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

Re: Request for Comment on Novel ETFs; Release Nos. 33-11426, 34-105808 and IC-36228; File No. S7-2026-24 (the "Request")[1]

Dear Ms. Countryman:

Practus LLP respectfully submits this letter in response to the Securities and Exchange Commission's (the "SEC" or "Commission") Request for comment concerning exchange-traded funds ("ETFs") that provide exposure to innovative asset classes or pursue novel investment strategies (referred to as a "Novel ETF" or "Novel ETFs"). We appreciate the Commission's continued leadership in considering how it may facilitate innovation in the ETF marketplace while protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

Novel ETFs present genuinely difficult questions involving investment company status, custody, valuation, liquidity, leverage, arbitrage, disclosure, exchange listing and the registration process, and those questions merit the careful consideration the Commission is giving them. We offer these comments in a constructive spirit, with the shared objective of strengthening the regulatory framework, enhancing investor protection, and reinforcing the continued effectiveness of the Investment Company Act of 1940, as amended (the "1940 Act" or "Act").

Our comments are organized around a single, constructive principle that we believe advances the objective that where any new or novel investment product or transaction is available to the public, investors and the public interest are best served when that investment product or transaction may be made available within a pooled investment vehicle subject to the protections of the 1940 Act, rather than developed outside of those protections. We therefore respectfully suggest that the most productive inquiry is not whether a novel asset or strategy provides a basis for operating outside the 1940 Act, but how the Commission can responsibly accommodate that product within the protections of the 1940 Act while addressing identifiable risks through targeted, objective and appropriately tailored requirements.

This orientation reflects the 1940 Act's core design. The 1940 Act principally regulates the investment vehicle and the way it is governed and operated, providing a durable framework for board oversight, fiduciary responsibility, custody, valuation, compliance, disclosure, conflicts of interest, affiliated transactions, leverage and the protection of fund and investor assets. Those protections have proven their value across generations of market change, and we believe they would provide equal value whether a portfolio holds traditional securities, derivatives, commodities, digital assets, event contracts, private assets or some combination of those investments.

1. As published in the Federal Register at 91 FR 40647 (July 2, 2026).

For these reasons, we encourage the Commission to take a broad and inclusive view of which pooled investment products should or could be regulated under the 1940 Act. The novelty of an underlying asset, standing alone, is a limited proxy for whether investors would benefit from the 1940 Act's protections, and we believe the framework works best when those protections extend to the full range of publicly offered pooled vehicles.

Executive Summary

Our principal recommendations are as follows:

1. The Commission may wish to reaffirm a functional and inclusive approach to investment company status, giving full and independent effect to Section 3(a)(1)(A)[2] and the question of whether an issuer is *primarily engaged* in the business of investing, reinvesting, owning, holding, or trading securities.
2. The Commission can strengthen its analysis by modernizing, rather than abandoning, the factors articulated in *In the Matter of Tonopah Mining Co.*, so that they account for the manner in which investment products are structured, marketed, governed, distributed and used in today's marketplace.
3. The Commission should reaffirm that voluntary registration is permitted (not prohibited) because investor protection is best advanced when a publicly offered pooled investment vehicle is not excluded from the 1940 Act merely because some or most of its underlying assets may not independently constitute securities for every purpose under the federal securities laws.
4. The Commission can preserve the considerable success of Rule 6c-11 by maintaining it as a strategy-neutral structural rule, addressing questions of custody, valuation, liquidity, leverage, arbitrage or disclosure directly rather than through categorical treatment of particular assets or strategies.
5. The predictability that has made Rule 485 (Rule 485") under the Securities Act of 1933, as amended (the "Securities Act") automatic-effectiveness framework so effective is best preserved by continuing to rely on transparent legal standards rather than broad discretionary authority to delay or suspend offerings on the basis of novelty alone.
6. The Commission has an opportunity to further its innovation objectives by facilitating earlier engagement through confidential draft filings, prefiling consultations, published guidance and objective review standards.
7. Where the SEC and the U.S. Commodity Futures Trading Commission share jurisdictional interests, the agencies' longstanding practice of coordination continues to serve investors well; the presence of commodity interests within a pooled investment vehicle need not, by itself, require that the vehicle to operate outside the 1940 Act.

We elaborate on these recommendations and related points below.

I. Why a Novel ETF Would Seek Registration Under the 1940 Act – The Registered Investment Company Is a Widely Accepted and Trusted Investment Vehicle

As an initial matter, it is important to ask why a Novel ETF would want to register under the 1940 Act instead of trying to avoid registration. There are compelling and constructive reasons why a sponsor would seek to organize a novel product as a registered investment company rather than as an exchange-traded commodity trust or another form of exchange traded product ("ETP"). Most importantly, registration provides investors with the protections of the 1940 Act. Registration also enables the product to operate

2. All section references herein are to the 1940 Act unless indicated otherwise.



within a widely trusted and recognized legal, operational and distribution framework understood by boards, advisers, custodians, administrators, auditors, authorized participants, broker-dealers, retirement platforms and financial advisers. Registered status also facilitates:

- board oversight of valuation and conflicts;
- a comprehensive compliance program;
- standardized financial reporting;
- custody arrangements subject to the 1940 Act;
- consistent prospectus disclosure;
- oversight of affiliated transactions;
- integration with brokerage and retirement platforms;
- regulated use of derivatives under Rule 18f-4;
- access to a familiar creation-and-redemption structure;
- more efficient tax treatment; and
- investor understanding of the product's basic legal form.

A sponsor's willingness to accept these obligations is, we believe, something the Commission should welcome and encourage. Where a sponsor seeks the 1940 Act's protections for a product simply because it provides exposure to an asset that the 1940 Act did not expressly contemplate in 1940, the 1940 Act's demonstrated capacity for principled evolution counsels in favor of accommodation.

In this vein, we believe that the Commission's consideration of Novel ETFs may usefully begin with the central role that registered investment companies now play in the modern financial marketplace. Mutual funds and ETFs are no longer specialized vehicles used only by institutional or sophisticated investors. They have become principal vehicles through which individuals invest, diversify their assets, save for retirement and obtain professional portfolio management — a development that reflects both the strength of the statutory framework and the Commission's stewardship of it.

The scale of the industry illustrates the degree to which investors and financial intermediaries have embraced the registered-fund structure. The Commission reports that SEC-registered investment companies had approximately $37.4 trillion in aggregate total net assets as of March 2026.[3]

Household participation is similarly widespread. In 2025, approximately 56.4% of U.S. households owned mutual funds or other U.S.-registered investment companies, representing approximately 76 million households and 128.7 million individual investors. A substantial majority of mutual-fund-owning households had incomes below $150,000, demonstrating that registered funds serve not only the wealthiest investors, but middle-income American families more broadly.[4]

Registered funds are also deeply embedded in the nation's retirement system. At year-end 2025, Americans had approximately $49.1 trillion earmarked for retirement. [5] Individual retirement accounts and employer-sponsored defined contribution plans, including 401(k) plans, represented approximately 68% of those retirement assets, and approximately 44% of IRA and defined contribution plan assets were invested

3. Registered Fund Statistics, Staff of the Division of Investment Management Analytics Office, U.S. Securities and Exchange Commission, available at https://www.sec.gov/data-research/investment-management-data.
4. Investment Company Institute, 2026 Investment Company Fact Book (2026) at ix, available at https://www.icifactbook.org.
5. *Id.*



in mutual funds.[6] IRAs alone held approximately $19.2 trillion, or approximately 39% of total U.S. retirement assets, at year-end 2025.[7]

The ETF structure has likewise become a mainstream investment and trading vehicle. At year-end 2025, U.S.-domiciled ETFs held approximately $13.4 trillion in net assets, and approximately 19.8 million U.S. households owned ETFs.[8] ETFs represented approximately 30% of the assets managed by U.S. investment companies.[9] The Commission's Request itself recognizes that, between the end of 2019 and the end of 2025, ETF assets grew from more than $4 trillion to more than $12 trillion, while the number of ETFs increased from approximately 1,900 to more than 4,600.[10]

These figures carry an encouraging policy implication. The broad acceptance of registered investment companies reflects more than investor preference for a legal form; it reflects well-earned confidence in the regulatory framework governing that form, including:

- independent board oversight;
- fiduciary duties;
- custody protections;
- valuation requirements;
- compliance programs;
- restrictions on affiliated transactions and conflicts of interest;
- limitations on capital structure and leverage;
- periodic reporting; and
- standardized disclosure.

Investors purchasing products that assist with savings, retirement and wealth management through retirement plans, brokerage accounts and financial advisers have come to associate mutual funds and ETFs with these protections. A product that is offered outside the 1940 Act intended to serve these same objectives may nonetheless be described or perceived in the marketplace as a mutual fund or ETF, even though it may lack significant features of the registered-fund framework — a consideration we believe supports extending the 1940 Act's protections broadly.

This established acceptance therefore supports a broad and inclusive approach. When a product functions as a publicly offered pooled investment vehicle, we believe that the Commission's investor-protection mission is best served by favoring its inclusion within the 1940 Act's protective framework, especially if the product is not otherwise operating under a similar regulatory framework (e.g., bank common trust funds).

We note, as well, a practical point that we believe is consistent with the Commission's objectives. Because investor demand for a particular strategy will often be met one way or another, a decision not to accommodate a product within the 1940 Act may simply channel that strategy into a commodity trust, note, special-purpose vehicle or other structure that does not provide comparable governance, custody, valuation, compliance and conflicts protections. From an investor-protection perspective, inclusion within the 1940 Act is frequently the more protective outcome.

6. *Id.* at 88.
7. *Id.* at 101.
8. *Id.* at ix.
9. *Id.* at 48.
10. Request at 40647.



II. Investment Company Status

The Commission asks: (i) whether a novel ETF whose principal strategy involves assets that may not be securities can satisfy Section 3(a)(1)(A) (the "Subjective Test"), (ii) why such a product would seek registration, (iii) whether the Commission should continue to apply the *Tonopah* factors, and (iv) whether a Novel ETF that holds the securities of a wholly-owned subsidiary that is not itself primarily invested in securities meet the Subjective Test and how investments through such subsidiaries should be treated.[11] We address each question below.[12]

A. The 1940 Act's Focus on Securities Was Purposeful but Not a Judgment to Exclude Other Assets

Before turning to the specific tests Congress wrote into the 1940 Act, we think it is valuable to reflect on why the 1940 Act speaks so specifically in terms of "securities," and why that focus, understandable in light of the marketplace Congress set out to regulate, should not obscure the aptness of applying the Act's protections to vehicles that pool the funds of many investors into a professionally managed, diversified portfolio, whatever the character of the underlying investments.

The 1940 Act grew out of a directive Congress placed in the Public Utility Holding Company Act of 1935 that the Commission study the investment company industry. The catalyst was a series of perceived abuses involving investment trusts associated with the utility sector. During Congress's investigation and regulation of complex public utility holding-company structures, attention also turned to investment companies and the potential for similar pyramidal structures and concentrations of control. Congress accordingly included § 30 in the Public Utility Holding Company Act of 1935, directing the SEC to conduct a comprehensive study of investment trusts and investment companies and to report its findings and recommendations to Congress.[13]

That directive produced the exhaustive review commonly known as the Investment Trust Study, which revealed significant abuses by investment company management, their investment advisers, and underwriters.[14]

Because the 1935 concerns arose out of complex holding-company arrangements — which by their nature involved securities — and because the Investment Trust Study examined an industry that was then pooling investor funds to provide diversification, economies of scale, and professional management, it is unsurprising that the Study and the resulting legislation were framed largely around pools that held securities. We do not suggest that this focus was incidental. It was deliberate and well founded: securities

11. Request at 40648-49.
12. We address each question below, but not necessarily in the order the Commission asked its questions.
13. *See* Public Utility Holding Company Act of 1935, ch. 687, § 30, 49 Stat. 803, 837–38; 86 Cong. Rec. 9807 (1940) (statement of Rep. Lea); *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the S. Comm. on Banking & Currency*, 76th Cong. 122–23 (1940) (statement of David Schenker, Chief Counsel, SEC Investment Trust Study).
14. The directive appeared in Section 30 of the Public Utility Holding Company Act of 1935. The Investment Trust Study was actually so exhaustive that it had to be produced in several parts over a few years and included six supplemental reports. *See* Securities & Exchange Commission, Tenth Annual Report of the Securities and Exchange Commission 119 (1944) (explaining that the Commission's investigation resulted in an overall report and six supplemental reports transmitted to Congress); *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the S. Comm. on Banking & Currency*, 76th Cong. 7 (1940) (statement of Robert E. Healy, Comm'r, Securities & Exchange Commission) (explaining that "the size and the problems of the industry proved to be much larger or more complicated than either we or Congress evidently anticipated").



were the assets these pools actually held; they were the assets that smaller investors were then clamoring to reach at scale; and their liquidity made them a ready means for affiliates and other insiders to overreach fund shareholders. Our point is a different one. A deliberate decision to address the securities-holding pools that dominated the industry in 1940 is not the same as a considered judgment that only securities-holding pools may ever receive the Act's protections, or that pooled vehicles holding other assets must remain permanently outside the Act's framework.

The true emphasis of the Study and of the 1940 Act, in our view, was not the securities character of fund assets as such, but the abusive structures and practices that had taken hold among investment companies and posed the greatest danger to investors. As then-Division Director Paul Roye observed in 2001:

> *[T]he Investment Trust Study, and the subsequent Congressional hearings, found that, to an alarming extent, investment companies were being organized and operated to benefit the interests of their affiliates rather than the interests of their shareholders. The highly liquid nature of fund assets made them easy targets for embezzlement by affiliates, who often viewed them as a source of private capital. Transactions between investment companies and their affiliates ... often resulted in improper transactions. Underwriters found it convenient to dump into the portfolios of affiliated funds securities that they found to be unmarketable.*[15]

Director Roye likewise underscored the structural dimension of the problem, noting that investment companies "were structured to ensure that they remained under the control of their sponsors," including through the layering of one fund atop another so that a sponsor could "control the resulting pyramid with a minimum investment of capital."[16] That repeated emphasis on structure is the key to understanding what the Act's provisions were built to accomplish.

The statute itself bears this out. In Section 1(b), Congress set out an extensive declaration of policy identifying the conditions the Act was meant to mitigate, and those conditions are overwhelmingly structural rather than asset-specific.[17] Congress declared the national public interest and the interest of investors adversely affected, among other circumstances:

- when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, ... rather than in the interest of all classes of such companies' security holders;
- when investment companies issue securities containing inequitable or discriminatory provisions, or fail to protect the preferences and privileges of the holders of their outstanding securities;
- when the control of investment companies is unduly concentrated through pyramiding or inequitable methods of control, or is inequitably distributed, or when investment companies are managed by irresponsible persons;
- when investment companies are reorganized, become inactive, or change the character of their business, or when the control or management thereof is transferred, without the consent of their security holders; and

15. Paul F. Roye, Dir., Div. of Inv. Mgmt., U.S. Sec. & Exch. Comm'n, *The Exciting World of Investment Company Regulation*, Remarks Before the American Law Institute/American Bar Association Investment Company Regulation and Compliance Conference (June 14, 2001).
16. *Id.*
17. *See* 15 U.S.C. § 80a-1(b).



- when investment companies by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character of their junior securities.

Each of these concerns is about governance, capital structure, control, conflicts of interest, and the fair treatment of investors — not about the particular kind of asset a fund happens to hold. The Act's substantive architecture follows suit, directing itself to board oversight, custody, affiliated transactions, leverage, valuation, and disclosure.

Two further considerations explain the securities framing without supporting an asset-based exclusion. First, Congress legislated with the Commerce Clause in view. Having seen other statutes fall for want of a sufficient national interest, the drafters grounded the Act in features that plainly implicated interstate commerce — the continuous use of the mails and instrumentalities of interstate commerce, trading on national securities exchanges, and a nationally dispersed shareholder base that made effective state regulation "difficult, if not impossible."[18] A securities-based test was a natural way to anchor the Act to that established national market. Second, and relatedly, Congress used the securities-based tests as a jurisdictional boundary — a means of confining the Act to the investment company industry that had grown up to give smaller investors access to the securities markets of the 1920s — rather than as a declaration that securities are the only assets whose pooled ownership warrants the Act's protections.

Consistent with that boundary-setting purpose, Congress did not reach vehicles that presented different concerns or were already regulated elsewhere. Banks, insurance companies, and commodity pools, for example, were addressed by other agencies and regimes, and the Act left them outside its reach in part out of comity and in part for want of any mandate to regulate them. That forbearance reflected the absence of a demonstrated need in 1940 — not a determination that pooled vehicles holding non-security assets are unsuited to the Act's protections.

The upshot is straightforward. Congress focused on securities because securities were the assets these pools then held, the assets investors sought, and a convenient jurisdictional and constitutional anchor — not because it judged the Act's protections inappropriate for pooled vehicles holding other assets. Where a modern pooled vehicle falls outside the Act only as a technical matter, because it is organized around assets other than securities, and where its investors would benefit from the very governance, custody, valuation, liquidity, and conflicts protections the Act was designed to provide, the sounder course is to welcome that vehicle into the Act's structure and substantive requirements rather than to treat a jurisdictional line created in 1940 as a permanent barrier to the protections investors would otherwise receive.

The bottom line is that the Commission and its staff (the "Staff") should welcome an issuer's willingness to voluntarily register as an investment company under the Act, not prohibit it.[19]

18. *See* Section 1(a), 15 U.S.C. § 80a-1(a) (finding, among other things, that the securities issued by investment companies "are distributed, purchased, paid for, exchanged, transferred, redeemed, and repurchased by use of the mails and means and instrumentalities of interstate commerce"; that their principal activities are "conducted by use of the mails and means and instrumentalities of interstate commerce, including the facilities of national securities exchanges"; that such companies "are media for the investment in the national economy of a substantial part of the national savings"; and that the wide geographic distribution of their security holders makes effective State regulation "difficult, if not impossible").
19. Notably, the Act itself does not prohibit an issuer from registering. Rather, the Act sets forth requirements for when an issuer ***must*** register.



B. Assets May Be Characterized Differently Under Different Federal Statutes

We note that the characterization of an instrument under one federal statute need not control its treatment under another where the statutes serve different purposes. An asset may be treated as a commodity or commodity interest for purposes of the Commodity Exchange Act while also being held as an investment by a registered fund. The relevant question under the 1940 Act is whether the issuer is an investment vehicle and whether application of the 1940 Act advances the 1940 Act's purposes.

This principle rests on well-settled Supreme Court authority. Because a statute of this kind is construed "in conformity with its dominating general purpose," with text read "in the light of context," the courts have long looked past labels to statutory purpose in applying the securities laws.[20] Application therefore turns on "the economic realities underlying a transaction, and not on the name appended thereto."[21] The Court has expressly recognized that the same instrument may be treated differently from one statutory scheme to the next: the definition of "security" applies except where "the context otherwise requires," and an instrument otherwise within it is excluded where another regulatory regime already serves the statute's protective purpose.[22] The 1940 Act carries its own context-sensitive preface — its definitions apply "unless the context otherwise requires,"[23]— and Congress imported the 1940 Act's definitions into other statutes only by express cross-reference,[24] confirming that no uniform, cross-statutory meaning was intended. Applied here, these authorities support treating a qualifying asset as relevant to investment company status for purposes of the 1940 Act, without disturbing its characterization under the Commodity Exchange Act, other federal securities laws, or any other regime.

While *Marine Bank* and *Reves* address whether a particular instrument sold to an investor is a security, the question under the 1940 Act is whether the pooled vehicle whose shares public investors will purchase should be governed by the statute designed for pooled vehicles. The CFTC's regulation of commodity interests protects the integrity of the commodity markets and their intermediaries. The 1940 Act provides oversight, fiduciary duties, custody, valuation, conflicts, and leverage protections at the level of the fund that no other regulatory regime does. The Commission and the CFTC have long administered overlapping regimes without concluding that the presence of commodity interests automatically places a pooled vehicle outside the 1940 Act. CFTC Rule 4.5, 17 C.F.R. § 4.5, for example, reflects a considered effort to coordinate the commodity-pool framework with the regulation of registered investment companies. That history is a model of the coordination we encourage here. For novel assets, we believe that the Commission and the CFTC, together with other relevant regulators, can most effectively serve investors by establishing a clear allocation of responsibilities, so that a product may be subject to appropriate requirements under more than one statute without investors losing the 1940 Act's protections simply because another regulator also has an interest in the underlying asset.

Recent market experience reinforces the point. Because investor demand for professionally managed exposure to innovative assets is real, sponsors that have been unable to bring a product within the 1940 Act have developed alternative structures registered under the Securities Act alone, which may also be driven by requirements found in Subchapter M of the Internal Revenue Code of 1986, as amended (the "Code") governing regulated investment companies such as mutual funds and ETFs. Those structures serve

20. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350–51 (1943).
21. *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975).
22. *Marine Bank v. Weaver*, 455 U.S. 551, 556–59 (1982); see also *Reves v. Ernst & Young*, 494 U.S. 56, 63, 67 (1990) (statutory terms "must be understood against the backdrop of what Congress was attempting to accomplish," weighing "the existence of another regulatory scheme").
23. 15 U.S.C. § 80a-2(a).
24. *See* 15 U.S.C. § 78c(a)(19).



important functions, but they are not interchangeable with a registered investment company, which generally provides substantially greater flexibility for professional portfolio management, together with the governance and investor protections discussed elsewhere in this letter. An important point for the Commission to consider is assisting sponsors in clarifying the tax treatment for Novel ETFs. In addition to amending the rules to allow for novel assets to be, or providing interpretive guidance that novel assets can be, held by an investment company, it would be useful in achieving that goal if the Commission were to define such novel assets as "securities" for purposes of section 2(a)(36) of the 1940 Act[25] so that trading in such assets would produce qualifying income under Code § 851(b)(2)[26] and such assets would be treated as securities for the diversification test found in Code § 851(b)(3).

C. Section 3(A)(1) Should be Read Practically in Terms of the Modern Financial System

Congress drafted three different definitions for the meaning of "investment company." Section 3(a)(1)(A) defines an issuer that, holds itself out as being, or proposes to engage primarily in the business of investing, reinvesting or trading in securities as an investment company. 3(a)(1)(B) covers a specific type of issuer, those that issue face-amount certificates of the installment type, and 3(a)(1)(C) covers issuers that are by definition an investment company based on a quantitative asset composition test.

As noted above, the definition of investment company is focused on investing in "securities," because that was the focus of Congress in 1940. However, exposure to assets in today's financial markets comes in all forms, and a strict focus on "securities" is no longer practical when evaluating novel assets.

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25. The Commission has shown that it understands the value of employing a definitional approach for one circumstance that is intended to drive a specific result, even where that approach is limited and not broadly applicable beyond the specific context in question. Most recently, the SEC proposed *inter alia* that a "qualified purchaser" for purposes of Section 18(b)(3) of the Securities Act, which provides that a security sold to such a purchaser is a "covered security," means "any person to whom securities are offered or sold pursuant to an offering registered under the Securities Act." Registered Offering Reform, SEC Release No. 33-11418 (May 19, 2026). By using this definition, every investor in an SEC-registered offering, whether listed or unlisted, would be a "qualified purchaser," thereby rendering all such securities "covered securities" shielded from state registration and qualification requirements. While Congress granted the SEC authority to define qualified purchaser by rule, the principle underlying the SEC's willingness to give a particularized definition to the term "qualified purchaser" in one part of the federal securities laws lends credence to the idea that the SEC can and should employ its administrative authority to create a definition of "security" or "investment security" that encompasses these novel assets and places issuers that invest in them squarely within the 1940 Act's purview. Although the scope of the Commission's authority with respect to the definition of "security" or "investment security" under the 1940 Act presents a distinct statutory question, this approach supports consideration of whether the Commission can use its existing interpretive or rulemaking authority to clarify the treatment of novel assets under the 1940 Act.
26. In 2016, the Treasury Department and the IRS stated that the IRS would no longer issue guidance on whether particular financial instruments are securities for purposes of Code Section 851, explaining: *"Finally, determining whether certain investments that provide RICs with commodity exposure are securities for purposes of the income test and the asset diversification requirements requires the IRS implicitly to determine what is a security within the meaning of section 2(a)(36) of the 1940 Act. Section 38 of the 1940 Act, however, grants exclusive rulemaking authority under the 1940 Act to the Securities and Exchange Commission (SEC), including 'defining accounting, technical, and trade terms' used in the 1940 Act. Any future guidance regarding whether particular financial instruments, including investments that provide RICs with commodity exposure, are securities for purposes of the 1940 Act is therefore within the jurisdiction of the SEC."* REG. 123600-16, 81 Fed. Reg. 66576, 66577 (Sept. 28, 2016). This is in accord with the statute where it states: (i) in respect of the income test found in Code Section 851(b)(2)(A), "gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the Investment Company Act of 1940, as amended)," and (ii) in respect of the asset diversification test found in Code Section 851(b)(3) referencing "securities," Code Section 851(c)(6) provides, "All other terms shall have the same meaning as when used in the Investment Company Act of 1940, as amended."



Exposure to novel assets in the modern financial system, such as digital assets, can come in many forms: direct investments, investments through ETPs, derivatives exposure, and even perpetual futures contracts. Indeed, in some cases a manager may not even be clear whether the investment being made involves a security or not – the most notable example being digital assets.

The purpose of professional management is that a professional investment adviser has the expertise to evaluate which channel may be the most efficient path to gain exposure to a particular asset on behalf of their fiduciary clients. They should not be constrained by arbitrary quantitative/structural thresholds that produce inferior products for their clients. One such example is requiring an actively managed crypto product to always hold 40% of its total assets in "securities" no matter how disadvantageous or overly complex it will make the product. Rather, the Commission should focus on providing flexibility for the benefit of the investing public by permitting the adviser to a Novel ETF to make the determination of how most efficiently to gain exposure to a particular novel asset – e.g., investing directly in a particular digital asset or investing through an ETP that holds the digital asset or a perpetual futures contract. The focus should not be on finding technicalities that would prohibit the investment adviser from using the well-recognized and regulated registered investment company structure.

To date, creating Novel ETFs has been complex and in some instances has forced sponsors to use alternative means and structures. Alternative structures that have been used to date are each limited in some fashion as compared to registered investment companies, most notably in the ability to be professionally managed while maintaining efficient tax treatment:

- *Crypto investment trusts.* Many crypto ETPs registered solely under the Securities Act have been organized as investment trusts under Treas. Reg. § 301.7701-4(c)(1), which are intended to qualify as grantor trusts and therefore be disregarded for U.S. federal income tax purposes. In order to qualify as an investment trust, there must not be a "power under the trust agreement to vary the investment of the certificate holders."[27] That power exists wherever a managerial authority enables the trust "to take advantage of variations in the market to improve the investments" of its holders.[28] As a result, an investment trust's ability to change investments, actively manage a portfolio, rebalance among assets, implement discretionary strategies, or respond dynamically to market developments is significantly constrained; an arrangement used as a device to carry on that kind of business is generally classified as a corporation or partnership rather than a trust.[29] Recent IRS guidance confirms, rather than displaces, these constraints. In Revenue Procedure 2025-31, issued November 10, 2025, the IRS provided a safe harbor under which a qualifying single-asset, exchange-traded crypto trust may stake its digital assets without losing its classification as an investment trust under Treas. Reg. § 301.7701-4(c).[30] The safe harbor is deliberately narrow: it applies only to a trust that owns "only cash and units of a single type of digital asset," confines the trust to an enumerated list of passive activities, and expressly requires that the trust be "prohibited from seeking to take advantage of variations in the market to improve the investments of trust interest holders."[31] The guidance thus permits a specific, protective activity within a structure that remains passive; it does not convert an investment trust into an actively managed vehicle. Even after the guidance, the investment-trust structure remains materially constrained relative to a professionally managed registered fund. The point is not that investment trusts lack value — they

27. Treas. Reg. § 301.7701-4(c)(1).
28. *Commissioner of Internal Revenue v. North American Bond Trust*, 122 F.2d 545, 546 (2d Cir. 1941).
29. *See* Treas. Reg. § 301.7701-4(b).
30. Rev. Proc. 2025-31, 2025-48 I.R.B. 743.
31. *Id.* § 6.02(5).



are well suited to passive, single-asset exposure — but that they are prohibited from ongoing professional portfolio management.

- *Publicly traded partnership structures.* Some industry participants have explored publicly traded partnership structures as a means of offering professionally managed exposure outside the 1940 Act. A partnership can accommodate active management more readily than a grantor trust, but it carries a distinct limitation. A partnership whose interests are traded on an established securities market is generally taxed as a corporation unless at least 90 percent of its gross income is "qualifying income."[32] Where the exception is satisfied, the partnership's tax items pass through to investors, who receive Schedule K-1s rather than the Form 1099 reporting associated with a registered fund. That difference can materially impair retail distribution: many individual investors wish to avoid K-1s; K-1 reporting can introduce additional tax complexity, state-filing obligations, and delayed reporting; and brokerage platforms, financial advisers, and retirement channels may be reluctant to distribute products that generate K-1s. The structure may therefore be less suitable for broad retail adoption. We note that the qualifying-income analysis is category-specific and, as applied to digital assets, evolving, so that not every publicly traded partnership produces the same tax result.[33]

- *Foreign or Cayman structures and PFIC concerns.* Industry participants have also considered foreign entities, including Cayman Islands entities, as vehicles for innovative investment exposure. Where a U.S. individual directly owns shares of a foreign corporation, however, the passive foreign investment company (PFIC) rules may apply or if owned by a majority of substantial U.S. shareholders, possibly the controlled foreign corporation rules. A foreign corporation will be considered a PFIC if 75 percent or more of its gross income is passive income, or at least 50 percent of its assets produce or are held for the production of passive income.[34] A U.S. shareholder of a PFIC is subject to a default regime that can tax gains and "excess distributions" at the highest ordinary-income rates, allocated across the holding period and increased by an interest charge,[35] and is generally required to file an annual report on IRS Form 8621.[36] Elections can mitigate these consequences — a qualified electing fund election under 26 U.S.C. § 1295 or a mark-to-market election for marketable stock under 26 U.S.C. § 1296 — but each depends on sponsor-provided information or on the shares being regularly traded, and each carries its own complexity. These features make a foreign corporation engaged in investment activities to be a difficult vehicle to offer directly to U.S. retail investors.

As is evident from the above, this reinforces the potential value of the Commission adopting a broad, inclusive approach to registration under the 1940 Act. Market participants have pursued these alternatives because investor demand exists and because active, professional management is valuable. Each alternative, however, carries tax, operational, governance, or distribution limitations that the registered investment company does not face. The registered fund is widely understood by investors, advisers, platforms, and retirement channels; it permits professional management; and it delivers that management within a comprehensive investor-protection framework. The market's sustained effort to approximate a professionally managed fund through less-suitable structures is itself evidence that the better course is to accommodate these products within the 1940 Act structure. This practical experience provides a further,

32. Code § 7704(c)(2).
33. *See* Code § 7704(d).
34. Code § 1297(a).
35. Code § 1291.
36. Code § 1298(f).



concrete reason to cast a broad net in determining which professionally managed pooled investment products may operate under the 1940 Act.

Accordingly, we recommend that the Commission should take a more flexible approach to investment company status questions involving products that are focused on asset exposure rather than traditional securities investments. Such a flexible approach is supported by the 1940 Act itself, as explained in more detail below.

a. Section 3(a)(1)(A) Should Be Interpreted Functionally

In considering novel investment products, we recommend that the functional inquiry under Section 3(a)(1)(A) should investigate whether an issuer's operations or proposed operations have the practical substance, operation, and effect of being an investment company, rather than solely by reference to an asset composition test that does not exist in the statute. However, the SEC and its Staff have historically relied on the general rule that if an issuer has "no more than 45 percent of its assets invested in securities and derives no more than 45% of its income from securities," then the issuer will not be deemed to be "primarily engaged" in the business of an investment company and not be required to register, unless it otherwise is required to under Section 3(a)(1)(C).[37] Under this construct, Section 3(a)(1)(A) could be rendered meaningless if its meaning is based solely on an asst composition test that is not part of the statute because, from a practical matter, Section 3(a)(1)(C) would likely be implicated under its 40 percent test before the analysis ever got to Section 3(a)(1)(A).[38] Importantly, however, the SEC's and the Staff's historical application of these tests was to create a floor where registration is required (most often when analyzing operating companies, not investment funds), not to serve as a bar from registration.

The distinction is especially clear in the context of Novel ETFs. For a conventional operating company, the nature of its physical operations, employees, revenues and business activities generally distinguishes it from an investment company. A Novel ETF is fundamentally different in that it typically:

- pools investor capital;
- issues interests whose value depends on a managed portfolio;
- is operated by an investment adviser;
- employs portfolio managers rather than an operating-business workforce;
- represents itself as an investment product;
- seeks appreciation, income, hedging returns or exposure to an investment theme;
- values its portfolio and calculates a net asset value;
- offers redeemable [and/or tradable] securities; and
- distributes its shares through investment-product channels.

These characteristics strongly indicate that the Novel ETF's primary business is investing, even where a portion – even a large portion – of its portfolio consists of assets that may be characterized as commodities or other non-security assets for a different statutory purpose. Applied to the issuer's business, any vehicle that is "primarily engaged" in a business that entails investing a pool of assets is one that the 1940 Act was designed to protect. A pooled vehicle does not become an operating company merely because the legal classification of some or even a majority of its portfolio assets differs among federal statutes, and

37. *See* Rule 3a-1 under the 1940 Act, 17 C.F.R. § 270.3a-1; Certain Prima Facie Investment Companies, Investment Company Act Release No. 10937 (Nov. 13, 1979).
38. We recognize that the two tests rest on different statutory formulations, including the use of "securities" in Section 3(a)(1)(A) and "investment securities" in Section 3(a)(1)(C), but the practical effect is that Section 3(a)(1)(A) has been less frequently relied upon as an independent basis for requiring registration.



we believe an interpretation that keeps the focus on the issuer's overall business best serves the 1940 Act's purposes.

This functional reading is well supported by the courts. The federal courts have treated Sections 3(a)(1)(A) and 3(a)(1)(C) as independent, alternative bases for investment company status, and have declined to reduce the "primarily engaged" inquiry to a mechanical asset ratio. As the Court of Appeals for the Seventh Circuit explained in *SEC v. National Presto Industries, Inc.*[39], the exception for an issuer primarily engaged in a non-investment business "has to be about considerations other than assets," and the analysis ultimately turns on "the beliefs the company is likely to induce in investors" — that is, whether the issuer's "portfolio and activities" would "lead investors to treat a firm as an investment vehicle or as an operating enterprise." Earlier authority is in accord: to determine whether an issuer is "engaged primarily in the business of investing," its "total activities of all sorts must be considered."[40] Congress reinforced this design in Section 3(b)(1), which excepts an issuer "primarily engaged" in "a business or businesses other than that of investing" and operates expressly "[n]otwithstanding paragraph (1)(C)."[41] A Novel ETF, whose defining characteristics are those of a managed investment portfolio, fits comfortably within Section 3(a)(1)(A) under this settled, function-focused approach.

b. Holding Out as a Registered Investment Company Is Relevant but Need Not Be Exclusively Determinative

A Novel ETF that publicly represents itself as an investment fund, registers on Form N-1A, is governed by a fund board, employs a registered investment adviser, calculates NAV and offers redeemable shares is plainly holding itself out as an investment vehicle.

At the same time, we agree that holding out should not, by itself, operate as an elective mechanism through which any issuer could simply choose investment company status. The most reliable inquiry considers holding out together with the actual structure, governance and operations of the vehicle. Where an issuer both represents itself as a fund and operates as a pooled investment product, we believe that the presence of some underlying assets that may not be securities need not negate its status under Section 3(a)(1)(A), particularly where the issuer wishes to avail itself of the requirements of the 1940 Act.[42]

c. An Opportunity to Provide Greater Clarity for being "primarily engaged"

In this regard, greater clarity on investment company status would benefit sponsors, boards, advisers, exchanges and, most importantly, investors. The Commission has alternatives that are supported by the statute. One such alternative is the Commission should consider issuing interpretive guidance

39. 486 F.3d 305, 314–15 (7th Cir. 2007).
40. *SEC v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3, 28 (S.D.N.Y. 1968), aff'd, 435 F.2d 510 (2d Cir. 1970).
41. 15 U.S.C. § 80a-3(b)(1).
42. This reasoning has been supported by prior Staff guidance with respect to investments in loan participations. See *Putnam Diversified Premium Income Trust*, SEC No-Action Letter (July 10, 1989) (Staff agreeing, and appearing to adopt the incoming letter's position, that loan participations are securities for purposes of the 1940 Act.); see also, the incoming letter ("*It is difficult to perceive that any useful purpose would be served from a policy standpoint by treating loan participations held by the Fund as anything other than portfolio securities. Indeed, a contrary view would lead to the awkward result that an entity which operated in all respects as an investment company, but which invested solely in loan participations, could argue that it was not subject to regulation under the 1940 Act, since it would not be an issuer engaged in a business specified in Section 3(a) of the 1940 Act (i.e., "investing, reinvesting or trading in securities").* ***An entity which operates like an investment company and desires to be treated as an investment company should be regulated as an investment company, unless it falls squarely within one of the specific exceptions to the definition of an investment company. (emphasis added").***

establishing a rebuttable presumption that a publicly offered pooled vehicle is primarily engaged in investing when it:

1. is externally or internally managed as an investment portfolio;
2. offers investors returns based primarily on the performance of portfolio assets or investment strategies;
3. does not conduct a substantial operating business independent of managing those assets;
4. holds itself out as a fund or investment product;
5. calculates NAV or an analogous portfolio value;
6. is offered through investment-product distribution channels; and
7. voluntarily undertakes to comply with the substantive protections of the 1940 Act.

Such a presumption would not alter the statutory definition. It would offer a modern and practical means of applying it — providing the predictability that supports orderly product development while preserving the Commission's ability to reach a different result where the facts warrant.

Another such alternative is that the Commission can also articulate guidance that recognizes there is no prohibition for an issuer to voluntarily register as an investment company, especially if the issuer itself believes that it is "primarily engaged" in the investment business. In other words, if an issuer believes itself to be an investment company, that should be the end of the inquiry. This is especially true when there is no other similar regulatory scheme available to the issuer and its investors.[43] This would create two classes of registrations: (1) mandatory registration relying on the existing body of jurisprudence and regulation as applied to preventing issuers from evading the 1940 Act where they would otherwise be required to register; and (2) issuers that wish to avail themselves and their investors of the protections of the 1940 Act because there is no other alternative regulatory scheme and are not otherwise operating companies and because the issuer's activities involve going in and out of "securities" along with other wrappers to achieve efficient exposure to a particular novel asset class.

Voluntary registration is supported by the text of the statute. Section 8(a) provides that "[a]ny investment company" organized under federal or state law "may register" under the Act. Nothing in that provision suggests that an issuer satisfying Section 3(a) may register only if registration is unavoidable. To the contrary, Commission precedent recognizes entities that "voluntarily registered under the Act," and *Putnam* demonstrates that the Staff has construed the Act's definitions in the specific context of an a pooled investment vehicle embracing regulation under the Investment Company Act. Reading the Act instead to prevent such an issuer from registering would invert the investor-protection purpose underlying the statute: an issuer willing to accept the Act's restrictions on affiliated transactions, leverage, custody, valuation, governance, compliance and disclosure would receive *less* regulatory protection for its investors because it elected to submit to regulation.

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43. Voluntary registration is not a novel concept. For example, it is not uncommon for a large fund complex to create so-called "central funds" that are only invested in by other investment companies. Because central funds are privately offered, they could rely on the exceptions under Section 3(c)(1) or 3(c)(7) but choose not to for operational reasons. These central funds also are considered "1940 Act only" funds because the securities are not registered under the Securities Act. We also note that commodity funds do not always have the asset composition that rises to the level of mandatory registration but are nevertheless registered under the 1940 Act. Indeed, the Commission itself has recognized voluntary registration under the 1940 Act and has not prohibited it. See Iowa Public Agency Investment Trust, Investment Company Act Release No. 32198 (July 29, 2016); Iowa Schools Joint Investment Trust, Investment Company Act Release No. 26522 (2004) (in both cases, the Commission permitted deregistration when the entities could rely on the exemption from Section 2(b) of the 1940 Act, which exempts governmental entities and in both cases the Commission acknowledged that the entities registered voluntarily but no longer wished to be registered).



d. 'The Commission Should Modernize the Tonopah Factors

We agree that the Commission should continue to apply the *Tonopah* factors, and we suggest that their usefulness can be enhanced by modernizing the manner in which they are interpreted. The existing factors — historical development, public representations of policy, activities of officers and directors, nature of assets and sources of income — remain valuable. They were developed in 1947 and originally applied in a marketplace quite different from that which exists today, and updating their application would keep them well suited to their purpose.[44]

The courts have embraced these factors. In *National Presto*, the Seventh Circuit applied the five *Tonopah* considerations — the issuer's history, the way it represents itself to the investing public, the activities of its officers and directors, the nature of its assets and the sources of its income — observing that the statutory term "primarily" is undefined and that "[n]o regulation fills the gap."[45] The court underscored that the decisive question is investor perception, asking whether the nature of an issuer's assets and income is "such as to lead investors to believe that the principal activity of the company was trading and investing in securities."[46] A modernized reading of the factors, attentive to how contemporary products are structured and understood by investors, would remain faithful to that longstanding, investor-focused inquiry.

For a newly organized ETF, historical development and present income may provide limited information, because the fund may have no operating history, no material income and no existing portfolio. Placing greater emphasis on forward-looking and structural considerations would allow the factors to speak more directly to such products. We recommend that the Commission supplement or interpret the *Tonopah* factors to include:

1. The economic function of the issuer. Does the issuer pool capital for the purpose of generating investment returns?
2. The nature of the investor's interest. Is the investor purchasing participation in a managed investment portfolio rather than in an operating enterprise that provides goods and/or services?
3. Governance and management. Is the issuer governed by a fund board and managed by an investment adviser with portfolio-management responsibilities?
4. Distribution and market understanding. Is the product distributed through channels customarily used for funds and understood by investors as an investment product?
5. Portfolio valuation. Does the issuer calculate NAV or another portfolio-based value at regular intervals?
6. Absence of a material operating business. Does the issuer conduct any substantial commercial activity apart from investing and managing portfolio exposure?
7. Regulatory purpose and investor protection. Would application of the 1940 Act advance its core protections without creating a conflict with another statutory regime?
8. Public adoption and investor use. Does the product provide pooled exposure to assets or strategies that investors increasingly access for investment purposes?
9. The totality of the vehicle's activities. Do the issuer's formation documents, personnel, service-provider relationships, public statements and actual operations collectively demonstrate that its primary business is investing?

The nature of assets and sources of income should remain relevant, although we believe they need not be dispositive. A framework in which the nature of assets and sources of income are controlling factors

44. Request at 40648, n. 11.
45. *SEC v. National Presto Industries, Inc.*, 486 F.3d 305, 312 (7th.Cir. 2007).
46. *Id.* at 315 (quoting *Tonopah*).



could produce the counterintuitive result that an issuer whose sole activity is managing a portfolio for investors would fall outside the 1940 Act simply because the portfolio includes a particular type of asset — an outcome we do not believe would serve the 1940 Act's investor-protection purposes and often times creates inferior products for investors.

The Commission's own rules already reflect this functional approach. Rule 3a-8, addressing certain research-and-development companies, provides that — "[n]otwithstanding sections 3(a)(1)(A) and 3(a)(1)(C)" — an issuer is deemed not to be an investment company when, among other conditions, it is "primarily engaged" in "a business or businesses other than that of investing in securities," as evidenced by the activities of its officers, directors and employees, its public representations of policies and its historical development.[47] That rule confirms both that the functional "primarily engaged" inquiry can be given independent effect notwithstanding the 40% asset test, and that the *Tonopah* factors supply practical criteria for applying it.

e. Preserving the 40% Test's Intended Role To Serve As A Floor to Required Registration, Not A Bar To Registration

The Section 3(a)(1)(C) test was designed to identify investment companies that are *required* to register through a quantitative measure. We recommend that its intended role is best preserved by not allowing the 40% Test to function, in effect, as a bar to registration that requires a product to maintain a particular amount of securities solely to be eligible for or to retain registered status.

Requiring a Novel ETF to hold 40% or more of its assets in investment securities at all times[48] — without regard to the product's disclosed strategy — could have several unintended consequences, potentially:

- distorting portfolio management;
- creating tracking error;
- adding costs;
- requiring economically unnecessary derivatives or subsidiary structures;
- reducing transparency;
- producing unintended tax consequences;
- providing investors with exposure different from what the fund's name and strategy suggest; and
- requiring the fund to obtain its intended exposure indirectly — through another ETP that itself holds the relevant commodity or digital asset — rather than by holding the asset directly.

This last consequence warrants particular emphasis, because it is distinct from the general observations that a rigid threshold can add costs or distort portfolio management. A fund that must satisfy the 40% investment-securities threshold at all times may be effectively compelled to obtain its exposure by investing in a separate ETP that holds the underlying asset, rather than holding that asset itself. That indirect

47. 17 C.F.R. § 270.3a-8.
48. We note that Section 3(a)(1)(C) includes the phrase "or proposes to acquire" investment securities that would comprise 40% of the issuer's total assets. This phrase was intentional and should capture issuers that can go above 40% at any time as part of their investment strategy, particularly where an issuer's assets may regularly fluctuate above and below 40% in investment securities due to market conditions and manager discretion to obtain the most efficient channel for exposure to the desired asset. Such a requirement would make operations terribly difficult for a Novel ETF if it had to continuously register and de-register as an investment company every few months because the nature of its asset composition is continuously in flux. Of course, this whole dilemma is resolved if the Commission adopts the functional approach to the Subjective Test as discussed elsewhere in this letter.



approach can require the fund to bear the acquired product's own management fee and operating expenses; introduce an additional layer of trading costs, bid-ask spreads, premiums or discounts, and tracking error; and create investment drag that makes portfolio management less efficient and can interfere with the fund's ability to deliver the exposure its strategy describes. The result is that shareholders bear costs that do not arise from the investment strategy itself, but solely from the need to satisfy a regulatory classification test — a cost the functional analysis under Section 3(a)(1)(A) would avoid.

Consistent with the Commission's longstanding preference for substance over form, a vehicle that is functionally and operationally an investment fund should be able to rely principally on Section 3(a)(1)(A), provided it accepts the 1940 Act's substantive protections. This approach preserves the integrity of the quantitative test while ensuring that it advances, rather than complicates, sound portfolio management.

D. Subsidiaries

A registered fund's use of a wholly-owned subsidiary is most soundly analyzed according to economic substance. Where a subsidiary serves solely as a portfolio-investment conduit for the fund, its activities should generally be attributed to the fund for purposes of the Section 3(a)(1)(A) analysis. The analysis can usefully distinguish between:

- an investment fund using a subsidiary to obtain exposure, facilitate custody, manage tax considerations or comply with another regulatory regime; and
- a holding company that owns and actively operates multiple commercial businesses.

In the first case, the subsidiary is part of the investment architecture of the fund. In the second, the subsidiaries may represent genuine operating businesses. The Commission is well positioned to distinguish these arrangements based on purpose, personnel, revenues, operations and investor representations. Subsidiary form, we believe, is most helpful when it neither automatically establishes nor defeats investment company status; the focus can remain on the primary business of the consolidated enterprise.

III. Novel ETFs and Rule 6c-11

The Commission explains that Rule 6c-11 establishes structural conditions intended to support effective ETF arbitrage but generally does not restrict the strategies or asset classes that an ETF may pursue.[49] We believe that strategy-neutral approach has been a significant success and encourage its preservation.

A. Novelty Alone Does Not Establish an Arbitrage Concern

Certain assets may present distinct operational considerations that warrant careful attention, including:

- differences in trading hours;
- fragmented liquidity;
- valuation inputs;
- transfer restrictions;

49. Request at 40649. The one caveat to this statement is that Rule 6c-11 does require ETFs relying on Rule 6c-11 that seek returns that correspond to a multiple of the returns of the underlying asset to comply with "all applicable" provisions of Rule 18f-4.



- custody arrangements;
- settlement periods;
- transaction costs;
- creation-and-redemption mechanics; and
- the availability of effective hedging instruments.

These operational considerations merit examination, and we do not minimize them. We believe, however, that these operational considerations are most productively assessed on an individual product-by-product basis rather than categorically looking at a particular asset. The Commission and the Staff should not establish that an entire category of assets is inherently incompatible with the ETF structure. Rather, it is the job of fund sponsors and managers to engineer products that comply with the requirements under Rule 6c-11. In that vein, the most reliable inquiry is whether a particular fund can maintain an effective arbitrage mechanism under reasonably foreseeable market conditions. Relevant considerations may include:

- the liquidity and transparency of the reference market;
- the ability of authorized participants and market makers to hedge exposure;
- the availability and reliability of pricing information;
- the composition of creation and redemption baskets;
- whether transactions will occur in kind, for cash or through a combination;
- anticipated transaction costs;
- premiums and discounts;
- bid-ask spreads; and
- contingency arrangements during stressed markets.

Because these are product-specific and market-specific questions, we believe they are best answered on the facts of each product rather than through an assumption that all products involving a designated asset class will operate in the same manner.

B. Rule 6c-11 Is Most Effective as a Structural Rule

For the same reasons, we recommend that Rule 6c-11 continues to serve investors best in its current form as a structural rule, and we would not recommend amending it to impose generalized:

- minimum securities holdings;
- asset-class prohibitions;
- concentration limits;
- issuer-specific limits;
- mandatory diversification;
- restrictions on designated novel strategies[50]; or
- exclusions based principally on novelty.

Conditions of this kind would transform Rule 6c-11 from a structural ETF rule into a substantive merit-regulation regime, a change we believe would be inconsistent with the rule's demonstrated strengths. Importantly, other provisions of the federal securities laws already address, with considerable effectiveness, many of the risks that a Novel ETF may present. For example:

50. With compliance with Rule 18f-4 for leveraged and inverse ETFs being the exception. However, we note that a mutual fund that wishes to provide leveraged returns is not prohibited from doing so, particularly if Rule 18f-4 is not applicable because the fund is able to do so without issuing senior securities that would implicate Rule 18f-4.



- Rule 18f-4 addresses derivatives and leverage;
- Rule 22e-4 addresses liquidity risk management;
- Rule 2a-5 addresses fair valuation;
- the custody provisions of the 1940 Act address safeguarding assets;
- Sections 17(a) and 17(d) address affiliated transactions;
- Form N-1A addresses strategy and risk disclosure; and
- exchange rules address listing and surveillance.

Where an existing rule does not fully address a new operational issue, the most precise and durable course is to amend or interpret the rule directed to that issue. Rule 6c-11 should continue serving its structural purpose rather than becoming a general mechanism for determining which investments are sufficiently conventional to be offered in ETF form. This is particularly important for leveraged and inverse products: as discussed in Section V.B, the Commission adopted Rules 18f-4 and 6c-11 as an integrated framework, and Rule 6c-11 is best not administered as a separate substantive limit on leverage once a fund has demonstrated compliance with Rule 18f-4.[51] If a Novel ETF can comply with the structural requirements under Rule 6c-11 and the 1940 Act, then the asset held by the Novel ETF should not be used as the basis to prevent the Novel ETF from coming to market.

C. Targeted Requirements Are More Effective Than Categorical Restrictions

In our view, a direct, risk-based approach best advances the Commission's objectives:

- If there is a specific custody concern, custody standards can be enhanced.
- If valuation is a concern, Rule 2a-5 applies but valuation and pricing expectations can also be clarified or expanded.
- If liquidity is a concern, Rule 22e-4 applies.
- If leverage is a concern, Rule 18f-4 applies.
- If arbitrage is a concern, evidence concerning arbitrage can be required.
- If disclosure is a concern, disclosure requirements can be expanded.
- If market surveillance is a concern, coordination with the listing exchange is available.

This approach is more precise, more durable and more consistent with the Commission's stated goals than addressing entire categories of assets or strategies as a class, and we believe it would strengthen investor protection while preserving room for beneficial innovation.

D. Disclosure and Investor Understanding

We support disclosure that clearly explains the investment strategy and risks that distinguish a novel ETF from more conventional funds. Depending on the product, this may include, among other disclosures:

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51. This is particularly important where a Novel ETF has demonstrated compliance with Rule 18f-4 because it is a limited derivatives user. We understand that the Staff interprets the phrase "all ***applicable*** provisions of Rule 18f-4" to mean that a levered or inverse Novel ETF must comply with ***all*** provisions of 18f-4, including the VaR test, even when it would not otherwise be required to if it were not relying on Rule 6c-11 – essentially, the word "applicable" is ignored and read out of the text of Rule 6c-11 without any Commission action permitting such an interpretation. The Commission should clarify that a Novel ETF that can achieve leveraged returns without the use of derivatives can satisfy Rule 6c-11 by complying with the provisions of Rule 18f-4 that are applicable to limited derivatives users.



- the legal and economic nature of the underlying exposure;
- whether the fund owns assets directly or through derivatives or subsidiaries;
- daily-reset and compounding effects;
- leverage;
- liquidity;
- custody;
- valuation;
- operational and technological risks;
- regulatory uncertainty;
- tax treatment;
- market-hours differences;
- creation-and-redemption practices;
- concentration; and
- the potential for premiums and discounts.

At the same time, we share what we understand to be the Commission's interest in disclosure that informs rather than overwhelms investors.

E. Use of "ETF" or "Fund" by Non-Investment-Company ETPs

We agree that investor clarity is an important objective and can be affected when products that are not registered investment companies use the terms "ETF" or "fund" in their names or marketing, because investors may reasonably assume that similarly labeled ETPs provide similar regulatory protections. To address this, the Commission might consider requiring prominent disclosure where an ETP is not registered under the 1940 Act — for example, a clear statement that the product is not a registered investment company and therefore is not subject to specified protections applicable to registered funds.[52] We believe, as a complementary and durable long-term measure, that permitting functionally similar pooled investment vehicles to enter the registered-fund framework, where they can comply with its substantive requirements, would most directly serve investor understanding. As discussed in Section II.D, the principal alternatives for developing professionally managed products outside the 1940 Act (e.g., grantor trusts, publicly traded partnerships, and foreign corporations) each carry tax and distribution limitations that make the registered-fund framework the more suitable regulatory regime for such products.

F. Generic Listing Standards

The interaction between Rule 6c-11 and exchange generic listing standards merits consideration. Rule 6c-11 and generic listing standards serve related, but distinct purposes: Rule 6c-11 governs the operation of an ETF under the 1940 Act, while exchange standards address listing, trading and surveillance. Where a product presents a novel surveillance or market-structure issue, we are of the view that the exchange and the Commission can most effectively address that issue directly. The possibility that an amendment to Rule 6c-11 could complicate generic listing is, in our view, a further reason to favor targeted solutions over portfolio restrictions.

52. The Staff generally already requires ETPs to include this type of disclosure; we are suggesting the Commission make this disclosure a requirement.



G. Objective Standards Promote Consistency and Confidence

We encourage the Commission to pursue a regulatory structure that can operate consistently across administrations, in which a sponsor's ability to offer a lawful investment product turns on transparent legal standards. Objective standards promote:

- equal treatment of registrants;
- predictable compliance obligations and standards;
- capital formation;
- investment in operational infrastructure;
- orderly product development; and
- public confidence in the regulatory process.

They also strengthen investor protection by encouraging sponsors to operate inside the regulated framework rather than seeking less protective alternatives.

Furthermore, we encourage the Commission and its Staff to seek to be as transparent as possible with respect to newly formulated or changes to policy positions and how such positions are communicated to registrants and the public more broadly. While the Staff in some instances has sought to communicate some of these positions verbally (either through the counsels to certain issuers or through larger telephonic meetings of interested persons), we do not believe these modes of communication are the most effective ways to ensure that important positions are communicated broadly beyond selected invitees. We respectfully request that any such communications be disseminated in a manner that is designed to reach the broadest audience (such as through a Dear Registrant letter, FAQ, IM Guidance, etc.) to ensure that all registrants, including potential registrants, are receiving equal access to such information.

IV. Registration and Rule 485

The Commission requested comment on automatic effectiveness, tolling, Commission-initiated delays, early engagement, competitive pressures, dormant funds, unresolved comments, material changes, suspension authority and disclosure.[53] We offer the following observations, again with the goal of preserving the strengths of the existing framework while addressing legitimate concerns.

A. Automatic Effectiveness Is a Valuable Part of the Statutory Framework

Rule 485 provides a predictable process under which post-effective amendments may become effective after specified periods. The Commission notes that filings adding new series or making material amendments to existing series may become automatically effective 75 days and 60 days, respectively, after the filing date.[54]

Automatic effectiveness is fully compatible with robust regulation. Registrants remain responsible for compliance with the Securities Act, the 1940 Act, Form N-1A and the anti-fraud provisions of applicable federal securities laws, and fund boards, advisers, counsel, auditors, service providers and signatories all bear responsibilities in connection with the filing and operation of a fund. The framework establishes an effective allocation of responsibility: the registrant is responsible for the filing, and the Commission retains its enforcement and other statutory authority where disclosure is materially deficient or unlawful.

53. Request at 40649-50.
54. Request at 40649.



B. The Existing Effectiveness Periods Should Not Be Lengthened for Novel Products

We suggest that a categorical extension of these periods for Novel ETFs would carry costs that may outweigh any perceived benefits. "Novel ETF" is not a sufficiently precise category or term to determine filing periods; novelty exists on a continuum and may relate to an asset, strategy, operational feature, derivative, index methodology or disclosure issue, and a product that is novel in one respect may be conventional in all others. Longer review periods could:

- delay investor access to such products;
- reduce competition;
- increase costs;
- disadvantage smaller sponsors;
- enhance incumbents' first-mover advantages;
- encourage strategic filing behavior; and
- make product development more dependent on informal discretion.

We believe the Commission's objectives are better advanced through earlier engagement and more objective guidance, as described below.

As a distinct structural alternative, the Commission could also reduce the recurring dispute over whether a filing adds a new series or merely amends an existing one by adopting a single automatic-effectiveness period applicable to both categories. Whether set at 60 days, 75 days, or another appropriately supported period, a uniform period could eliminate disputes over classification, reduce incentives to structure filings around the shorter period, promote consistent treatment among registrants, simplify Staff administration, provide clearer expectations to boards, counsel, sponsors, and competitors, and focus the review process on the substance and completeness of a filing rather than on the procedural category into which an amendment falls. We offer this as an administrable option for the Commission's consideration rather than as our exclusive recommendation. Our central point is that the existing periods should not be lengthened merely because a product is characterized as novel, and that efficient effectiveness periods should be preserved.

C. An Alternative to Automatic Tolling Based on Response Timing

We believe that automatic tolling of effectiveness based solely on the timing of a registrant's response to comments may not achieve its intended purpose as reliably as a more flexible approach. Comments vary substantially in complexity; a single comment may require consultation with a board, sub-adviser, custodian, index provider, exchange, tax counsel, auditor or derivatives counterparty. A fixed five-business-day period could inadvertently reward superficial responses and discourage the careful analysis that we believe the Commission and its Staff values. A framework in which the Staff and registrant communicate concerning timing — with the registrant voluntarily delaying effectiveness where material issues remain under active consideration — would preserve both the pace and the quality of review.

D. Preserving the Predictability of the Effectiveness Framework

We recommend that the predictability that has made Rule 485 so effective is best preserved without adding broad discretionary authority to delay a Novel ETF merely because unresolved policy questions remain, which could move the system toward de facto discretionary approval and could produce different outcomes depending on the priorities of the Commission in office at a given time. The Commission already possesses important and well-established tools to address materially incomplete, inaccurate or unlawful



filings, including the authority discussed in the Request under Rule 485(c) and Section 8(d) of the Securities Act.[55]

To the extent the Commission concludes that any additional authority is warranted, we suggest that it would be most consistent with the framework's strengths if it were:

- tied to a clearly identified material violation or deficiency that is consistently applied among registrants;
- subject to written notice;
- supported by stated reasons;
- limited in duration;
- subject to Commission-level review;
- applied under published standards; and
- accompanied by an opportunity for the registrant to cure the issue promptly.

We further suggest that a good-faith legal disagreement between the Staff and a registrant, without more, is best resolved through continued engagement rather than an automatic administratively imposed delay.

E. Effectiveness Before an Instrument Is Available

In our view, a helpful distinction can be drawn between registration-statement effectiveness and commencement of operations. A fund may become effective before it has seeded its portfolio, entered into contracts or commenced public operations; effectiveness does not necessarily mean that the fund must launch immediately. At the same time, a fund should not commence operations unless it can implement its disclosed investment strategy consistently with its registration statement and should not represent that it is implementing a strategy that is not yet legally or operationally available. Clear Commission guidance distinguishing effectiveness from commencement would be useful, and we believe such guidance would address the underlying concern more precisely than a categorical prohibition on effectiveness. Additionally, allowing funds to go effective but not commence operations will also reduce costs to registrants who would otherwise have to file BXTs in perpetuity until a fund can commence operations. We believe these filings have no meaningful purpose where the registration statement is otherwise in good order. The Commission could instead require an issuer to make representations that it will not launch the fund until it can implement the disclosed investment strategy and that the Registrant will update the disclosure prior to launch should any such updates be necessary prior to the fund's launch.

F. Early Engagement Should Be Encouraged

We strongly support mechanisms for earlier engagement, which we believe would directly advance the Commission's innovation and investor-protection objectives, including:

- confidential draft registration statements;
- prefiling consultations;
- designated Staff contacts for novel products;
- written issues lists;
- published interpretive guidance;
- standardized supplemental-information requests; and
- optional meetings involving the registrant, adviser, counsel and relevant service providers.

55. Request at 40650.



A confidential draft process could allow substantial issues to be addressed before a public filing begins the 75-day period. Following a confidential review, the public filing could become effective after a shorter period, such as 30 days, provided that the public filing is materially consistent with the reviewed draft. To promote accountability and public understanding, the Commission might also publish anonymized statistics concerning the process, including typical review periods and categories of issues raised, while preserving confidential business information and declining to identify individual sponsors absent consent.

G. Preserving the Consultative Character of Early Engagement

We suggest that early engagement is most valuable when it remains a consultative process focused on identifying and resolving issues, rather than a substantive merit review of whether investors should be permitted to access a lawful strategy. The objective of such early engagement can be to identify:

- legal issues;
- operational issues;
- disclosure gaps;
- custody questions;
- valuation concerns;
- arbitrage mechanics; and
- compliance expectations.

Once those issues are addressed under objective standards, the sponsor should be well positioned to proceed.

H. Competitive Pressures and Rapid Filings

Competitive pressure is a normal and often beneficial feature of financial markets, encouraging innovation, lowering fees and expanding investor choice, though it can also create incentives to file quickly. We believe that the most effective response is to continue to emphasize filing quality and legal responsibility rather than discouraging speed itself. A sponsor filing an incomplete or materially misleading registration statement remains subject to existing legal consequences, and we would encourage the Commission not to presume that multiple or similar filings are inherently problematic, since different sponsors may independently identify the same market opportunity, particularly where an asset class or investment theme is receiving public attention. For similar reasons, we would respectfully caution against a special upfront registration fee designed principally to discourage filings, as such a fee could disproportionately burden smaller and newer sponsors while having little effect on larger firms.

I. Confidentiality During Part of the Review Period

Allowing a Rule 485(a)(2) filing to remain nonpublic during an initial review period could promote substantive engagement and reduce purely imitative filings. A workable framework might permit confidential submission, followed by public filing at least 30 days before effectiveness, providing the market with notice while preserving an initial period for sponsor development and Staff review.

J. Board and Signatory Identification of New Series

Fund boards should receive appropriate information concerning new series, particularly where board approval is required under the 1940 Act or the fund's governing documents. We believe, however, that requiring each trustee or authorized signatory to provide an additional product-specific certification



beyond existing signature and governance requirements is not necessary and could be read to impose new substantive product-approval obligations that go beyond a board's existing oversight role. As an alternative that would achieve the underlying objective, the Commission might clarify that registrants should maintain records demonstrating that each new series was properly authorized under applicable law and the registrant's governing documents.

K. Investment Flexibility

A fund should retain reasonable investment flexibility, subject to its disclosed principal strategies, fundamental policies, name, risk disclosures and applicable law. The fact that an existing fund possesses broader authority than a newly filed fund does not necessarily create unfairness, as existing funds may have different shareholder expectations, investment objectives and operating histories. We recommend that materially misleading disclosure or inappropriate strategy changes are best addressed directly, rather than by requiring all funds seeking related exposure to employ identical portfolio language.

L. Funds That Become Effective but Do Not Launch

In our view, automatic deregistration after six months is inappropriate and unduly rigid, because funds may delay launch for legitimate reasons, including:

- market conditions (market conditions can materially change from when a fund is filed to when the fund is eligible to go effective);
- exchange approval;
- service-provider readiness;
- availability of investment products, such as options, swaps or futures;
- seed-capital timing;
- counterparty onboarding;
- index availability;
- custody arrangements;
- tax considerations; and
- changes in investor demand.

A balanced alternative would require periodic confirmation that the series remains inactive and that its disclosure will be updated before launch. Requiring issuers to withdraw funds that have gone effective but have not launched would be punitive in terms of costs for issuers who often have valid reasons for not launching a particular fund.

M. Unresolved Staff Comments

We suggest that requiring prospectus disclosure of unresolved Staff comments may not advance investor understanding as intended. Staff comments are part of the disclosure-review process and may involve legal interpretations, requests for clarification or matters not material to an investment decision; public disclosure could inadvertently confuse investors, imply that the Staff has approved or disapproved the product, and encourage negotiation through public filings rather than constructive engagement. Material information underlying a comment must, of course, be disclosed where necessary to make the registration statement complete and not misleading. Additionally, registrants are required to file responses to Staff comments on EDGAR and the Staff has the option to make these comments public. Comment disagreements and explanations thereof would be included in these letters, which would be in the public domain once the response letter is available on EDGAR. We believe the focus is most productively placed



on the adequacy of the disclosure itself rather than requiring the dialogue between the Staff and registrant to be included in a registration statement.

N. Material Changes During Review

Additional guidance concerning material strategy changes would be useful, and we welcome the Commission's attention to it. We believe that a new 75-day or 60-day period need not automatically be required for every change not made in response to a Staff comment, with materiality remaining the governing principle. The Commission could identify factors such as whether a change:

- alters the fund's investment objective or principal investment strategies;
- changes the essential economic exposure;
- introduces materially different principal risks;
- changes the fund from unleveraged to leveraged;
- changes the primary asset class;
- materially affects arbitrage or valuation;
- changes the fund's tax treatment; or
- renders prior disclosure materially misleading.

Minor refinements, expanded examples, revised terminology or implementation details would not, in our view, warrant restarting the entire effectiveness period.

A related and currently unsettled threshold question is how to treat the repurposing of an existing series that is effective, but had not yet launched — that is, substantially changing the investment objective and strategy of a series that is already effective but has never commenced operations. The question is whether such a change is a material amendment to an existing fund, eligible for the 60-day period under Rule 485(a)(1), or the addition of a new fund subject to the 75-day period under Rule 485(a)(2).[56] Importantly, the distinction between a 60- or 75-day period is itself a product of Commission rulemaking, not of the 1940 Act. The 75-day period for a post-effective amendment filed 'for the purpose of adding a series" was adopted in 1994.[57] Because the line between the two periods was drawn by rule, it can be reconsidered by rule.

Two features of the 1994 Adopting Release are instructive here. First, in describing the funds to which the rule applies, the Commission observed that "[m]utual funds often organize themselves as series companies and offer investors an opportunity to invest in one or more 'portfolios,' each of which has a specific investment objective," with the fund offering "a series or class of shares that represents an interest in the portfolio in which the investor desires to participate."[58] The series structure is thus an organizational choice the Commission recognized funds make — and, as discussed below, one governed by state law. Second, the 75-day period appears in the 1994 Release's discussion captioned "Post-Effective Amendments Adding Series." There, the Commission declined to adopt its own proposal to treat the addition of a series as the equivalent of a new registration statement; commenters had observed that the new disclosure in such an amendment "usually is limited to the discussion of investment objectives, policies and risks of investment in the new series and thus such an amendment is not the equivalent of a new registration

56. 17 C.F.R. § 230.485(a)(1)-(2).
57. *See* Post-Effective Amendments to Investment Company Registration Statements, Securities Act Rel, No. 7083, Investment Company Act Rel. No. 20486, 59 Fed. Reg. 43464 (Aug. 24, 1994) (the "1994 Release").
58. *Id.* at n.7.



statement," and the Commission settled on 75 days to allow adequate disclosure review while preserving certainty as to the effective date.[59]

The analysis usefully begins by recognizing that the creation and existence of a fund is a matter of state organizational law and the registrant's governing documents, not of the federal securities laws. Registered funds are commonly organized as series companies — a single legal entity, frequently a business trust or a Delaware statutory trust, under which multiple series are established by the entity's governing instrument.[60]. The federal securities laws take this state-law structure as a given and builds upon it. The 1940 Act contemplates a registered open-end company that issues "a number of series of preferred or special stock each of which is preferred over all other classes or series in respect of assets specifically allocated to that class or series."[61] The Commission's own rules define a "series company" by reference to that provision and provides that "[e]ach series of a series company . . . shall be deemed to be a separate investment company," deferring throughout to "applicable State law."[62] The Internal Revenue Code similarly treats each "fund" of a series investment company as a separate corporation.[63] Against that backdrop, it is helpful to distinguish among: (i) the creation or existence of a series under state law; (ii) the registration of that series' securities under the federal securities laws; (iii) the commencement of the series' operations; (iv) the material amendment of the series' disclosure; and (v) the addition of a new series to a registration statement. By the rule's own terms, it is the last of these — adding a series — that triggers the 75-day period.

Where a series already exists as a matter of state law and under the registrant's governing documents — even though it has never commenced operations — treating a Rule 485(a) filing that repurposes that series as a material amendment eligible for the 60-day period is a reasonable interpretation of the existing rule, because the filing amends the disclosure of a series that already legally exists, rather than creating a new one. Such a filing may be frustrating to competitors or may afford a timing advantage, but conduct permitted by the text and structure of the existing rules should not be viewed as evasive.

This question has taken on particular practical significance in the review of single-reference-asset leveraged and inverse leverage ETFs. In that context, we understand that the Staff has at times indicated, through the registration-statement comment process, that changing a fund's reference asset causes the filing to be treated as the offering of a new fund subject to the 75-day period, rather than as a material amendment to an existing series. We raise this observation in a constructive spirit and fully recognize the Staff's legitimate interest in adequate time to review novel products. We note only that this position appears to have developed through individual comment letters rather than through any formal Commission rule or published interpretation, and that whether a series legally exists is a question of state organizational law rather than a function of the particular reference asset the series is disclosed to track. The 1994 Release reinforces the point: it ties the 75-day period to the act of "adding a new series" to a series company, rather than to the degree or materiality of any change in a series' investment exposure, and it recognizes that organizing as a series company, with its several portfolios, is itself a structural choice. Read together, we believe the 1994 Release's acknowledgment of the series-company structure and its framing of the 75-day period around "adding a series" support the view that whether a filing creates a "new" fund turns on the addition of a series to the entity — a matter of state organizational law — rather than on how significant a change to a single-reference-asset ETF's disclosed exposure may be. We recognize the question is not free

59. *Id.* § III.E.
60. *See* 12 Del. C. § 3801 (a Delaware statutory trust, including any series thereof, exists under its governing instrument and the filing of a certificate of trust).
61. 15 U.S.C. § 80a-18(f)(2).
62. 17 C.F.R. §§ 270.18f-2, 230.144A(a)(1)(iv)(A).
63. 26 U.S.C. § 851(g).



from doubt, and we do not suggest the Staff has acted improperly in raising it. We highlight it because it illustrates precisely where clear, generally applicable guidance would help: a framework developed before single-security leveraged ETFs existed does not squarely address single security leveraged ETFs, and reasonable parties can therefore differ on whether a change in reference asset calls for a 60-day or a 75-day filing.[64] It is also worth acknowledging candidly that the 1940 Act was enacted with pooled vehicles holding diversified portfolios in mind and did not contemplate funds designed around a single security or a small number of holdings. As the marketplace has evolved toward such products, there is understandable tension in fitting them within procedural categories developed for a different era.

For that reason, if the Commission concludes that the current distinction between a 60-day and 75-day filing produces inconsistent or undesirable results — in this context or others — the more effective response is to address the matter prospectively by rule, establishing one clear and publicly articulated standard, rather than to rely on uncertain, after-the-fact characterizations of what constitutes a "new" fund developed in the course of individual filings. The single uniform automatic-effectiveness period described in Section IV.B would resolve the question directly: if the same period applied whether a filing adds a series or materially amends an existing one, the classification dispute — and any incentive to contest it through the comment process — would largely disappear, and review could focus, as it should, on the substance and completeness of the filing.

O. The Relationship Between Rules 497 and 485(a)

The Request appropriately recognizes uncertainty about the correct process when a fund makes a material change after effectiveness but before, at, or shortly after launch. Industry practice and interpretation on this point are not uniform, and we think it more useful to describe the principal views than to assert a single answer.

Under one view, a fund may disclose a material change promptly through a supplement filed under Rule 497 (most often Rule 497(e))[65] and then incorporate that change into the registration statement through a later Rule 485(a) filing, potentially in connection with the fund's next annual update. A registrant following this approach might make the Rule 485(a) filing sufficiently before the annual-update deadline to afford the Staff a meaningful review period. Although this reading can be grounded in the language and operation of the existing rules, waiting until the next annual update may leave the material change outside the registration statement for an extended period and may afford the Staff the opportunity to review the change only much later in the process.

Under a second view, a material change should be disclosed immediately through a Rule 497 supplement and accompanied by, or promptly followed by, a Rule 485(a) filing. Because a post-effective amendment reflecting a material change is not eligible for immediate effectiveness under Rule 485(b), it proceeds under Rule 485(a) and is subject to the applicable review period.[66] This approach provides immediate disclosure to shareholders while also placing the change into a filing subject to the Rule 485(a) review period.

64. We also note that the concept of changing the reference asset for a single security ETF is the equivalent of creating a new fund is a recent phenomenon. Historically, as far as we are aware, when an existing fund completely changes its strategy (for whatever reason – e.g., new sub-adviser, new index, etc.) the Staff has always permitted such a change to occur through the 60-day filing process, not the 75-day process.
65. Rule 497(e) governs a prospectus or statement of additional information that "varies from" the form last filed. *See* 17 C.F.R. § 230.497(e).
66. 17 C.F.R. § 230.485(a)(1), (b).



We do not read the cited authorities to resolve this question definitively, and we do not attempt to resolve it here. We note only that Rule 497 filings are not uniformly beyond the Staff's involvement: the Commission's rules contemplate that certain information supplied through a Rule 497 filing becomes part of the registration statement itself,[67] and the Staff retains authority over the timing and effectiveness of the related Rule 485(a) amendments.[68] Accordingly, we encourage the Commission to provide clear, generally applicable guidance addressing:

- when a Rule 497 filing alone is sufficient;
- when a Rule 485(a) filing is also required;
- whether the two filings must be contemporaneous;
- how quickly a Rule 485(a) filing must follow a Rule 497 filing;
- whether the answer differs for pre-launch, at-launch, and post-launch changes;
- whether a Rule 497 filing can provide interim disclosure pending effectiveness of a Rule 485(a) amendment; and
- what types of changes are sufficiently fundamental to require a Rule 485(a) filing.

Consistent application of these rules would benefit the Staff, registrants, counsel, boards, exchanges, and investors alike. Industry participants will naturally structure filings within the available rules; clear and consistently administered standards are therefore preferable to uncertainty or to case-by-case expectations that are not publicly articulated.

P. Suspension Authority

We recognize and support the Commission's need to retain meaningful authority to address materially deficient filings. We suggest that this authority is most effective, and most protective of the framework's predictability, when it is reserved for identifiable legal violations, material inaccuracies, failure to satisfy express rule conditions or threats to investors that cannot be addressed through less restrictive means — rather than extending broadly to suspend a particular series after effectiveness, reliance on Rule 6c-11, or use of Rule 482 advertising based on unresolved policy disagreements. Any suspension must appropriately be accompanied by procedural protections, written findings and an opportunity to cure.

Q. Disclosure Reforms

The Commission may appropriately consider tailored disclosure for Novel ETFs. A principles-based requirement could direct a Novel ETF to clearly explain any material aspect in which its assets, strategy, valuation, custody, liquidity, leverage, tax treatment, arbitrage mechanism or regulatory status differs from a conventional ETF. We believe that a standardized cover-page warning for every product labeled "novel" may be less useful, because novelty is not itself a risk; disclosure that identifies the actual risk would better serve investors. The Commission may also wish to consider clearer disclosure distinguishing registered ETFs from ETPs that are not registered under the 1940 Act.

V. Reaffirming a Principles-Based Approach: Observations from Recent Experience

The 1940 Act's enduring strength lies in its ability to protect investors while accommodating decades of financial innovation. In that spirit, we offer three observations drawn from recent experience

67. *See* 17 C.F.R. § 230.430A(b) (information filed under Rule 497(h) deemed part of the registration statement as of effectiveness),
68. *See* 17 C.F.R. § 200.30-5(c)(3)



with novel products. We share them not as criticism, but as examples to illustrate a constructive point: the regulatory process serves investors best when it begins with the question, "Can this product be brought within the protections of the 1940 Act in a manner that protects investors?" When the inquiry starts from inclusion, the 1940 Act's disclosure, governance, custody, valuation, compliance, and board-oversight provisions operate as they were designed to — as advantages that accompany innovation, not as obstacles to it. Each example below reflects a situation in which a more flexible, principles-based application of the existing framework could have advanced investor protection while allowing responsible innovation to proceed.

A. Investment Company Status for a Fund Seeking Cryptocurrency-Related Exposure

The first example involves an investment company that sought to offer investors cryptocurrency-related investment exposure and, notably, to do so by affirmatively registering under and complying with the 1940 Act. It is notable that for most of the 1940 Act's history, the Commission's interpretive posture has been devoted to preventing issuers from structuring around the 1940 Act to avoid its protections. Here, by contrast, the sponsor sought to bring its product inside the 1940 Act and to extend the 1940 Act's protections to its investors. That is precisely the outcome the framework should encourage.

The principal question in this case was whether the fund satisfied the statutory definition of "investment company." As the comment letter discusses in Part II, Section 3(a) provides two independent pathways to that status: the functional "primarily engaged" inquiry under Section 3(a)(1)(A) and the objective 40% investment-securities test under Section 3(a)(1)(C). In practice, the discussion came to center almost entirely on whether the fund would hold at least 40% of its assets in "investment securities" at all times. We recommend that an approach treating the 40% threshold as the exclusive route to investment company status can, unintentionally, subordinate the independent functional test under Section 3(a)(1)(A) and leave little room for the *Tonopah* factors — a facts-and-circumstances inquiry in which no single factor is dispositive and which asks, at bottom, how a reasonable investor would understand the enterprise. Where the great majority of those factors indicate that a vehicle is, in substance, a professionally managed investment fund, a functional reading of Section 3(a)(1)(A) can recognize that reality without straining the statute.

A related point concerns the meaning of "investment securities." An asset need not qualify as a "security" under every federal securities law in order to constitute an "investment security" for purposes of the 1940 Act. Interests in exchange-traded products are securities; certain staking arrangements may be investment contracts; liquid staking tokens may be securities; and a given digital asset may itself be a security for purposes of the 1940 Act.[69] Congress designed the 1940 Act to regulate pooled investment vehicles that hold investment assets on behalf of public investors, regardless of whether every underlying asset fits neatly within classifications developed for other statutory purposes. A reasonable interpretation

69. Cf. Division of Corporation Finance, U.S. Securities and Exchange Commission, *Statement on Certain Protocol Staking Activities* (May 29, 2025) (analyzing whether certain protocol staking arrangements involve investment contracts under *Howey* and whether specified protocol staking activities involve the offer and sale of securities under Section 2(a)(1) of the Securities Act or Section 3(a)(10) of the Exchange Act); Division of Corporation Finance, U.S. Securities and Exchange Commission, *Statement on Certain Liquid Staking Activities* (Aug. 5, 2025) (analyzing whether liquid staking activities and Staking Receipt Tokens involve the offer and sale of securities under the Securities Act and Exchange Act, while recognizing that a deposited crypto asset, like any asset, may be offered and sold as part of or subject to an investment contract). However, these staff statements do not interpret the definitions of "security" or "investment securities" under Sections 2(a)(36) or 3(a)(2) of the 1940 Act, and therefore do not foreclose a determination, based on the particular facts and circumstances, that a staking arrangement, liquid staking token, digital asset, or other crypto-related interest constitutes a "security," and therefore an "investment security," for purposes of the 1940 Act.



of the statute would therefore permit a digital-asset fund to satisfy investment company status where the fund holds sufficient securities investment and, critically, where investors receive the full measure of the 1940 Act's protections. This reading is consistent with the Commission's long-standing practice of permitting commodity-focused and similarly situated funds to register as investment companies even where their holdings of traditional investment securities are modest.

Because the comment letter already develops the functional Section 3(a)(1)(A) analysis and the "investment securities" point in Part II, we do not repeat that analysis here. We note only that the matter was ultimately resolved by the fund agreeing to construct its portfolio to hold at least 40% in qualifying "investment securities." While the resolution was workable, it is a more formalistic path than the statute requires and created a less efficient product for shareholders; a more flexible interpretation — one that gave independent effect to the functional test — would have furthered the same investor-protection objectives without disturbing the statutory framework.

B. Leveraged Exchange-Traded Funds

The second example involves a number of sponsors that sought to register a suite of leveraged exchange-traded funds providing enhanced daily exposure to widely followed reference assets. We offer this observation at a policy level rather than as renewed technical analysis.

The starting observation is a practical one. Investors today can already assemble substantially similar leveraged economic exposure on their own — through margin, listed options, swaps, security futures, foreign-market and over-the-counter transactions, direct ownership, and Securities Act-only products — and through an established and actively traded market in two-times leveraged exchange-traded products, both long and inverse, across single stocks, sectors, indices, and other reference assets. The relevant policy comparison, then, is usually not between a novel registered ETF and no investor access to the strategy. It is between professionally managed exposure within a registered investment company and substantially similar exposure that the investor assembles directly. Where the economic exposure is already legally available, preventing a registered fund from offering it does not necessarily reduce investor risk; it may simply move the investor into a setting without an independent fund board, a derivatives risk manager acting under a board-approved program, integrated portfolio-level risk management, a daily net asset value, a registered adviser managing the entire position, a standardized prospectus, fund-level liquidity and valuation procedures, restrictions on affiliated transactions comparable to those under the 1940 Act, or professional rebalancing and monitoring. We state the point carefully: a self-directed investor using futures or options remains subject to the protections applicable to those regulated markets, exchanges, and intermediaries. But regulation of the instrument, the exchange, the broker, or the futures commission merchant is not the same as regulation of a professionally managed pooled investment vehicle under the 1940 Act.

A current development illustrates the point. CME Group initially announced a planned suite of financially settled single-stock futures on February 10, 2026 and, on June 30, 2026, announced a July 27, 2026 launch date for contracts on more than fifty prominent U.S. companies, including NVIDIA, Microsoft, Meta Platforms, Alphabet, Apple, Amazon, and Tesla. As reflected in CME's contract specifications, each standard contract represents 100 shares of the underlying stock and each Micro contract represents 10 shares. Single-stock futures are "security futures," subject to the joint jurisdiction of the Commission and the Commodity Futures Trading Commission under the framework established by the Commodity Futures Modernization Act of 2000.[70]

70. *See* 15 U.S.C. § 78c(a)(55); 7 U.S.C. §§ 1a(44), 2(a)(1)(D)(i).



These contracts are margin-based, capital-efficient instruments. Because a futures position is established by posting margin rather than paying the full value of the underlying shares, an investor can obtain a given amount of notional exposure to an individual stock with substantially less committed capital than through a fully funded share purchase. The joint SEC-CFTC customer-margin rules set a 15% minimum initial and maintenance margin requirement for an unhedged security-futures position, although an exchange, clearing organization, or intermediary may require more.[71] CME's own materials illustrate the resulting capital efficiency using NVIDIA: at the 15% margin level, an investor obtains the notional exposure represented by 100 shares while committing far less capital than a cash purchaser, and far less than an investor financing a stock purchase at the 50% initial-margin level generally applicable under Regulation T.[72]

We do not describe these contracts as "3x" or "6.67x" products. Unlike a leveraged fund with a stated daily multiple, a single-stock future generally provides approximately one-for-one notional economic exposure to the shares it represents; the leverage arises from the relationship between that notional exposure and the margin required to hold it. At the 15% regulatory minimum, the ratio of notional exposure to required margin is approximately 6.67-to-1 (and, given contract indivisibility, CME's own $20,000 illustration permits six standard NVIDIA contracts, or roughly 6x the capital committed). The leverage an investor actually obtains depends on applicable margin requirements, contract prices and sizes, available capital, brokerage requirements, and the number of contracts acquired. The relevant point is that an investor, through an appropriately approved futures or securities account at an intermediary offering these products, may today establish a materially leveraged long or short position in an individual company through a centrally cleared, financially settled security future — without investing through a registered investment company, and thus without the governance, custody, valuation, board-oversight, derivatives-risk-management, and disclosure protections the 1940 Act provides.[73]

That development sharpens the policy question: why should materially similar single-name leveraged exposure remain unavailable through a registered fund that has designed its structure to comply with Rule 18f-4 and the other applicable provisions of the 1940 Act? A retail investor using single-stock futures may obtain notional exposure substantially exceeding twice the capital committed to margin, while a newly launched leveraged registered fund is, under the Commission's current application of Rule 18f-4's relative VaR limit, effectively constrained from offering a comparable targeted multiple. To the extent the Commission concludes that a professionally managed version of such exposure would serve investors, the constructive path is a targeted amendment to Rule 18f-4, or appropriate interpretive or exemptive relief — not a categorical bar that leaves the strategy available only outside the 1940 Act's protections.

Listed options make the same point. An investor may purchase or sell calls, puts, LEAPS, or combinations to obtain leveraged, inverse, hedged, or otherwise modified exposure to an individual security or index; a purchased call, for example, allows participation in a stock's appreciation for a smaller initial capital outlay than buying the shares, and so produces leverage.[74] Relatedly, a purchased put can permit an investor to benefit from a stock's depreciation in price for a smaller initial capital outlay than a comparable short sale of the shares. Options are not perfect substitutes for a daily-reset leveraged fund — they carry expiration dates, strike selection, implied volatility, time decay, nonlinear payoffs, exercise and assignment considerations, and the possibility of losing the entire premium — and we therefore do not claim exact replication in every case. The point is that investors can already construct economically comparable, and in

71. *See* 17 C.F.R. § 242.403(b)(1); id. § 41.45(b)(1); id. § 242.400(b)(1).
72. *See* 12 C.F.R. § 220.12(a).
73. *See* 17 C.F.R. § 240.15c3-3(o).
74. *See* 3A Securities and Federal Corporate Law § 2:91 (2d ed.) (purchase of calls presents "speculative opportunities with a lesser cash outlay and greater leverage than their respective alternatives").



some cases more highly leveraged, exposures through listed instruments, though doing so may demand substantially greater knowledge and active management. The Commission's derivatives framework itself reflects the limited senior-security concern such purchased options present: Rule 18f-4 defines a "derivatives transaction" to reach only an instrument under which a fund "is or may be required to make any payment or delivery of cash or other assets during the life of the instrument or at maturity or early termination,"[75] and the adopting release explains that a fund purchasing a standard exchange-listed option generally pays only a non-refundable premium and has no further payment obligation, so that a fully-paid purchased option falls outside the definition.[76] Written options, spreads and combinations, options embedded in other instruments, and instruments creating future payment obligations are treated differently; we do not suggest that all options are outside the rule.

A registered fund offering leveraged exposure can furnish, at the level of the investment vehicle, protections that the self-directed investor does not receive: professional selection and management of derivatives positions; daily portfolio valuation; collateral and liquidity management; counterparty and operational oversight; an independent board; a derivatives risk management program and a designated derivatives risk manager where required; portfolio-level stress testing, backtesting, escalation, and reporting; standardized strategy and risk disclosure; automatic rebalancing according to a disclosed methodology; and the limits imposed by Rule 18f-4 and the fund's other disclosed policies.[77] None of this suggests that leveraged ETFs are free of material risk. They present real risks — daily-reset effects, compounding, volatility, path dependency, the potential for rapid losses, and performance over periods longer than a day that can differ substantially from the stated daily multiple.[78] Those risks support clear disclosure and robust risk management. They do not, standing alone, support requiring investors to construct the same exposure outside a registered fund.

This example also underscores the distinct roles of Rules 6c-11 and 18f-4, which the Commission adopted as an integrated framework. Rule 6c-11 is principally a structural and exemptive rule: it permits a qualifying ETF to operate without an individual exemptive order, treats ETF shares as redeemable securities, and accommodates creation and redemption transactions and the conditions that support ETF arbitrage. 17 C.F.R. § 270.6c-11(b). Rule 18f-4 is the Commission's modern framework for derivatives and leverage risk, generally requiring a derivatives risk management program, a designated derivatives risk manager, board oversight and reporting, and compliance with a value-at-risk limit.[79] When it adopted Rule 18f-4, the Commission amended Rule 6c-11 so that leveraged and inverse ETFs may rely on Rule 6c-11 "provided that they comply with the applicable provisions of rule 18f-4," and Rule 6c-11(c)(4) now expressly conditions specified leveraged or inverse index ETFs on compliance with "all applicable provisions of."[80] We therefore encourage the Commission to ensure that Rule 6c-11 is not administered as an additional, unwritten substantive limit on leverage after a fund has demonstrated compliance with Rule 18f-4 — the rule is designed specifically to address derivatives and leverage risk. Using Rule 6c-11 to prevent a product based on the level or nature of its leverage, without identifying an independent arbitrage,

75. 17 C.F.R. § 270.18f-4(a).
76. *See* Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 34084, 85 Fed. Reg. 83162 (Nov. 2, 2020).
77. *See* 17 C.F.R. § 270.18f-4(c).
78. Although leveraged ETFs are often discussed in terms of their risks, the available data indicates that investors, in aggregate, have realized substantial net gains from these products. Bloomberg reports that leveraged ETFs have generated more than $65 billion in aggregate net investor gains. *Retail Traders Defy 'Dumb Money' Label With TQQQ Profits*, Bloomberg Television (July 27, 2026) (remarks of Eric Balchunas, Senior ETF Analyst, Bloomberg Intelligence), available at https://www.bloomberg.com/news/videos/2026-07-27/retail-traders-defy-dumb-money-label-with-tqqq-profits-video.
79. 17 C.F.R. § 270.18f-4(c).
80. Rule 18f-4. 17 C.F.R. § 270.6c-11(c)(4); Investment Company Act Release No. 34084, supra.



creation-and-redemption, disclosure, or other structural deficiency, would risk converting a structural exemptive rule into a parallel substantive leverage regime. That, in turn, could undermine the integrated framework the Commission built through Rules 18f-4 and 6c-11, make Rule 18f-4 compliance insufficient in practice, create uncertainty about what leverage levels are actually permissible, replace published standards with product-by-product limitations, and produce inconsistent outcomes across products and administrations.

We are not necessarily suggesting that the Commission revisit Rule 18f-4 or its 200% relative VaR limit at this time, which represents the governing constraint. Our observation is narrower and largely factual. Because value-at-risk measures portfolio risk rather than a fund's return multiple, a fund can comply with the 200% relative VaR limit and still be structured to provide economic exposure greater than two times the performance of an individual reference asset — depending, for example, on the designated reference portfolio selected, on security-selection effects, and on the particular instruments used, including fully-paid purchased options that fall outside the rule's "derivatives transaction" definition.[81] We do not suggest that any particular nominal multiple necessarily complies; whether a given structure satisfies the VaR tests is a fact-specific matter for the Staff's review. The point that matters from a policy perspective is simpler: such exposure can be, and already is, obtained both inside a VaR-compliant registered fund and — as the single-stock futures and listed-options examples illustrate — entirely outside the 1940 Act. Where that is so, the more constructive question is why the Commission would not be receptive to accommodating the strategy within the 1940 Act's protections, rather than leaving investors to assemble comparable exposure on their own.

We recognize that, when many similar filings arrive in a short period, a standardized approach to comments can be an efficient use of limited Staff resources. We note only that novel products of this kind can differ meaningfully in structure, and that attention to the specific features of an individual filing — rather than treatment of a category as a whole — tends to advance both investor protection and responsible innovation. The constructive inquiry remains whether the strategy's risks are accurately captured, bounded, supervised, and disclosed within the 1940 Act, not whether the exposure itself ought to be available to investors at all.

The same comparative principle extends beyond leveraged products. Investors can already obtain, outside a registered fund, exposure to over-the-counter securities, foreign ordinary shares, depositary receipts, other foreign-market instruments, commodities, digital assets, event contracts, private-market or pre-IPO interests where legally available, and combinations of listed derivatives. We do not suggest that every such asset can or should be held by every registered fund. We suggest only that the availability of an exposure elsewhere is relevant to the Commission's analysis: where the exposure already exists, the Commission can usefully ask whether a registered fund can hold or obtain it consistently with applicable law; whether the product can satisfy custody, valuation, liquidity, leverage, disclosure, and arbitrage requirements; whether professional management and fund governance would improve the investor's experience; and whether barring the registered product would merely redirect investors toward a less integrated or more complex means of obtaining substantially the same exposure. As the next subsection illustrates, that inquiry also depends on coordination across the Commission — so that a structural listing concern is distinguished from a substantive objection to the strategy, and an exposure available through direct trading, security futures, options, or another exchange-traded product is not treated as categorically unacceptable simply because the strategy is proposed to be utilized by a registered fund.

In sum, the availability of an economic exposure outside the registered-fund framework does not establish that the exposure is suitable for every investor, but it does affect the relevant policy comparison.

81. *See* 17 C.F.R. § 270.18f-4(a), (c).



If investors may obtain leveraged single-stock exposure through security futures, margin, or listed options, preventing a professionally managed fund from offering substantially similar exposure does not remove the risk from the marketplace; it may instead move that risk from a vehicle that is governed by an independent board, and a registered adviser, and that must implement a derivatives risk management program, daily valuation, standardized disclosure, and portfolio-level controls into an account in which the investor must construct and monitor the exposure independently. Where the applicable substantive rules can be satisfied, we believe the Commission should generally favor bringing that exposure within the 1940 Act rather than leaving investors to replicate it outside the Act.

C. Foreign Securities, Depositary Receipts, and Institutional Consistency

The third example involves an issuer that sought to bring to market exchange-traded funds holding depositary receipts of well-established foreign companies. Our point here is not the substantive listing question itself, but institutional consistency across the components of the Commission.

In that matter, the Division of Investment Management engaged constructively and in detail with the registrant. A substantial set of disclosure and 1940 Act questions — including questions concerning Rule 140 under the Securities Act, a longstanding Staff no-action position addressing disclosure about underlying issuers, eligibility of underlying issuers to file on Form F-3, and the availability of current public information under Exchange Act Rules 12g3-2(b) and 15c2-11 — were raised and, through successive responses, satisfactorily addressed. Yet even after those 1940 Act and disclosure concerns had been resolved, considerations arising in the exchange-listing process and within the Division of Trading and Markets could operate, in effect, to keep the product from reaching the market.

We do not suggest that any Division reached an incorrect result, or that any concerns were unfounded. The observation is a more modest and institutional one: innovation is frustrated, and investors are not better protected, when different areas of the Commission effectively apply different or sequential standards to the same product, such that a registrant can resolve every concern raised by one area only to encounter an independent obstacle from another. Consistency across related products matters as well; a standard the Commission has applied to permit one category of novel exchange-traded product to reach the market can helpfully inform its treatment of analogous products.

Greater coordination across the Commission — so that a registrant understands, at the outset, the full set of standards its product must satisfy — would provide issuers with clearer expectations, improve regulatory efficiency, reduce unnecessary cost and delay, and facilitate responsible product innovation, all while preserving the investor protections that each division of the Commission is charged with safeguarding. And here, as elsewhere, the registered-fund structure itself adds a layer of protection that a direct investment in the underlying instrument does not: oversight under the 1940 Act, a registered investment adviser, and an independent board, each owing separate fiduciary duties to shareholders.

Observation

These three examples are offered to illustrate the value of approaching Novel ETFs with an institutional mindset that begins by asking whether innovation can be accommodated within the confines of the 1940 Act — whether, that is, a product can be brought within the 1940 Act's protections in a manner that protects investors — rather than whether the product should be permitted to exist at all. Consistently across these examples, the same theme emerges: investors are generally better served when innovative products are brought inside the 1940 Act than when comparable economic exposure is left to be obtained through less-regulated alternatives.



The 1940 Act has historically demonstrated remarkable adaptability. Its enduring success stems from its ability to provide robust investor protections while evolving alongside financial innovation. We encourage the Commission to continue that tradition by favoring thoughtful, principles-based regulation that brings innovative investment products inside the 1940 Act whenever reasonably possible, rather than leaving investors to obtain comparable exposures through less regulated markets.

VI. A Recommended Policy Framework

Drawing these threads together, we offer the following framework, which we believe would allow the Commission to accommodate innovation while preserving the 1940 Act's core investor protections.

- **Begin With Inclusion.** Where a vehicle seeks to function as a publicly offered pooled investment product, begin with a presumption that investors should receive the protections of the 1940 Act.
- **Identify the Actual Risk.** Determine whether the existing 1940 Act regulatory regime does not adequately address the risk.
- **Use the Rule Directed to That Risk.** Seek to address the issue through the statutory provision or rule designed for it (e.g., derivatives, custody, valuation, liquidity, etc.), rather than through an asset-class prohibition.
- **Apply Objective and Public Standards.** Sponsors should be able to determine the applicable requirements for a new product in advance, and similar products should receive similar treatment.
- **Coordinate With Other Regulators.** Where another regulator has jurisdiction over an asset, instrument, market or intermediary, coordinate with any such regulator on the requirements that will apply, which will provide sponsors greater clarity and promote innovation.
- **Preserve Automatic Effectiveness.** Automatic effectiveness should remain the rule, with delays reserved for exceptional, legally grounded and procedurally constrained circumstances.
- **Facilitate Early Engagement.** Confidential drafts and prefiling consultations can resolve difficult issues without converting the process into discretionary product approval.
- **Distinguish Effectiveness From Launch.** A registration statement may become effective before a fund begins operations; a fund should launch only when it can implement its strategy lawfully and consistently with its disclosure.
- **Regulate Conduct, Not Novelty.** The framework is most effective when it addresses how a product operates and the risks it creates, rather than seeking to determine whether a fund's investments are new or difficult to classify.
- **Compare the Registered Product With the Available Alternative.** When evaluating a novel strategy, consider how investors may already obtain substantially similar exposure — such as through security futures, margin, listed options, or other market instruments — and whether the registered-fund structure would improve disclosure, governance, professional management, and risk oversight. Where the exposure exists in any event and the applicable substantive rules can be satisfied, bringing it within the 1940 Act generally serves investors better than providing no other alternative than to replicate such exposures outside the 1940 Act.

Conclusion

The Commission's Request presents a valuable opportunity to establish a durable framework for the next generation of exchange-traded investment products, and we are grateful for the Commission's thoughtful and open approach to it.



The 1940 Act has repeatedly proven its capacity to accommodate substantial evolution while maintaining robust investor protections. ETFs themselves once required individualized exemptive relief; the Commission's adoption of Rule 6c-11 replaced that process with a transparent and generally applicable framework that has contributed to increased competition, innovation and investor choice — a development the Commission expressly recognizes in the Request.[82] That same constructive, principles-based approach can guide the treatment of novel ETFs.

The extraordinary acceptance of registered investment companies by American households, retirement savers, advisers and financial intermediaries is, in our respectful view, a reason to extend the 1940 Act's protections broadly. Investors are generally better served when an investment product operates within a framework of board oversight, custody, valuation, compliance, fiduciary responsibility and conflicts regulation. Novel assets may call for novel operational solutions; they do not call for diminished investor protection.

Accordingly, we encourage the Commission to:

- interpret investment company status functionally and inclusively;
- give full and meaningful effect to Section 3(a)(1)(A);
- modernize the *Tonopah* analysis;
- preserve the strategy-neutral nature of Rule 6c-11;
- address specific risks through targeted requirements;
- preserve automatic effectiveness under Rule 485;
- encourage early and confidential engagement; and
- establish objective standards that operate consistently across products and administrations.

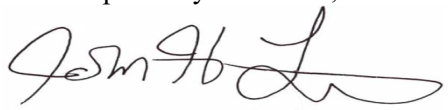
We offer these comments in the spirit of partnership with the Commission in its important work. The central policy question, we submit, is not how to keep innovative investment products outside the 1940 Act, but how to bring them responsibly within it — to the benefit of investors, the markets and the continued vitality of the 1940 Act.

We appreciate the Commission's consideration of these comments and would welcome the opportunity to discuss these matters further.

* * *

Please contact me at (913) 660-0778 regarding the responses contained in this letter.

Respectfully submitted,



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82. Request at 40647.