is a security, and its holder need not defend that conclusion by pointing to the business beneath it. In *Landreth Timber Co. v.*

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[29] 15 U.S.C. § 80a-3(a)(1)(C).

[30] 15 U.S.C. § 80a-3(a)(2).

[31] In the Matter of Tonopah Mining Co. of Nevada, 26 S.E.C. 426 (1947).

[32] *Moses v. Black*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,866, at 90,365–66 (S.D.N.Y. Feb. 3, 1981) (declining to interpret Section 3(a)(1)(A), then Section 3(a)(1), so as to eliminate the word "primarily").

[33] We note that the Commission's treatment of consolidation under Rule 3a-1 could be read against this conclusion. Rule 3a-1, a safe harbor from prima facie investment company status under Section 3(a)(1)(C), determines status on an unconsolidated basis except that a parent must consolidate the financial statements of a wholly-owned subsidiary with its own. 17 C.F.R. § 270.3a-1. In adopting the rule, the Commission declined to require consolidation with majority-owned subsidiaries, observing that Section 3(a)(1)(C) requires unconsolidated financial statements while Section 3(a)(1)(A) "contains no such limitations." Certain Prima Facie Investment Companies, Release No. IC-11551, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,805, at 83,918–20 n.9 (Jan. 14, 1981). Neither point is relevant here. The consolidation command in Rule 3a-1 is confined to the rule's own safe harbor, and it confirms that when the Commission wants consolidation it says so expressly. The observation in the adopting release was not carried into any rule text, and in the four decades since, neither Congress nor the Commission has adopted a consolidation requirement under Section 3(a)(1)(A).

Landreth, the Supreme Court held that the sale of stock possessing the usual features of stock is the sale of a security, and it declined to look past the instrument to the character of the underlying enterprise.[34] The 1940 Act takes the same instrument-level approach. Section 2(a)(36) defines "security" to include "stock" without qualification as to what the issuer of the stock does.[35] The shares of the wholly-owned subsidiary carry the ordinary features of equity. They entitle the Registrant Fund to the profits of the subsidiary, they carry the voting rights of a sole shareholder, and they appreciate and decline with the fortunes of the subsidiary. They are securities in their own right, and the Staff has recognized that securities issued by a majority-owned subsidiary are securities for purposes of Section 3(a)(1)(A).[36]

Finally, the subsidiary exists as a structure to meet a specific tax law requirement, not as an effort to repackage a non-security as a security for purposes of the Registrant Fund obtaining registration under the 1940 Act. The Internal Revenue Code of 1986, as amended (the "Code") conditions treatment as a regulated investment company on the source of the company's income: at least 90% of a regulated investment company's gross income must derive from enumerated categories, including dividends, interest, gains from the sale of stock or securities, and other income derived with respect to its business of investing in stock or securities.[37] Here, the Registrant Fund seeks to access exposure to an asset that would produce non-qualifying income if held directly. As an example, the Registration Statements filed by Bitwise Funds Trust for the Bitwise ETFs state that the relevant Bitwise ETF makes certain investments through the subsidiary because direct holdings would produce non-qualifying income for purposes of Bitwise ETF qualifying as a regulated investment company.[38] Therefore, in order to comply with the Code's income test, the Registrant Fund will make these investments through its wholly-owned subsidiary, and in order to comply with the Code's diversification test, the Registrant Fund will limit the subsidiary's position to 25% or less of the Registrant Fund's total assets at each fiscal quarter end.[39] As such, the subsidiary entity serves a clear business purpose within the Registrant Fund's structure, and its

[34] *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686–87, 690 (1985).

[35] 15 U.S.C. § 80a-2(a)(36).

[36] Great American Management and Investment, Inc., *supra* note 18.

[37] 26 U.S.C. § 851(b)(2).

[38] Post-Effective Amendment No. 46, *supra* note 4.

[39] 26 U.S.C. § 851(b)(3).

shares should be evaluated as what they are: securities held by the Registrant Fund, without any further look-through being necessary.

C. The Registrant Fund's Wholly-Owned Subsidiary Is Part of a Securities Investment Business, Not an Operating Business

It is the way in which an issuer engages with the securities of its subsidiary, not the nature of the subsidiary itself, that determines whether such securities are part of a securities investment business under Section 3(a)(1)(A). An issuer that organizes and capitalizes a subsidiary to hold investment exposure for its shareholders is investing in securities; a holding company that organizes and capitalizes a subsidiary to operate a business is not.

The 1940 Act addresses subsidiary securities in several provisions; however, none of them apply to the Subjective Test. Section 3(a)(1)(A) applies to "securities" without any qualifying language, and shares of a wholly-owned subsidiary, as discussed above, are securities held by the Registrant Fund.[40] Congress and the Commission did intend to remove certain types of securities from the analysis of whether an entity should be an investment company, but they did so with regard only to either the Objective Test or to the entire definition of "investment company." Section 3(a)(2) removes the securities of certain majority-owned subsidiaries from the defined term "investment securities."[41] Section 3(a)(1)(C) directs that its computation be made on an unconsolidated basis.[42] Section 3(c)(6) excepts companies engaged in specified businesses through majority-owned subsidiaries.[43] Rule 3a-1 permits a parent to exclude the securities of certain majority-owned subsidiaries from the assets counted against the rule's limits.[44] Since none of these provisions qualify the term "securities" in the Subjective Test, the distinction between an operating business and an investment business conducted through a subsidiary must be made using only the

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[40] *See supra* notes 34–36 and accompanying text. The basis on which the Registrant Fund's holdings are analyzed is addressed *supra* Section II.B.

[41] 15 U.S.C. § 80a-3(a)(2); *see supra* note 30 and accompanying text.

[42] 15 U.S.C. § 80a-3(a)(1)(C); *see supra* note 29 and accompanying text.

[43] 15 U.S.C. § 80a-3(c)(6).

[44] 17 C.F.R. § 270.3a-1; *see supra* note 33.

language Congress placed into the Subjective Test: "engaged primarily . . . in the business of investing, reinvesting, or trading in securities."[45]

In addition to the text of the statute itself, the Staff has distinguished issuers by the character of their business with respect to their subsidiaries' securities. The Staff has applied that distinction to conclude that some issuers are investment companies and others are not. In *United Asset Management Corp.*, a newly organized holding company proposed to acquire at least 80% of the voting securities of a number of investment advisory firms, each an operating business that would continue to manage its own affairs after acquisition. The Staff concluded that the company would not be an investment company under what is now Section 3(a)(1)(A)[46] because its primary business would be owning or holding the securities of those subsidiaries rather than investing, reinvesting, or trading in them. The Staff rested that conclusion on the words of the statute itself: the Objective Test reaches "investing, reinvesting, owning, holding, or trading," while the Subjective Test reaches only "investing, reinvesting, or trading."[47] Owning businesses through subsidiaries belongs to the Objective Test, but is not the conduct of a securities investment business. A parent that holds a subsidiary's shares in order to receive the income of an operating business is conducting that business through the corporate form, while an issuer that holds a subsidiary's shares as capital exposed to market risk, in order to obtain an investment return, is investing in those shares.

The Staff has also applied that distinction in the other direction. In *Great American Management and Investment, Inc.*, the Staff took the position that an issuer could be an investment

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[45] The distinction must be made within the Subjective Test alone. Section 3(b) provides its exemptions "[n]otwithstanding paragraph (1)(C) of subsection (a)," 15 U.S.C. § 80a-3(b), and runs only against capture under that paragraph; a holding company within Section 3(a)(1)(A) could neither make the self-determination Section 3(b)(1) permits nor obtain the order Section 3(b)(2) authorizes. *See* Rosenblum & Rosenblum, *supra* note 9, § 3.3, at 80–81. *See also* United Asset Management Corp., *infra* note 47 (staff stating that Section 3(b)(1) "only excepts" issuers that are investment companies under what is now Section 3(a)(1)(C)).

[46] Before the National Securities Markets Improvement Act of 1996, the Subjective Test appeared at Section 3(a)(1) of the 1940 Act and the Objective Test at Section 3(a)(3). Pub. L. No. 104-290, § 209(c), 110 Stat. 3416, 3435 (1996). Authorities predating the renumbering are quoted as written; this letter otherwise uses the current designations.

[47] United Asset Management Corp., SEC Staff No-Action Letter (Nov. 2, 1981) ("[I]t appears that UAM would not be an investment company as defined in section 3(a)(1) because its primary business will be owning or holding securities rather than 'investing, reinvesting, or trading' in them . . . .").

company under the same provision if its primary business consisted of investing, reinvesting, or trading in securities issued by its majority-owned subsidiaries, even when those securities were not "investment securities" for purposes of Section 3(a)(1)(C).[48] Finally, the Commission has itself also recognized this distinction. As discussed above, an issuer may fall outside Section 3(a)(1)(C) precisely because its assets are majority-owned subsidiary securities, and nevertheless meet the definition under Section 3(a)(1)(A).[49] In particular, a "special situation investment company," a company that takes control of other companies in order to profit by selling their securities, should be regulated under the 1940 Act even though its holdings are the securities of its own majority-owned subsidiaries.[50] In each case, the subsidiary's shares were consistently treated as securities. What determines whether holding them is part of a securities investment business is the character of the parent's business with respect to them: ownership and operation on one side, investing, reinvesting, and trading on the other.

The Registrant Fund's engagement with its subsidiary's shares is investment activity. The Registrant Fund organized and capitalized the subsidiary, took its shares in exchange for the capital contribution, and is its sole shareholder.[51] The subsidiary conducts no operating business. It has no employees, no plant, and no customers, and its assets are financial instruments. It exists to hold the investment exposure the Registrant Fund delivers to its own shareholders, it is advised by the Registrant Fund's investment adviser, and it follows the Registrant Fund's investment policies on an aggregate basis.[52] The Registrant Fund does not manage an enterprise through the subsidiary. It holds the subsidiary's shares at risk in hope of gain, and those shares are the source of the

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[48] Great American Management and Investment, Inc., *supra* note 18 ("Great American could be an investment company as defined in section 3(a)(1) if its primary business consisted of investing, reinvesting, or trading in securities issued by its majority-owned subsidiaries which were not investment companies even though such securities were not 'investment securities' for purposes of section 3(a)(3).").

[49] Treatment of Asset-Backed Issuers Under the Investment Company Act, *supra* note 20, 76 Fed. Reg. at 55,321 n.104.

[50] *Id.* ("[A] company may be a 'special situation investment company' that should be regulated under the Investment Company Act, even though the company holds securities of its majority-owned subsidiaries that are not investment companies. . . . A special situation investment company generally is a company that secures control of other companies primarily for the purpose of making a profit in the sale of the controlled companies' securities.").

[51] *See* Post-Effective Amendment No. 46, *supra* note 4 (describing the wholly-owned Cayman Islands subsidiary and stating that the fund is its sole shareholder).

[52] *Id.*

investment return the Registrant Fund offers its shareholders.[53] It holds those shares within a portfolio it manages from day to day, alongside the government treasuries and money market fund shares that constitute the balance of its assets. The Registrant Fund invested capital in those shares when it organized the subsidiary, and it invests and reinvests across that portfolio daily. Its business is conducted through the verbs of the Subjective Test, not through the owning and holding that Congress placed only in the Objective Test.

In conclusion, investments in securities issued by wholly-owned subsidiaries should be considered to comprise part of a securities investment business under the Subjective Test when the issuer's engagement with those securities is itself the conduct of an investment business, as the Registrant Fund's is. The analysis should not differ for holding companies engaged in operating businesses through wholly-owned and majority-owned subsidiaries. The same analysis applies to such businesses, but it produces a different result. Their engagement is ownership and operation rather than investment, and the phrase "engaged primarily . . . in the business of investing, reinvesting, or trading in securities" already captures that difference without any narrowing of the word "securities."

III. Question 3: When evaluating whether a Novel ETF meets the Subjective Test, should the Commission continue to apply the Tonopah Factors? Are there different or additional factors the Commission should consider or emphasize in its analysis of a Novel ETF? Why or why not?

The Tonopah Factors should continue to be applied as they currently exist. There is no reason for the Commission to disregard seventy-nine years of consistent use of the Tonopah Factors across Commission adjudication, judicial adoption in enforcement litigation, staff no-action positions, rulemaking, declaratory orders, and interpretive guidance.[54] Nor are Novel ETFs

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[53] *See supra* notes 24–28 and accompanying text.

[54] *See, e.g.*, Tonopah, 26 S.E.C. 426 (adjudication); *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 29–30 (S.D.N.Y. 1968) (examining the issuer's expenditures, sources of income, and activities to determine primary engagement in an enforcement action), *aff'd*, 435 F.2d 510 (2d Cir. 1970); Great American Management and Investment, Inc., *supra* note 18; Willkie Farr & Gallagher, *supra* note 23; Rule 3a-8 under the 1940 Act, 17 C.F.R. § 270.3a-8 (rulemaking incorporating the factor framework for research and development companies); Snowflake Inc., Release No. IC-34049 (Oct. 9, 2020) [85 Fed. Reg. 65,449 (Oct. 15, 2020)] (notice), Release No. IC-34085 (Nov. 4, 2020) (order); Lyft, Inc., Release No. IC-33399 (Mar. 14, 2019) [84 Fed. Reg. 10,156 (Mar. 19, 2019)] (notice), Release No. IC-33442 (Apr. 8, 2019) (order);

so unlike anything the Commission has seen before that they require different or additional factors. On the contrary, after the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[55] agency interpretations issued contemporaneously with a statute and applied consistently over time, while not controlling, "may be especially useful in determining the statute's meaning."[56] The Tonopah Factors are such an interpretation. The Commission articulated them within seven years of the Act's enactment, drew them from decisions dating to 1942, and has applied them without interruption since.[57] Further, the Commission followed this same course the last time a novel structure raised this question. When commenters disputed the investment company status of special purpose acquisition companies, the Commission proposed a rule to address their status, declined to adopt it, and instead issued guidance reaffirming the Tonopah Factors and applying them to the new facts.[58]

Tonopah itself designated the nature of the issuer's present assets and the sources of its present income as the most important of the five factors.[59] Both factors are objective, and both are measured at the issuer level. Applying this analysis to the Registrant Fund, at the issuer level every asset the Registrant Fund holds is a security, and all of its income derives from securities.[60]

SPAC Rules Adopting Release, *supra* note 22, at 14,258 & n.1146 (stating that the Commission has looked to the five factors to assess primary engagement under Section 3(a)(1)(A) "and in other contexts under the Investment Company Act").

[55] 603 U.S. 369 (2024).

[56] *Id.* at 394 ("[I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[57] *See* Tonopah, 26 S.E.C. at 427 & n.2 (identifying the five considerations and drawing on In the Matter of International Mining Corp., 12 S.E.C. 174 (1942), In the Matter of Tobacco Products Export Corp., 12 S.E.C. 743 (1943), and In the Matter of Bankers Securities Corp., 15 S.E.C. 695 (1944), *aff'd sub nom.* Bankers Sec. Corp. v. SEC, 146 F.2d 88 (3d Cir. 1944)).

[58] SPAC Rules Adopting Release, *supra* note 22, at 14,258–61. The Commission proposed but did not adopt Rule 3a-10, which would have provided a safe harbor from investment company status. *Id.* at 14,258–59. The one consideration the Commission added, duration, was framed as informing the existing factors rather than supplementing them. The release states that duration is "not the sole determinant" of status and analyzes duration through its effect on historical development and on the activities of officers, directors, and employees. *Id.* at 14,259–60.

[59] Tonopah, 26 S.E.C. at 427 (listing the five "principal relevant considerations" and identifying as "most important" the nature of the issuer's present assets and the sources of its present income).

[60] *See supra* Sections II.A and II.B (analyzing the Registrant Fund's assets and income on an unconsolidated basis).

Therefore, the Tonopah Factors themselves require that the greatest weight be given to the two factors that cleanly resolve the question in favor of investment company status for the Registrant Fund. The Tonopah Factors are sufficient to execute an appropriate analysis of the issuer, and while certain aspects of Novel ETFs may be new, they are not so unusual as to warrant breaking with Commission precedent and establishing new factors outside of Tonopah.

IV. Question 2: Why would a Novel ETF with a principal investment strategy to invest in assets that are not securities seek to register as an investment company and be regulated as such (rather than as, for example, an exchange-traded commodity trust or some other type of ETP)?

A Novel ETF with a principal investment strategy to invest in assets that are not securities would seek to register under the 1940 Act because its sponsor has concluded that, for the particular exposure the fund will offer, a 1940 Act ETF is the most suitable available structure. A Novel ETF, by the Request's definition, offers exposure to an innovative asset class or strategy. Demand for that exposure among financial professionals and institutional investors (together, "Advised Investors") is documented below, but the novelty of the exposure itself is the reason the vehicle matters. Investors are more comfortable accessing something new from within a structure they know well. Based on its experience across a range of financial products, including exchange-traded commodity trusts registered under the Securities Act, Bitwise has reached that conclusion with respect to event contracts. There are three principal reasons. First, the 1940 Act structure permits Advised Investors to access innovative exposures while continuing to comply with the mandates and regulatory constraints that govern their accounts. Second, the 1940 Act provides a mandatory set of investor protections that are particularly valuable to investors contemplating exposure to something new. Third, the 1940 Act structure permits a sponsor to bring a product to market in a timely and cost-effective manner where demand for the product exists, while alternative structures would make the path to market long and uncertain.

A. The 1940 Act Structure Gives Advised Investors Access to Exposure They Demand Within Their Mandates and Constraints

Advised Investors seek the diversifying, less correlated sources of return that event contracts may provide, and the 1940 Act structure makes that exposure accessible to them. Advised Investors operate within fiduciary duties, investment mandates, custody requirements, and platform rules that determine which instruments their accounts may hold, and a direct event

contract position sits poorly within those constraints. A 1940 Act ETF delivers the same exposure through a familiar form that fits within them.

Restrictions on Advised Investors are significant. Under the fiduciary standard governing investment advisers and Regulation Best Interest governing broker-dealers, a financial professional must determine that an investment is prudent and administrable for the account, an assessment a direct event contract position may not satisfy where it lacks the daily pricing, qualified custody, and standardized disclosure available through a registered, exchange-traded vehicle.[61] Investment mandates and investment policy statements commonly limit permissible holdings to registered or exchange-listed instruments and may exclude direct commodity interests and derivatives, categories into which an event contract position could fall. The custody obstacle is more basic. An event contract is not a security. It is a contractual position on the outcome of a future event, traded on a CFTC-regulated designated contract market rather than a securities exchange, and it therefore falls outside the custody and settlement infrastructure ordinarily used for securities. A direct position generally cannot be held in an ordinary brokerage account, deposited with The Depository Trust Company, or maintained under the custodial arrangements that apply to a fund's securities.[62] Even a permissible holding must satisfy the platforms and gatekeepers through which advised capital transacts, and custodial and brokerage platforms, model portfolio and managed account programs, and home office due diligence teams commonly admit registered, listed funds with a ticker, daily pricing, and standardized operational processing. Capital governed by the Employee Retirement Income Security Act of 1974 ("ERISA") faces additional constraints, because plan assets must be held in trust under custody arrangements designed for conventional investments.[63] Therefore, for a substantial portion of advised capital, the obstacle to event contract

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[61] An investment adviser must act in a client's best interest, exercise due care in selecting investments, and place the client's interests ahead of its own. *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248, 84 Fed. Reg. 33,669, 33,671–72 (July 12, 2019); 15 U.S.C. § 80b-6. Regulation Best Interest imposes a related obligation on broker-dealers, requiring recommendations to rest on a reasonable basis and serve the retail customer's best interest rather than the firm's competing financial interests. *See* 17 C.F.R. § 240.15l-1(a)(1); Regulation Best Interest: The Broker-Dealer Standard of Conduct, Release No. 34-86031, 84 Fed. Reg. 33,318, 33,318–20 (July 12, 2019).

[62] *See* Request at 5; 7 U.S.C. § 7a-2(c)(5)(C); CFTC, *Contracts & Products—Event Contracts*, https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm (last visited Aug. 25, 2026) (describing event contracts as derivative contracts whose payoff depends on a specified event, occurrence, or value and explaining the CFTC regime governing their listing on registered entities).

[63] *See* 29 U.S.C. § 1103(a) (requiring that plan assets be held in trust). A plan fiduciary also must discharge its duties with the care, skill, prudence, and diligence of a prudent expert and must diversify plan

exposure is not a lack of interest but the lack of an eligible means of obtaining and holding it.

Despite these constraints, demand among Advised Investors for broader and more diversified exposure is well documented and has increased steadily. The annual CAIS-Mercer adviser survey has tracked that trend since 2022, when nearly nine in ten advisers reported that they intended to increase allocations to alternative asset classes over the following two years, principally to seek diversification, capital preservation, and uncorrelated returns.[64] By December 2025, 90% of advisers surveyed allocated to alternatives, 88% planned to increase those allocations, and nearly half allocated more than 10% of client portfolios to the category.[65] Cerulli's research reflects the same demand. As of July 2026, 82% of advisers identified portfolio diversification as a primary objective in allocating to alternatives, and Cerulli estimated that advisers held $2.2 trillion in semiliquid alternative assets and projected that the amount could approach $4 trillion within five years.[66]

Capital flows also reflect that demand. Assets in defined outcome, or "buffer," ETFs grew from approximately $200 million in 2017 to approximately $78 billion across more than 400 funds by the end of 2025, and assets in managed futures ETFs, valued in part for their low correlation to equities, grew nearly tenfold in three years.[67] Two shifts in the delivery of investment advice have

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investments to minimize the risk of large losses. *See* 29 U.S.C. § 1104(a)(1)(B) (prudence); *id.* § 1104(a)(1)(C) (diversification).

[64] Press Release, CAIS, *Nearly 9 in 10 Financial Advisors Plan to Increase Alternatives Allocations over Next Two Years, CAIS and Mercer Survey Finds* (Nov. 15, 2022), available at https://www.caisgroup.com/our-company/press/nearly-9-in-10-financial-advisors-plan-to-increase-alternatives-allocations.

[65] Press Release, CAIS, *Fourth Annual CAIS Mercer Survey Shows Alts Moving from Niche to Norm with Half of Advisors Now Allocating 10%+ to Alts* (Dec. 10, 2025), available at https://www.caisgroup.com/our-company/press/fourth-annual-cais-mercer-survey-shows-alts-moving-from-niche-to-norm.

[66] David Bodamer, *Cerulli: Wealth Allocations to Alts Could Reach $4T Within Five Years*, Wealth Management (July 30, 2026), available at https://www.wealthmanagement.com/alternative-investments/cerulli-wealth-allocations-to-alts-could-reach-4t-within-five-years (reporting that 82% of surveyed advisers cited portfolio diversification as a primary goal); Press Release, Cerulli Associates, *Private Markets Set to Add $2 Trillion in Advisor-Intermediated Assets over Next Five Years* (July 30, 2026), available at https://www.cerulli.com/press-releases/private-markets-set-to-add-2-trillion-in-advisor-intermediated-assets-over-next-five-years (estimating current adviser ownership of less than fully liquid private capital at $2.2 trillion and projecting $2 trillion of growth over five years).

[67] Katie Greifeld, *'Buffer' ETFs Prove a Decent Bond Alternative in War-Hit Markets*, Wealth Management (Mar. 13, 2026), available at https://www.wealthmanagement.com/etfs/-buffer-etfs-prove-a-decent-bond-alternative-in-war-hit-markets (reporting $200 million in assets in 2017); Zachary Evens, *How*

directed that demand toward registered, exchange-traded vehicles: first, the growth of fee-based advisory arrangements, which now hold more than $17 trillion in assets, and second, the growth of third-party model portfolios, within which ETFs have overtaken mutual funds as the predominant underlying vehicle.[68]

Advised Investors also express a clear preference for accessing new exposures through ETFs. In the year before spot bitcoin ETFs launched in the United States, the Bitwise/VettaFi Benchmark Survey found that an ETF was the preferred method of obtaining bitcoin and crypto exposure for 64% of advisers. By early 2026, 81% of institutions surveyed preferred to access spot crypto through a registered vehicle.[69] Where the same exposure has been offered through both structures, investors have favored the 1940 Act fund. As an example, by September 2024 the Invesco Optimum Yield Diversified Commodity Strategy ETF, organized under the 1940 Act, had grown to approximately three times the size of a Securities Act product providing exposure to the same commodity basket.[70] When exposure to a novel asset class becomes available through a

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the Largest Buffer ETF Providers Stack Up, Morningstar (Feb. 18, 2026), available at https://www.morningstar.com/funds/how-largest-buffer-etf-providers-stack-up (reporting $78 billion across 420 defined outcome ETFs at year-end 2025); Lan Anh Tran & Ryan Jackson, *Managed Futures: What to Know About This Strategy for ETFs*, Morningstar (Aug. 2, 2024), available at https://www.morningstar.com/funds/managed-futures-open-new-frontier-etfs (reporting that assets in managed futures ETFs grew nearly tenfold, and the number of such ETFs doubled, over the three years through mid-2024).

[68] Leo Almazora, *Fee-Based Model Adoption Is Accelerating Among Advisors, Says Cerulli*, InvestmentNews (Dec. 2, 2024), available at https://www.investmentnews.com/ria-news/fee-based-model-adoption-is-accelerating-among-advisors-says-cerulli/258431 (reporting that assets in fee-based arrangements increased 169% between 2014 and 2023, from approximately $6.5 trillion to more than $17 trillion); Stephen Margaria, *Your Advisor Is Not Choosing Your Holdings, and That's OK*, Morningstar (June 15, 2026), available at https://www.morningstar.com/portfolios/your-advisor-is-not-choosing-your-holdings-thats-ok (reporting that assets in third-party model portfolios reached $934 billion as of March 2026, more than three times their June 2021 level, and that ETFs constituted 55% of average model portfolio holdings, compared with 34% for mutual funds).

[69] Bitwise Asset Management & VettaFi, *The Bitwise/VettaFi 2024 Benchmark Survey of Financial Advisor Attitudes Toward Crypto Assets* 14 (Jan. 2024), available at https://s3.amazonaws.com/static.bitwiseinvestments.com/Research/The-Bitwise-VettaFi-2024-Benchmark-Survey.pdf; Coinbase & EY-Parthenon, *Volatility Drives Discipline, Not Retreat: 2026 Institutional Investor Digital Assets Survey* 3 (Mar. 2026), available at https://www.coinbase.com/institutional/research-insights/research/insights-reports/2026-institutional-investor-survey-e-and-y.

[70] *See 2 Commodity ETFs to Help Diversify Portfolios*, ETF Trends (Sept. 23, 2024), available at https://etftrends.com/innovative-etfs-channel/2-commodity-etfs-to-help-diversify-portfolios/ (reporting $4.3 billion in assets for the 1940 Act fund and $1.4 billion for the Securities Act product and explaining that the funds held the same commodities in slightly different weights).

registered, exchange-traded vehicle, advised capital adopts that vehicle as its preferred means of access.

Offering event contract exposure through a 1940 Act ETF is a direct response to what Bitwise hears from Advised Investors. They want diversifying exposures, they cannot hold them directly, and they want the exposure in the registered, exchange-traded form their accounts are built to hold.

B. The 1940 Act Structure Provides Investor Protections That No Comparable Structure Provides

A fund registered under the 1940 Act is subject to an integrated, mandatory set of investor protections administered under the oversight of persons independent of the fund and its adviser. Securities Act products are subject to the disclosure and antifraud protections of the federal securities laws, but the 1940 Act adds substantive, board-level safeguards for which the Securities Act framework provides no direct analog. Three of those safeguards are particularly relevant here. The 1940 Act requires every registered fund to be overseen by a board of directors, a minimum proportion of whom must be independent of the fund and its adviser.[71] An advisory contract and the fees payable under it cannot take effect or continue in effect without the independent directors' approval, and those directors have an affirmative, unwaivable duty to request and evaluate the information reasonably necessary to assess the arrangement.[72] The 1940 Act also imposes strict requirements on the safekeeping of fund assets, limiting the persons and institutions that may

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[71] *See* 15 U.S.C. § 80a-10(a) (requiring that at least 40% of a registered investment company's board consist of persons who are not interested persons); *id.* § 80a-2(a)(19) (defining "interested person" to include officers, employees, and affiliated persons of the fund or its adviser, certain immediate family members, legal counsel to the fund during the relevant period, and persons with certain material business or brokerage relationships). In practice, the statutory floor understates the norm, because funds relying on commonly used exemptive rules must maintain a majority independent board as a condition of that relief. *See, e.g.*, 17 C.F.R. §§ 270.10f-3, 270.12b-1(c), 270.15a-4, 270.17a-8, 270.17d-1, 270.17e-1, 270.17g-1, 270.18f-3, 270.23c-3.

[72] *See* 15 U.S.C. § 80a-15(c) (requiring independent-director approval of an advisory contract and imposing on directors a duty to request and evaluate, and on the adviser a duty to furnish, information reasonably necessary to evaluate the contract's terms). The 1940 Act and its rules assign independent directors a comparable gatekeeping role with respect to the fund's principal underwriting contract, distribution plan, selection of its independent public accountant, and specified affiliated transactions. *See* 15 U.S.C. § 80a-15(c) (principal underwriting contract); 17 C.F.R. § 270.12b-1(b)(2) (distribution plan); 15 U.S.C. § 80a-31(a) (selection of independent public accountant); *see also, e.g.*, 17 C.F.R. §§ 270.10f-3(b)(11), 270.17a-8(a)(3), 270.17e-1(b)(2) (specified affiliated transactions).

maintain custody and prescribing exacting conditions for those custody arrangements.[73] Finally, every registered fund must adopt and implement a written compliance program, administered by a chief compliance officer and reviewed at least annually under the board's oversight.[74]

In each case, the protection rests on statute and rule rather than on negotiated contractual terms. Securities Act products also typically engage custodians, but a commercial custody arrangement is not equivalent to a statutory custody regime, and the terms of a Securities Act product's custody arrangement depend principally on the governing contracts.[75] Sponsors of Securities Act products may maintain compliance policies and designate compliance personnel, but the scope and staffing of those programs generally remain matters of sponsor discretion. The 1940 Act makes the adequacy and effectiveness of a fund's compliance program a legal condition of its operation and places administration of that program beyond the adviser's exclusive control. The chief compliance officer answers to the board, not solely to the adviser or the fund.[76]

These protections are particularly valuable where the exposure is new. An event contract position runs through a CFTC-regulated designated contract market rather than the settlement infrastructure ordinarily used for securities, and it presents precisely the custody and counterparty questions that Section 17(f) and its rules exist to answer. A novel strategy likewise presents the questions of fee, valuation, and conflict that independent directors are charged with asking. Investors evaluating something unfamiliar cannot rely on a long operating history or a settled market practice. The 1940 Act substitutes structure for that missing history.[77] It places a standing,

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[73] *See* 15 U.S.C. § 80a-17(f); 17 C.F.R. §§ 270.17f-1 to 270.17f-7 (identifying eligible custodians and prescribing conditions for custody, segregation, records, and verification). Rule 17g-1 separately requires the fund to maintain a fidelity bond against larceny and embezzlement by officers and employees who handle fund assets. 17 C.F.R. § 270.17g-1.

[74] *See* 17 C.F.R. § 270.38a-1(a)(1), (a)(3), (a)(4). The policies and procedures must be reasonably designed to prevent violations of the federal securities laws, assessed objectively based on whether the program is tailored to the fund's conflicts and compliance risks. *See* Compliance Programs of Investment Companies and Investment Advisers, Release Nos. IA-2204; IC-26299, 68 Fed. Reg. 74,714, 74,716–18 (Dec. 24, 2003). The chief compliance officer must be competent and knowledgeable regarding the federal securities laws, empowered to develop and enforce the fund's policies and procedures, and have authority to compel adherence to the program. *See id.* at 74,718.

[75] *Compare* 15 U.S.C. § 80a-17(f) (prescribing custody requirements for registered investment companies), *with* 15 U.S.C. §§ 77a–77aa (containing no comparable custody regime).

[76] The chief compliance officer's appointment, compensation, and removal require the approval of the board, including a majority of the independent directors, and the chief compliance officer reports directly to the board. 17 C.F.R. § 270.38a-1(a)(4)(i)–(iv).

[77] *See supra* notes 71–74.

independent body between the adviser and the shareholders, puts the fund's assets in qualified hands as a condition of operating, and makes compliance a legal obligation subject to independent oversight rather than a matter of sponsor discretion. For an Advised Investor contemplating a first allocation to event contracts, those safeguards are not incidental features of the structure. They are a substantial part of the reason to prefer it.

C. The 1940 Act Structure Offers Demonstrable Savings in Cost and Time to Market

The 1940 Act path to market is faster and more predictable than the alternatives. Two features of the regulatory framework account for that difference. First, a fund that satisfies Rule 6c-11 may operate as an ETF without obtaining a fund-specific exemptive order from the Commission, and its shares may list under applicable generic exchange listing standards without a fund-specific rule change under Section 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act").[78] Second, a post-effective amendment filed under Rule 485(a)(2) generally becomes effective 75 days after filing, absent further Commission action.[79] Together, these features provide a defined and comparatively predictable path to market.

For a Securities Act product that does not qualify under applicable generic listing standards, the path is materially different. The exchange must obtain Commission approval of a rule change filed under Section 19(b) of the Exchange Act, a process that historically has taken months or years and involved meaningful approval uncertainty. The Commission has adopted generic listing standards for certain categories of exchange-traded products, including commodity-based trust shares, but those standards do not reach the Novel ETFs at issue here.[80] A Novel ETF offered as a Securities Act product would have no tailored listing standard and no settled route to effectiveness. The 1940 Act structure addresses those uncertainties by providing a defined regulatory framework.

Bitwise has brought products to market under the Securities Act, and its filing history

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[78] *See* 17 C.F.R. § 270.6c-11; Exchange-Traded Funds, Release Nos. 33-10695; 34-87295; IC-33646, 84 Fed. Reg. 57,162, 57,162–63 (Oct. 24, 2019). Before 2019, an ETF generally could operate only under an exemptive order issued by the Commission and list only after the exchange obtained approval of a fund-specific rule change under Section 19(b), 15 U.S.C. § 78s(b).

[79] 17 C.F.R. § 230.485(a)(2).

[80] *See* Request at 4; Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to Adopt Generic Listing Standards for Commodity-Based Trust Shares, Release No. 34-103995, 90 Fed. Reg. 45,414, 45,414–16 (Sept. 22, 2025).

illustrates how uncertain that path is.[81] The Bitwise Bitcoin ETF (BITB) reached the market 1,826 days after its first registration statement was filed, during a period in which no established pathway existed for a spot bitcoin product and the Commission denied successive proposals. Once a pathway for spot crypto products had emerged, the Bitwise Ethereum ETF (ETHW) reached the market in 117 days. The Bitwise Solana Staking ETF (BSOL) reached the market in 341 days, with a registration statement that became effective automatically and shares that listed under generic standards without a Commission order. Even setting BITB aside, the two launches that followed established pathways differed by a factor of three. In each case, the timeline turned principally on the regulatory characterization of the underlying asset, a determination outside the sponsor's control and unresolved at the time of filing.[82] A framework in which time to market depends on an asset-by-asset determination that the sponsor can neither predict nor influence does not permit a sponsor to plan launches against current demand. The 1940 Act structure does not present that variability. Its 75-day effectiveness clock is set by rule, and it applies to every fund that files under it.

The cost difference is equally demonstrable. In Bitwise's experience, organizing and registering a standalone exchange-traded product under the Securities Act has cost between four and ten times as much in legal fees as organizing a comparable 1940 Act fund. A 1940 Act fund

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[81] The figures are based on the following first-filing and launch milestones disclosed in EDGAR: Bitwise Bitcoin ETF Trust, Registration Statement on Form S-1 (Jan. 10, 2019), available at https://www.sec.gov/Archives/edgar/data/1763415/000149315219000408/forms-1.htm; Bitwise Bitcoin ETF, Annual Report on Form 10-K (Mar. 18, 2025), available at https://www.sec.gov/Archives/edgar/data/1763415/000095017025040572/bitb-20241231.htm (reporting commencement of operations on Jan. 10, 2024); Bitwise Ethereum ETF, Registration Statement on Form S-1 (Mar. 28, 2024), available at https://www.sec.gov/Archives/edgar/data/2013744/000199937124004119/bitwise-s1_032824.htm; Bitwise Ethereum ETF, Annual Report on Form 10-K (Mar. 17, 2025), available at https://www.sec.gov/Archives/edgar/data/2013744/000095017025040492/ethw-20241231.htm (reporting effectiveness on July 22, 2024, and commencement of trading on July 23, 2024); Bitwise Solana ETF, Registration Statement on Form S-1 (Nov. 21, 2024), available at https://www.sec.gov/Archives/edgar/data/2045872/000121390024101076/ea0222031-s1_bitwise.htm; Bitwise Solana Staking ETF, Annual Report on Form 10-K (Mar. 20, 2026), available at https://www.sec.gov/Archives/edgar/data/2045872/000119312526117404/bsol-20251231.htm (reporting commencement of trading on Oct. 28, 2025).

[82] BITB's registration statement became effective following the resolution of litigation concerning the listing of spot bitcoin products. *See Grayscale Invs., LLC v. SEC*, 82 F.4th 1239 (D.C. Cir. 2023) (vacating as arbitrary and capricious the Commission's disapproval of a proposed rule change to list a spot bitcoin exchange-traded product). ETHW followed the Commission's approval of spot ether products. BSOL's timeline reflected the period during which the regulatory characterization of its underlying asset remained unresolved.

may be organized as a series of an existing registered trust and use shared registration infrastructure rather than establish a separate registrant. The difference is structural. The standalone Securities Act product bears the full expense of a separate registration, while the 1940 Act series bears the marginal cost of adding a fund to an established framework.

The savings continue during ongoing operations. A 1940 Act fund satisfies its investor-facing periodic reporting obligations through annual and semi-annual shareholder reports.[83] A product reporting under the Exchange Act, by contrast, must file annual, quarterly, and current reports.[84] That difference produces recurring costs. In Bitwise's experience over the past year, the ongoing legal and reporting maintenance of a Securities Act exchange-traded product has cost approximately two and a half times as much per fund per year as the ongoing maintenance of a 1940 Act fund.

In Bitwise's experience, where demand for a product exists, the 1940 Act structure permits a sponsor to meet that demand in a timely and cost-effective manner.[85] The alternatives impose delay, uncertainty, and expense that yield no additional protection for investors.

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Bitwise appreciates the Commission's consideration of this Response. We would be pleased to discuss any of the matters it addresses or provide additional information that would assist the Commission or the Staff. Please direct any questions to the undersigned at johanna@bitwiseinvestments.com.

Respectfully submitted,

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[83] *See* 15 U.S.C. § 80a-29(e); 17 C.F.R. § 270.30e-1.

[84] *See* 15 U.S.C. § 78m(a); 17 C.F.R. §§ 249.308 (Form 8-K), 249.308a (Form 10-Q), 249.310 (Form 10-K).

[85] *See supra* Section IV.A (documenting demand among Advised Investors).