Letter from the Investment Company Institute

August 31, 2026

Ms. Vanessa A. Countryman
Secretary
US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

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

Dear Ms. Countryman:

The Investment Company Institute[1] appreciates the opportunity to respond to the Request for Comment on Novel ETFs issued by the Securities and Exchange Commission (the "Commission" or the "SEC").[2] ICI members sponsor or manage ETFs of all types, including index-based and actively managed ETFs operated pursuant to Rule 6c-11 under the Investment Company Act of 1940 ("1940 Act").[3]

ETFs are a convenient, cost-effective tool for investors seeking to gain or shed exposure to broad markets, particular sectors or geographical regions, or specific investment strategies. Demand for ETFs has grown markedly among both institutional and retail investors. As of June 30, 2026, there were 5,323 ETFs listed in the United States, with total assets under management of $15.4 trillion.[4] As investor demand has increased, sponsors have offered more

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[1] The Investment Company Institute (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $48.0 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 125 million investors. Members manage an additional $10.8 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and separately managed accounts (SMAs) for individual investors. ICI associate members include service providers to funds, including financial communications firms, custodians and transfer agents, and CIT Trust companies. ICI has offices in Washington, DC, Brussels, and London.

[2] *See* Request for Comment on Novel ETFs, SEC Release No. IC-36228 (June 30, 2026) ("RFC"), available at https://www.sec.gov/files/rules/other/2026/33-11426.pdf.

[3] ICI members manage approximately 98% of ETF assets under management in the US.

[4] Investment Company Institute.

ETFs with a greater variety of investment objectives. Indeed, since the beginning of 2025, more than 1,750 new ETFs launched in the US.[5] About 14.7% of US households (19.8 million US households) held ETFs in 2025 and net flows into ETFs since the beginning of 2025 exceed $2.39 trillion.[6]

We commend the Commission for seeking public comment on ETFs of the type set forth in the RFC. But as detailed below, we have concerns regarding the potential policy implications of some of the questions raised in the RFC and would not want any attempt at addressing such questions to disproportionately impact ETFs relative to other investment vehicles, necessitate changes to ETFs operating in the marketplace today, or alter well-established practices of registered investment companies ("funds") more generally. We also acknowledge the challenges faced by the Commission staff due in part to the rapid growth of the US ETF industry, including those identified in the RFC and as further described in a recent interview with Investment Management Division Director Brian Daly.[7] As the Commission seeks to fulfill its mandate to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation, ICI is committed to ensuring that potential responses to these legitimate challenges do not adversely impact existing ETFs or other funds, stifle the continued innovation in the ETF space, or limit investor choice. When considering the questions raised in the RFC, we recommend that the Commission follow the advice attributed to Hippocrates – first, do no harm.

Summary of Comments and Recommendations

In summary, ICI's comments and recommendations include the following:

- No changes to investment company status determinations, Rule 6c-11, or other rules specific to ETFs of the type described in the RFC are necessary at this time.

- If the Commission does seek to propose rule changes specific to funds seeking innovative exposures or utilizing innovative strategies, a narrowly tailored, objective definition would be necessary given that the concept of "novel" is subjective and constantly evolving.

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[5] Investment Company Institute.

[6] Investment Company Institute, "Profile of ETF-Owning Households, 2025" (Nov.), *available at*: www.ici.org/files/25_rpt_etf_profiles_data.xls.

[7] *See* Trillions, *Will the SEC Approve Prediction Market ETFs This Year* (Jul. 2, 2026) ("Daly Interview"), *available at:* https://podcasts.apple.com/us/podcast/will-the-sec-approve-prediction-market-etfs-this-year/id1318276878?i=1000775138496.

- While modest changes to the rules relating to registration statement effectiveness and timing may be appropriate, there should not be wholesale changes to the automatic effectiveness rules for ETFs and other funds and any changes should be subject to a notice and comment rulemaking.

The Governance Framework for Funds, Including ETFs, is a Major Success

For more than 85 years, 1940 Act-registered funds have provided investors with professional portfolio management subject to a strong governance framework and comprehensive regulation. Under the federal securities laws, funds must provide investors and prospective investors with a prospectus containing key information about the fund's essential characteristics (*e.g.*, its investment objective and strategies) and principal risks, in plain English, in a standardized order and format,[8] and follow other strict reporting and disclosure requirements. The 1940 Act and its rules provide safeguards designed to, among other things, minimize conflicts of interest, protect fund assets, reduce risks, and ensure compliance with the federal securities laws, and they further regulate funds' use of leverage, transactions with affiliates, custody, diversification, audits of their financial statements by independent accountants, maintenance of required books and records, liquidity risk management, valuation of assets and periodic disclosure of portfolio holdings.[9] In complying with these provisions, each fund must follow formalized practices pursuant to written policies and procedures reasonably designed to prevent federal securities law violations.[10]

Further, funds must have a board of directors, which generally has at least a majority of members who are independent of the fund's manager.[11] The board oversees the management, operations and investment performance of the fund and is subject to state law duties of care and loyalty and has specified responsibilities under the 1940 Act.

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[8] *See* Section 5(b)(2) of the Securities Act of 1933 ("Securities Act"). *See also* Form N-1A. Registration statements for open-end funds, which include the prospectus, must be filed on the SEC's EDGAR Filing System and are publicly available.

[9] *See, e.g.,* Letter from Susan M. Olson, General Counsel, ICI, to Vanessa Countryman, Secretary, SEC, dated Sept. 24, 2019, at 6-7, available at https://www.sec.gov/comments/s7-08-19/s70819-6190597-192465.pdf.

[10] Rule 38a-1 under the Investment Company Act requires funds to adopt policies and procedures to prevent violations of the federal securities laws. *See also* Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26299 (Dec. 17, 2003), available at https://www.sec.gov/rules/final/2016/33-10233.pdf.

[11] On most fund boards, independent directors make up at least 75 percent of its members. *See* ICI/IDC, Overview of Fund Governance Practices, 1994-2024, available at https://www.idc.org/system/files/2025-10/25-idc-overview-of-fund-governance-practices.pdf.

The combination of these requirements provides investors with extensive information and additional substantive protections designed to ensure that fund management does not abuse its position of trust.

The ETF is perhaps the most successful financial innovation in decades, but its journey has been a complex and gradual one.[12] Prior to the adoption of Rule 6c-11, a fund sponsor had to obtain certain exemptions from the 1940 Act in order to operate an ETF. These exemptions were issued to individual applicants, and over time the conditions evolved, which resulted in certain sponsors having greater flexibility to operate ETFs than other sponsors. In order to level the playing field and reduce inefficiencies, in 2019, the Commission adopted Rule 6c-11 to permit ETFs that satisfy the Rule's conditions to operate without obtaining an exemptive order. Rule 6c-11 established a consistent regulatory framework for transparent ETFs—both active and index—with conditions designed to support an efficient arbitrage mechanism to keep a close tie between the ETF's market price and its net asset value. As the Commission acknowledged in the RFC, since the adoption of Rule 6c-11, there has been greater competition and innovation among ETFs, as well as increased investor choice, with the ETF market having grown significantly in both assets and numbers of funds.[13]

ETFs have expanded investor access to investments and strategies, and we are concerned that any changes to the way that ETFs are regulated or brought to market could unjustly and unnecessarily impact the dynamism of the world's largest ETF market. We appreciate the SEC's ongoing willingness to seek public comment prior to any rule proposal to help assure that US capital markets generally, and the US ETF market in particular, are able to continue to serve the interests of investors in offering innovative investment solutions. We believe that the success of the ETF market is due, in part, to the history of cooperation among ETF issuers, their counsel and the Commission staff in developing new products and providing appropriate disclosure of the strategies and risks of those products. The result is a dynamic industry and world-leading capital markets that help solve problems and provide investment solutions for American investors. When considering the questions raised in the RFC, we recommend that the Commission heed the words of Chair Atkins and look to achieve the "minimum effective dose of regulation."[14]

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[12] *See* Daly Interview, *supra* note 7.

[13] "Between the end of 2019 and end of 2025, total net assets under management have grown from over $4 trillion to over $12 trillion and the number of ETFs from almost 1,900 to over 4,600." RFC at 3 (citing Registered Fund Statistics, Staff of the Division of Investment Management Analytics Office, Securities and Exchange Commission, available at https://www.sec.gov/data-research/investment-management-data).

[14] *See, e.g.,* Paul S. Atkins, Remarks at the Investor Advisory Committee Meeting, (Mar. 12, 2026), *available at:* https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-iac-031226.

The RFC's Approach to "Novel ETFs"

The RFC does not expressly define "Novel ETF," but rather lists examples of ETFs that provide "exposure to innovative asset classes or using novel investment strategies," including the following asset classes and strategies: 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.[15]

While we appreciate the RFC's illustrative examples, we believe that any effort to define "novel" in this context will pose significant difficulties and interpretive issues.[16] Given the pace of innovation in the ETF space, any proposed definition focused on particular exposures or strategies may not neatly apply to future exposures or strategies, including those that are yet to be imagined.

We do not believe that rule changes specific to Novel ETFs as described in the RFC are warranted. However, if the Commission does seek to propose rule changes specific to funds seeking innovative exposures or utilizing innovative strategies, a narrowly tailored, objective definition would be necessary. Further, any such proposed definition, indeed any of the proposed changes mentioned in the RFC, must go through the Commission's standard notice and comment rulemaking process, through which the public would have an opportunity to review, consider, and comment on the proposals.

No Changes Should be Made to Investment Company Status Determinations

The RFC asks a number of questions regarding whether ETFs with a principal investment strategy to invest in assets that are not securities under the 1940 Act are investment companies as defined under the 1940 Act, and whether such an ETF may register as an investment company and be regulated as such under the 1940 Act.[17] This is an important issue as such determination would have significant legal and regulatory implications, including notable tax implications. Citing the "objective test" and "subjective test" in Section 3 of the 1940 Act and the well-established "Tonopah Factors" to determine whether an investment company meets the subjective test, the Commission asks whether a Novel ETF could meet the subjective test if its principal investment strategy is to invest in assets that are not securities. Relatedly, the Commission asks whether a Novel ETF that holds non-security assets through a

[15] RFC at 5.

[16] At the same time, we acknowledge the importance of ETFs and other investment companies providing clear and understandable investment strategy and risk disclosures.

[17] RFC at 6-8.

wholly-owned subsidiary (*e.g.*, a Cayman subsidiary that holds derivatives, commodities, digital assets or other non-securities) could meet the subjective test.

Product sponsors and their counsel carefully consider these questions in launching any investment vehicle structured as an ETF that invests in non-traditional assets. However, no changes to long-settled interpretations of investment company status are warranted at this time. The fund industry has long understood what it means to be an investment company, and a variety of vehicles, not just ETFs, have relied upon that understanding.

Investment company status determinations have significant tax implications. Special tax rules apply to registered funds that qualify as regulated investment companies ("RICs").[18] The RIC tax rules are generally favorable for retail investors, who receive dividends that may qualify for various tax preferences, and which are reported on a simple tax form.[19] Consequently, registered funds typically elect and maintain RIC tax status whenever possible. The tax code does not differentiate between ETFs and mutual funds. Only a fund registered under the 1940 Act as a management company or unit investment trust, or as a business development company, can qualify for RIC tax status.[20] This may partly explain why ETFs seek investment company status. Any change in the determination of investment company status would likely change which ETFs can or cannot elect RIC tax status.

RIC tax status also comes with investment restrictions, principally a "qualifying income" test that generally requires RICs to derive at least 90% of their income and gains from interest, dividends, securities lending fees, and gains from securities (as defined in section 2(a)(36) of the 1940 Act), foreign currencies, or certain "other income" from the RIC's business of investing in stocks, securities, or currencies. Notably, commodities and digital assets do not generate qualifying income. RICs will typically hold assets generating non-qualifying income in a wholly-owned subsidiary corporation (also known as a "blocker") that issues securities (stock) that pay dividends. Asset diversification restrictions in the RIC tax rules generally limit a RIC to holding less than 25% of its gross assets in subsidiary corporations (*e.g.*, blockers). Due to these investment restrictions, most publicly offered retail investment funds that invest primarily or exclusively in assets that are not securities[21] cannot qualify for RIC tax status and are subject to more complex tax rules.[22]

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[18] See 26 U.S.C. §§ 851-860G, also known as Subchapter M of the Internal Revenue Code.

[19] Form 1099-DIV (Dividends and Distributions).

[20] 26 U.S.C. § 851(a)(1).

[21] For example, crypto assets, many commodity-focused instruments, some private assets, and event contracts would generally not be securities. Many of these assets are "novel," based on the RFC's examples of "novel investment strategies."

[22] These funds are generally taxed as partnerships or trusts.

In the case of funds or ETFs holding securities of wholly-owned subsidiaries, the securities of such wholly-owned subsidiaries are "securities" under the 1940 Act, and such funds or ETFs would satisfy the subjective test for what constitutes an investment company. Section 3 of the 1940 Act presents an "or" test, such that any determination under either the subjective or objective test is irrelevant if the other test is satisfied. Funds and ETFs that meet either test for determining investment company status are appropriately registered under the 1940 Act. This issue is also highly relevant for tax purposes. Tax law generally respects the separate legal and tax status of corporations issuing securities, including corporate subsidiaries of RICs.[23] The US Treasury and IRS do not issue rulings or other guidance indicating what is or is not a security,[24] deferring to the 1940 Act and case law and SEC guidance for such determinations.

Any removal of the ability to utilize wholly-owned subsidiaries would have a variety of unintended consequences that negatively impact investors, including investors in well-established funds that have served their interests for many years. For instance, commodity strategy funds utilizing wholly-owned subsidiaries provide investors with return and risk profiles different from those of stock and bond funds and can help provide additional portfolio diversification. In particular, any effort that were to change how funds operate in this regard would create significant investor confusion with no clear benefit, and could lead to adverse tax consequences, negative performance impacts and other unfavorable outcomes for investors.

Further, for the reasons identified previously in this letter, regulation as an investment company is desirable given the 1940 Act's regulatory protections. Because of these and other benefits, ETFs and other types of registered funds are the investment vehicles of choice for many investors.

Rule 6c-11 Should Not be Changed as the RFC Suggests

As noted above, Rule 6c-11 has been a positive development for American investors. It has fostered the rapid growth of the ETF industry, providing investors with access to innovative products that are often more cost effective, liquid, transparent and tax efficient than other investment products. The US financial markets are the envy of the world,[25] and ETFs play an increasingly important role in the US financial ecosystem. We believe that there should not be any changes to Rule 6c-11 of the type mentioned in the RFC. There is no cause to single out

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[23] By default, any distribution of property made by a corporation to its shareholders "out of its earnings and profits" is treated as a dividend. See 26 U.S.C. § 316(a).

[24] See the most recent IRS "no rule" list, in Rev. Proc. 2026-3, which includes "[a]ny issue relating to the treatment of a corporation as a regulated investment company under § 851 and related provisions that requires a determination whether a financial instrument or position is a security as defined in the Investment Company Act of 1940."

[25] *See, e.g., CFTC and SEC Announce Historic Memorandum of Understanding Between Agencies,* (Mar. 11, 2026) *available at:* https://www.cftc.gov/PressRoom/PressReleases/9192-26.

ETFs for special, potentially more onerous treatment when Rule 6c-11 has served as an effective framework for ETFs following a wide variety of investment strategies.

Any changes to Rule 6c-11 of the type suggested in the RFC could stifle innovation and prove extremely disruptive for investors, fund sponsors and the ETFs themselves. Because Rule 6c-11 applies only to ETFs, any changes to the Rule that impose diversification or other requirements or limit the types of investment strategies ETFs could pursue would significantly disadvantage ETFs relative to other investment products that are not subject to such restrictions and limitations. Further, to the extent such restrictions and limitations would apply to existing ETFs (whether "novel" or otherwise), they would place a significant burden on fund sponsors to come into compliance with such restrictions and limitations, while at the same time creating significant investor disruption and confusion. For example, it is unclear whether any changes to Rule 6c-11 would impact the generic exchange listing standards that most ETFs rely upon.[26] Similarly, it is unclear whether such changes would impact the ability of ETFs, their authorized participants and market makers to rely upon the class exemption from various provisions of the Securities Exchange Act of 1934 that facilitate trading of ETFs.[27]

We therefore strongly recommend that no changes of the type contemplated by the RFC be made to Rule 6c-11.

Thoughtful Consideration Must be Given to the Registration Statement Process

Much of the RFC is focused on potential changes to the rules regarding automatic effectiveness of registration statements. The RFC seeks public comment on a variety of topics, including whether Rule 485 under the Securities Act should be amended to extend the review period for Novel ETFs, whether the review period should be tolled where a registrant fails to respond to staff comments, and whether the Commission should be permitted to delay effectiveness on its own. In addition, the RFC questions whether sponsors of Novel ETFs would be supportive of a pre-filing consultation process or a confidential registration statement process.

We have discussed these questions with our members, and there is general agreement that modest changes to the rules relating to registration statement effectiveness and timing may be appropriate. At the same time, there is strong agreement that there should not be wholesale changes to the automatic effectiveness rules for ETFs and other funds.

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[26] *See, e.g.,* NYSE Arca Rule 5.2-E(j)(8); Nasdaq Rule 5704(b); Cboe BZX Rule 14.11.

[27] *See* Order Granting a Conditional Exemption From Exchange Act Section 11(d)(1) and Exchange Act Rules 10b-10, 15c1-5, 15c1-6, and 14e-5 For Certain Exchange-Traded Funds, available at https://www.sec.gov/files/rules/exorders/2019/34-87110.pdf.

With respect to the idea of the Commission permitting confidential registration statement filings for Novel ETFs, some members have expressed support, subject to appropriate guardrails. But others have expressed concern that, absent clear rules regarding the process (*e.g.*, the timing as to when a filing is made public or goes effective), including the eligibility to use it, the crush of filings the Commission is currently experiencing in public filings would be replicated in a confidential filing process, which will diminish transparency without addressing the Commission's articulated concerns. Similarly, while there is general support to protect innovators that have done the work to research and design new products, there is no consensus about an appropriate method to preserve first mover advantages.

Although we are not prepared to make specific recommendations at this time, we are committed to continuing conversations with our members and the SEC staff about their views on the Rule 485 issues raised in the RFC, such as a voluntary confidential registration statement filing process. To this end, we have established a working group among our members tasked with giving further consideration to such Rule 485 issues. With the input of the working group, we expect to provide further feedback to the SEC staff regarding potential process-oriented guidance or rule changes that would be applicable to the filing and review associated with registration statements of any investment company.

Conclusion

We again commend the Commission and the staff for seeking public input on parts of the ETF ecosystem. We appreciate the hard work and engagement of the Commission and its staff but feel strongly that the Commission should not take any action that would impair the dynamism and innovation of the US ETF market. We continue to believe that innovation can continue to thrive alongside thoughtful regulations designed to protect investors, ensure fair, orderly and efficient markets and facilitate capital formation, and we look forward to working with the Commission and its staff on these efforts.

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ICI appreciates the opportunity to comment on the RFC on Novel ETFs. If you have any questions or would like additional information, please contact me at paul.cellupica@ici.org or Josh Weinberg at joshua.weinberg@ici.org.

Sincerely,

/s/ Paul G. Cellupica
Paul G. Cellupica
General Counsel

cc: The Honorable Paul S. Atkins, Chairman
The Honorable Hester M. Peirce, Commissioner
The Honorable Mark T. Uyeda, Commissioner
Brian Daly, Director, Division of Investment Management