ETF BILD PROJECT

Business Insights | Leadership Discussion

August 31, 2026

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

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

Dear Secretary Countryman:

Thank you for the opportunity to submit this letter in response to the request for comments contained in the above-captioned release titled "Request for Comment on Novel ETFs" ("Novel ETFs Release"), whereby the U.S. Securities and Exchange Commission ("Commission" or "SEC") seeks comments on ways to facilitate innovation in the exchange-traded fund ("ETF") space while protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. The ETF BILD applauds this timely regulatory initiative that has great potential to stimulate innovation in the ETF industry, bringing new and beneficial investment solutions to investors.

ETF BILD

The ETF BILD (Business Insights & Leadership Discussion) is a forum located at www.etfbild.com with a mission to be the catalyst for discussions on the most pressing issues faced by the business leaders of the ETF industry. The ETF BILD Project is at the intersection of academic research and actionable business leadership. The ETF BILD Project continues to be focused on the business insights, leadership, and discussion of the ETF industry.

SEC and Innovation

Before turning to the questions asked by the SEC in its Novel ETFs Release, we wish to commend the SEC for a similar innovative action that occurred in 1990. That year, the SEC granted an exemptive application permitting the first ETF, by definition a "novel

ETF."[1] The SEC's use of its exemptive authority under the Investment Company Act of 1940, as amended (the "1940 Act"), paved the way for the entire ETF industry, which might never had developed had the SEC not recognized the innovativeness of the product that was crafted in a way to protect investors and ensure orderly markets where its shares would trade. The benefits shared by purveyors of ETFs and the institutional and retail investors who consume the ETF product that were unleashed when the SEC granted the first ETF exemptive application continue to be staggering.

Responses to Comments

INVESTMENT COMPANY STATUS

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?*

It is a laudable goal of the SEC "to facilitate innovation in the ETF space" that could allow ETF sponsors to provide "exposure to innovative asset classes or using novel investment strategies" (i.e., Novel ETFs). The SEC identified the following as Novel ETFs: those with "crypto assets; commodity-focused instruments; single-stock strategies; heightened leverage; blockchain-enabled opportunities; private assets; event contracts; and/or a combination of any of the above."

At the outset, it is important to note that the SEC does not have unfettered ability to facilitate the creation and offering of Novel ETFs. The SEC only has such power to the extent that Congress through the 1940 Act, and other securities acts have bestowed it with such power. The SEC should be sure footed before it acts in this area due to the risk of Congress in its oversight role or a court finding that the SEC has exceeded its authority. Before taking any action in this space, the SEC should be mindful of Section 706 of the Administrative Procedures Act provides that a "reviewing court shall ... (2) hold unlawful and set aside agency action, findings, and conclusions found to be ...(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

Two of the several findings set forth in the 1940 Act that led to the enactment of the 1940 Act that described the types of companies Congress intended to be regulated under the

[1] See SuperTrust Trust for Capital Market Fund, Inc. Shares, et al., Investment Company Act Release No. 17809 (October 19, 1990).] SuperTrust launched its first ETF on November 5, 1992.

1940 Act both contain the word "securities": "(3) the principal activities of such companies—investing, reinvesting, and trading in *securities* … [and] (4) such companies customarily invest and trade in *securities*." (emphasis supplied) In our view, there would be a significant risk that a court, another regulatory agency or Congress itself would find that the SEC exceeded if its regulatory authority if it were allow an ETF to register with the SEC under the 1940 Act that primarily engages in a business *other* than investing, reinvesting, or trading in securities, has a principal investment strategy to invest in non-securities assets or that merely holds itself out as an ETF.

Expanding the definition of investment company to facilitate Novel ETFs as suggested by the question has broader consequences both within and outside the SEC. In the past, the vast majority of SEC interpretations of the scope of the definition of "investment company" have been to address companies seeking to avoid the 1940 Act; i.e., so-called operating companies or early stage or "transient" companies that temporarily invest most of their assets in securities while waiting to deploy their capital in operating endeavors. By expanding the definition to reach companies investing in non-securities, the SEC risks sweeping companies into the 1940 Act that should not be regulated as an investment company. Regulatory line drawing to allow certain companies that want to be regulated investment companies while fencing out operating companies would be tricky and open the SEC up to arbitrary and capricious challenges.

If a company is not primarily in a business other than investing, reinvesting, or trading in securities, it is quite possible that such company meets the definition of a company regulated by another law and administrative agency. Usurping the primary regulator of such company could lead to court challenges. The SEC should also be mindful that while it might act to allow a Novel ETF to register as an investment company under the 1940 Act, if such Novel ETF has sizeable positions in non-securities, it may not be able to meet the Internal Revenue Code Subchapter M requirements including that provision's qualifying income test. Offshore blockers might be used under such circumstances but such devices are costly and cumbersome.

ETF BILD, nevertheless, believes that the SEC in cooperation and coordination with Congress and applicable regulators can clear these hurdles to pave the way for ETFs with a blend of asset types. The SEC both in the past and very recently has shown its ability to work with other federal agencies and achieve a joint approach to regulation. Perhaps the SEC and applicable agencies can borrow from the 1981 Shadd –Johnson Accord and the 2026 Memorandum of Understanding between the SEC and the CFTC to designate a primary regulator based on the predominant type of asset owned by the ETF, opening the

door to ETFs with a mixture of underlying assets and investment strategies. Once such designation is made, the regulator would continue to be the designated regulator regardless of changes in the asset-mix. The efficient and colossal distribution mechanism that has arisen for securities-based ETFs has the great potential to make available ETFs with mixed securities/non-securities assets to vast numbers of retail investors; however, only investment vehicles that are on sound regulatory footing should be entitled to access this distribution network.

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 exchanged-traded commodity trust or some other type of ETP)?*

The very short answer is distribution, as alluded to in the prior response. A sponsor of any given financial product irrespective of the assets it holds and trades welcomes the ability to offer a product registered under the 1940 Act to gain access to distribution channels with the most potential consumers of its product.

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 SEC *In the Matter of Tonopah Mining Co. of Nevada*, Investment Company Act Release No. 1084, 26 SEC 426 at 427, July 22, 1947 ("*Tonopah*") developed five factors to determine the business in which a company is primarily engaged so as to provide a framework for addressing whether a given *operating company* should be regulated under the 1940 Act. Importing these factors into a framework designed to determine what additional types of *non-operating companies* are investment companies for purposes of being regulated under the 1940 Act is counterintuitive. Three of the *Tonopah* factors -- historical development, public representations of policy and activities of its officers and directors – are concepts geared towards analyzing operating companies, not a passive entity offering a financial product. These factors should have no bearing on whether an entity primarily engaged in investment activities should be regulated under the 1940 Act

Since three of the *Tonopah* factors are not relevant with respect to whether a given Novel ETF may register or continue to be registered as an investment company, the SEC should leave the *Tonopah* factors on the shelf when reengineering the 1940 Act regulatory scheme to address Novel ETFs. Instead, we believe that taking an objective instead of subjective

regulatory approach to whether a given Novel ETF may register with the SEC as an investment company should be the SEC's goal. Objective approaches send clear signals to the financial industry regarding how a given product will be regulated while a subjective approach introduces uncertainty and possibly regulatory fiat when applying subjective factors. As noted, the SEC working with applicable regulatory agencies should strive for a test such as a numeric, predominant asset test that dictates how a given Novel ETF will be regulated.

NOVEL ETFS AND RULE 6c-11

5. *Do the assets and strategies of Novel ETFs present any questions regarding: a) the functioning of the ETF arbitrage mechanism and related secondary trading activity that supports it; b) investor protection; c) the maintenance of fair, orderly, and efficient markets, as well as any unique challenges to market surveillance necessary to support the ETF's listing; or d) other structural or operational issues? Why or why not?*

   Novel ETFs to date (e.g., single stock ETFs) have not caused issues with respect to the arbitrage mechanism and such ETFs have been able to maintain tight spreads. The ability of an ETF to effect create and redeem transactions in cash in lieu of the assets that do not readily trade on markets is a major reason for the lack of issues. As a result, there have been little investor protection concerns.
   More importantly, ETFs depend upon the Authorized Participant community to operate efficiently and grow in size. A given Authorized Participant is willing to serve in this capacity provided it has the ability to hedge its exposure when effecting creates and redemptions. To the extent that a given ETF basket consists of sizeable illiquid and novel assets (e.g., prediction market interests in their current state), it may not be willing to perform the functions of traditional Authorized Participants. Furthermore, market participants may not be willing to quote prices for shares issued by ETFs with unpredictable characteristics. The SEC should continue to rely upon the Authorized Participant community and other market participants to gatekeep and self-police the type of Novel ETFs that evolve. In fact, the wildly successful ETF product owes much of its success to the services performed by Authorized Participants since the first ETF launched, a role not mandated by any law or regulation.

6. *Should rule 6c-11 be amended to address these or other questions with respect to Novel ETFs? For instance, should the Commission consider amendments addressing new portfolio requirements, such as minimum holdings in securities, restrictions from using certain strategies or investing in certain asset classes, or criteria such as specific diversification requirements, concentration limits, or issuer-specific limits? Why or why not? Or should the rule be amended to exclude certain assets or investment strategies? Why or why not?*

In the view of ETF BILD, the SEC should shed conditions in rule 6c-11 instead of adding conditions. Rule 6c-11 goes beyond its core function of providing ETFs with exemptions from certain provisions of the 1940 Act (i.e., Sections 17, 18 and 22(e)) that otherwise their operations would violate. The rule's website and custom basket conditions have proven unnecessary since issues involving excessive bid/ask or share price/net asset value per share spreads have rarely arisen since the rule's adoption, primarily because of the efforts of lead market makers and authorized participants. Further bloating the rule with new requirements such as portfolio requirements, minimum holdings in securities, restrictions from using certain strategies or investing in certain asset classes, and criteria such as specific diversification requirements, concentration limits, or issuer-specific limits, is counter to the SEC's initiative of fostering innovation. Rather, we believe such topics are best addressed through disclosure by amending the ETF's registration form (Form N-1A) and not adding new requirements to rule 6c-11.

7. *Should the Commission consider any steps to help investors better understand the features of Novel ETFs? Are there steps the Commission could consider to help investors understand what distinguishes Novel ETFs from other ETFs*?

A component of the ETF industry's success can be attributed to ETF providers educating financial advisers and investors about the product. In the 1990s and early 2000s, the pioneering ETF complexes upon their own initiatives conducted a remarkable amount of investor education about the new ETF product through training their salespersons, generating literature, engaging in seminars and otherwise reaching out to investors and their financial advisers. No SEC rule prodded these efforts.

Rather than introducing rules with a consumer protection gloss like the SEC unsuccessfully did with its ill-fated ESG rule, the SEC should have faith that the ETF industry will sufficiently educate investors and their financial advisers about Novel ETFs. ETF complexes have utilized technological advancements since the first ETFs, most notably the Internet, to continue to provide vast educational and other resources to investors about

their products and strategies. Imposing rules designed to help investors better understand the features of Novel ETFs would in our view interfere with and possibly stifle those in the best position to educate investors – ETF complexes.

8. *Some ETPs that are not investment companies (e.g., exchange-traded commodity trusts) may use the term "ETF" (or "fund") in their name or label themselves as ETFs. How do investors interpret this, and are there any implications for investor clarity?*

   Creating a standard taxonomy in the exchange-traded product ("ETP) around name, strategy, tactic and product structure has been long debated by the ETP industry. The industry did not even land on the term "Exchange-Traded Fund" or "ETF" for years after the Spider, Q's and original BGI family of products came to market. The issue became exacerbated with the launch of leverage and inverse products and the misunderstanding of many investors over what that actually means. The shock to many investors that exchange traded notes or ETNs were actually balance sheet products and not funds has been a serious issue during periods of financial crisis.

   Although the most important aspect of an ETP is the strategy and its tax impact, the industry should welcome a uniform and consistent taxonomy across all aspects of investment products whether such an investment vehicle is technically a mutual fund, ETF, ETP, commodity pool, or other structure. ETF BILD believes that taxonomy conversation should be applied in a much broader arena than through the narrow view of the Novel ETF conversation.

9. *Amendments to rule 6c-11 (such as new portfolio conditions) could affect how the generic listing standards apply to a Novel ETF. Should this interplay between rule 6c-11 and the generic listing standards inform any analysis of potential changes to the rule? Are there other ways in which rule 6c-11 could be amended or other Commission action taken to better facilitate innovation while protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation?*

As noted above, we do not believe adding conditions to rule 6c-11 to address a myriad of issues presented by Novel ETFs is a prudent regulatory approach. The stock exchanges should rely upon their own listing requirements and expertise when determining whether the shares of a given Novel ETF should be listed. A slimmed down rule 6c-11 would shift that responsibility back to the exchanges and their experts, instead of defaulting to the position that as long as a given ETF meets the conditions of rule 6c-11, it is appropriate to list their shares.

REGISTRATION AND RULE 485

10. Certain post-effective amendments filed under rule 485, including those for certain Novel ETFs, may raise issues that may be challenging to address within the rule's currently prescribed timeframes. Should the 75-day and 60-day automatic effectiveness periods be extended for Novel ETFs? If yes, for how long? If not, why not?

The SEC through its rulemaking authority should not extend the 75-day and 60-day automatic effectiveness periods for Novel ETFs or ETFs in general. Both "waiting periods" provide the SEC, assuming it is properly staffed, ample time to review the strategies and risks of a Novel ETFs set forth in their prospectuses. The length in terms of days of the SEC staff review periods have continued to stand the test of time and has historically (but not recently) provided the ETF issuers with a high degree of certainty of the effective date of the post-effective amendment allowing the ETF to launch.

Instead of altering the 75-day and 60-day automatic effectiveness periods by an arbitrary or uncertain number of days for Novel ETFs, the SEC should impose more discipline upon its staff to adhere to these regulatory deadlines. Simply put, the SEC staff should issue comments and the ETF sponsor either accepts or rejects (at is peril) the comments. This approach worked well for both the ETF industry and the SEC for years after the first launch of the ETF product. However, the SEC staff in recent years without regulatory authority began persuading if not pressuring issuers of ETFs to file BXTs when their comments have not been addressed to their satisfaction. Many of the comments directed at a typical filing of a new ETF have been designed to advance the SEC's regulatory issue du jour (e.g., an ETF's name being consistent with its investment strategy) instead of focusing on clarifying for the investor the particular strategy of the ETF and informing the investor of the strategy's risks. The explosion of BXTs in recent years is evidence of a practice that has introduced a high degree of uncertainty when a given ETF may launch, while unnecessarily tying up SEC resources by engaging in rounds of rounds of comments and responses.

Obviously, there are exceptions that warrant the SEC having additional time to review a Novel ETF, as was the case with the first ETF. These exceptions should be limited as much as possible, including when the SEC's Division of Investment Management staff believes it may have exceeded its authority delegated to it by the Commissioners.

The SEC with the assistance of the ETF industry and their counsel should study ways to introduce innovative ways to improve the disclosure review process. Simple solutions might be the use of facing sheets indicating whether the ETF is a Novel ETF or resembles an

existing ETF already declared effective by the ETF. The SEC and ETF industry might also leverage artificial intelligence and other technologies to streamline the registration process of new, including Novel ETFs.

11. *Should effectiveness be automatically tolled for a Novel ETF if a registrant fails to respond to staff comments within a specified period (e.g., five business days) before effectiveness? Why or why not?*

ETF sponsors and their counsel historically have recognized when a proposed ETF is novel and likely to elicit numerous and in-depth comments from the SEC staff. In such cases, a common sensical approach has been followed, beginning with the ETF sponsor submitting to the SEC staff a draft prospectus and a cover letter via e-mail (and not a formal filing) explaining the novel aspects of the proposed ETF. In cases when a given ETF sponsor fails to follow this common sensical approach, the SEC staff should continue to strongly request the sponsor of an ETF to file a BXT or in some cases withdraw the filing so that the SEC staff and possibly the Commissioners staff have sufficient time to review the Novel ETF. Disrupting a process that has worked well since the first ETF prospectus landed on the SEC's desk with a rule that automatically tolls effectiveness is not warranted and may unnecessarily delay the launch of Novel ETFs.

12. *While registrants may voluntarily delay effectiveness under rule 485, should the rule be amended to enable the Commission to delay effectiveness of a Novel ETF on its own initiative? If yes, how should the amended rule be structured, under what circumstances should the Commission be able to delay effectiveness, and what if any limits or notice requirements should apply?*

As noted in the prior response, amending rule 485 to permit the Commission to delay effectiveness of a Novel ETF on its own initiative is not necessary since, to our knowledge, there have been only rare cases where a registrant disregarded a request by a SEC staff member to file a BXT to delay the effective date.

14. *If the automatic effectiveness periods were extended, would registrants experience unnecessary delays in responding to market demand?*

ETF BILD believes amending Rule 485 to automatically toll the effective registration date of a Novel ETF significantly risks delaying the effective date of such ETF. Armed with this automatic effectiveness, the SEC staff would have less incentive to address the challenging or problematic issues raised by the Novel ETF and the Novel ETF adviser would

have virtually no leverage or ability to push through the filing. In our view, the automatic effectiveness would lead to unnecessary delays with the byproduct of delaying an ETF product that might be beneficial to, and suit the financial needs, of certain investors.

16. *Are there other ways rule 485(a) could be modified to better support innovation, while protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation?*

For new ETFs including new Novel ETFs, rule 485(a) is a mechanical rule that simply starts the 75-day effective date clock. Therefore, the rule does not lend itself to being modified to address the SEC's attempt to support more innovation. As noted above, the better mechanism might be the facing sheet mandated by Form N-1A that is included in the filing pursuant to 485(a). Possible modification to the facing sheet might include a "check-the-box" indicating a Novel ETF, requiring exhibit(s) with links to similar, previously effective ETFs and prompts explaining why the proposed ETF is novel or similar or dissimilar to other effective ETFs.

21. *Should the Commission take action with respect to funds that become effective but never launch? For example, should the Commission amend its rules to provide that such funds would be automatically deregistered after a defined period (e.g., 6 months)? Why or why not?*

ETF BILD believes that there is no compelling reason for the SEC to "deregister" proposed ETFs that are the subject of post-effective amendments but that have not yet launched. While we understand and appreciate that ETFs never launched consume limited SEC staff resources (since the staff reviews and comments on them), there are a multitude of reasons why certain proposed ETFs never are launched including those idiosyncratic to their sponsors and changing competitive and market conditions. We appreciate that a significantly reduced SEC staff recently has been confronted with a record number of ETF filings. We expect that the SEC staff will return to full staffing in the near future while the number of ETF filings revert back to more normal levels.

22. *Should the Commission develop additional mechanisms to address unresolved staff comments? For instance, should funds be required to disclose material unresolved staff comments, similar to the approach used for certain closed-end funds and Form*

10-K and Form 20-F filers? Would such disclosure be useful to investors and other market participants? Why or why not?

As noted herein, the SEC staff has historically issued comments to ETFs and other registrants that were not satisfactorily resolved in the view of the staff or even ignored by the ETF provider. For years, this was standard practice and the SEC did not raise objections or require BXT filings until its comments were resolved. During this time, most ETF sponsors and their counsel fully addressed and resolved SEC comments because of the incentive to have a more regulatory- and perhaps litigation-proof prospectus. However, the SEC staff to our knowledge has no express statutory or regulatory authority to demand an ETF sponsor to satisfactorily address its comments and we believe that it would be a healthy development for the ETF industry and SEC staff if the latter returns to its past ways of not expecting its comments to be addressed to its liking.

26. Should the Commission consider changes to the ETF disclosure regime because of questions that Novel ETFs may raise? Should the Commission consider heightened disclosure requirements for certain Novel ETFs?

As a matter of course, the SEC has amended Form N-1A over the years for a variety of reasons including to address the features of an ETF that differ from those of a mutual fund. Depending upon the Novel ETFs that are developed and filed with the SEC, the SEC may find that the cumulative comments given to such Novel ETFs can better be addressed by adding new Form N-1A disclosure items.

Conclusion

For the reasons discussed above, we support the SEC's initiative. If the SEC or its staff have any questions or wish to discuss the comments discussed herein, please contact us at 914.406.6277.

Very truly yours,

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