

August 31, 2026

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

Re: Request for Comment on Novel ETFs, File No. S7-2026-24, 91 Fed. Reg. 40647 (July 2, 2026)

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to respond to the above-referenced request for comment.[2] The request for comment seeks the public's input on exchange-traded funds (ETFs) that seek to invest in innovative asset classes or engage in novel investment strategies.[3] The problem with these so-called "Novel ETFs" is that the assets that they intend to buy and sell are not really investments and the strategies they intend to pursue are not really about investing.

Some of the Novel ETFs that gave rise to the request for comment are funds that seek to hold event contracts on election outcomes and sporting events and funds that seek to hold futures contracts that track the performance of professional sports teams.[4] These are indeed novel funds. They are so novel that they bear no resemblance to ETFs regulated under the Investment Company Act of 1940 (ICA). That is because ETFs that are regulated under the ICA "invest in securities."[5] Funds that seek to hold event contracts on elections or sports or futures contracts that track an index that reflects the performance of sports teams do not invest in securities.

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 91 Fed. Reg. 40,647 (July 2, 2026).

3 *Id*. at 40,647.

4 *See, e.g.*, Dominic Basulto, *My Prediction: Prediction Market ETFs Will Be a Huge Disappointment for Long-Term Investors*, The Motley Fool (Mar. 9, 2026), https://finance.yahoo.com/news/prediction-prediction-market-etfs-huge-092000302.html; Sumit Roy, *Wall Street Wants to Turn Every NHL Team Into an ETF*, etf.com (Aug. 17, 2026), https://finance.yahoo.com/markets/options/articles/wall-street-wants-turn-every-210050974.html.

5 Henry T.C. Hu and John D. Morley, *The SEC and Regulation of Exchange-Traded Funds: A Commendable Start and a Welcome Invitation*, 92 S. Cal. L. Rev. 1155, 1162 (2019); *see also* Jerry Brito, Houman Shadab, and Andrea Castillo., *Bitcoin Financial Regulation: Securities, Derivatives, Prediction Markets, and Gambling*, 16 Colum. Sci. & Tech. L. Rev. 144, 176 (2014) ("ETFs are also typically regulated under the Investment Company Act of 1940 because they invest in securities.").

For this reason, these ETFs cannot register under the ICA because they do not meet the definition of an investment company. Securities ownership "is the defining feature of an investment company under the ICA."[6] These ETFs do not invest in securities. The SEC should not treat them as if they do. To do so would only cloud the regulatory regime for ETFs.[7]

The request for comment seems to recognize this problem. It asks whether a Novel ETF would meet the definition of an investment company, which includes being in the business of investing in securities, "notwithstanding that its principal investment strategy is to invest in assets that may not be securities."[8] To ask the question is to answer it. A fund whose principal strategy is to hold something other than securities cannot meet the definition of an investment company where that definition includes being in the business of investing in securities.

ETFs that hold event contracts on elections or sports or futures contracts that track the performance of professional sports teams are also inconsistent with the purpose of an investment company. Investment companies are essentially "large, liquid pools of public savings entrusted to the company management for investment in productive enterprises."[9] But funds that hold event contracts on elections or sports or futures contracts on sports teams are not investing in productive enterprises. Prediction markets "allocate no capital, finance no businesses, create no employment opportunities, and safeguard no precious savings or investment capital."[10] Similarly, there is "'no cash-producing asset'" underlying funds that invest in futures on sports teams; they are just derivatives "'tied to a nonsensical index.'"[11] There is no reason for the SEC to treat these funds as equivalent to ETFs that invest in securities and in which millions of Americans invest.

In this respect, "it seems worth keeping in mind the chief reason ETFs and mutual funds have risen to such prominence in the first place—the trust and confidence they've engendered among investors."[12] Over the last few decades, ETFs "have become common investment vehicles to help American retail investors build financial nest eggs and to help institutional investors meet

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6 Hu and Morley, 92 S. Cal. L. Rev. at 1165.

7 *See* Commissioner Caroline A. Crenshaw, *Muddying the Waters: More Confusion on Crypto Asset Security Status* (May 31, 2025) (noting the confusion caused by not objecting to the effectiveness of new exchange-traded funds investing in crypto assets despite staff statements that the crypto assets were not securities). https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-crypto-asset-security-status-053125.

8 91 Fed. Reg. at 40648-49.

9 *The Investment Company Act of 1940*, 50 Yale L.J. 440, 440 (1940).

10 Jonathan R. Macey and Luca Enriques, *Why Prediction Markets and Securities Markets Require Different Regulatory Priorities*, Oxford Business Law Blog (Aug. 26, 2026), https://blogs.law.ox.ac.uk/oblb/blog-post/2026/08/why-prediction-markets-and-securities-markets-require-different-regulatory.

11 Philip van Doorn, *Wall Street wants to turn sports betting into ETFs. Critics call it dangerous 'nonsense,'* MarketWatch (Aug. 18, 2026), https://www.morningstar.com/news/marketwatch/2026081872/wall-street-wants-to-turn-sports-betting-into-etfs-critics-call-it-dangerous-nonsense.

12 Jeffrey Ptak, CFA, *Know When to Fold 'Em: Why the SEC Should Reject Prediction-Market ETFs*, Morningstar (Jun. 1, 2026), https://www.morningstar.com/funds/know-when-fold-em-why-sec-should-reject-prediction-market-etfs.

financial obligations."[13] ETFs have been "a relatively cheap, reliable gateway to global capital markets, creating trillions in wealth and advancing important goals like putting kids through college or paving the way to a secure, comfortable retirement after our working years."[14] Novel ETFs tied to prediction markets or professional sports teams "seem like the antithesis of that."[15]

Fortunately, the framework for regulating ETFs recognizes the need to distinguish funds with real value from funds with no economic utility. As the request for comment states, because ETFs are an exchange-traded product, exchanges must receive approval under the Securities Exchange Act of 1934 to list ETFs before they can trade on a national securities exchange.[16] The Exchange Act requires that the Commission find that the listing and trading of the new product is in the public interest before approving it.[17] And the Commission has said previously that such a finding "would be difficult with respect to a product that served no investment, hedging, or other economic function, because any benefits that might be derived by market participants would likely be outweighed by the potential for manipulation, diminished public confidence in the integrity of the markets, and other valid regulatory concerns."[18] Because funds that seek to hold event contracts on elections or sports or futures contracts tied to professional sports teams serve no investment, hedging, or other economic function, they would not be in the public interest.

The SEC asks why would a "Novel ETF with a principal investment strategy to invest in assets that are not securities seek to register as an investment company and be regulated as such?"[19] The answer is that ETFs registered and regulated under the ICA are considered safe investment vehicles.[20] But assets in unconventional funds not registered and regulated under the ICA are often "risky and unusual."[21] So Novel ETFs want to avoid this characterization. That is likely especially so for funds that wish to hold event contracts, since contrary to the CFTC's view that such products are swaps many states view them as gambling products. The Novel ETFs are so novel that the regulatory status of their underlying assets is far from clear. That makes it all the more important that the SEC treats these Novel ETFs as the risky and unusual ETFs that they are and refrains from regulating them under a regime that does not apply to them.

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13 *See, e.g.*, *Exchange-Traded Funds: Issues for Congress*, Congressional Research Service (Sept. 24, 2018), https://www.congress.gov/crs-product/R45318.

14 *Id.*

15 *Id.*

16 91 Fed. Reg. at 40,648.

17 *See, e.g.*, *Request for Comment on Exchange-Traded Products*, 80 Fed. Reg. 34,729, 34,738 (June 17, 2015).

18 *Order Approving Proposed Rule Change by the American Stock Exchange, Inc. Relating to Portfolio Depository Receipts*, Exchange Act Release No. 31591, 1992 WL 388730, at *3 n.20 (Dec. 11, 1992).

19 91 Fed. Reg. at 40,649.

20 *See, e.g.*, *Exchange-Traded Funds: Issues for Congress*, Congressional Research Service (Sept. 24, 2018) ("The majority of ETFs are 'plain-vanilla index-tracking products that are considered lower risk.), https://www.congress.gov/crs-product/R45318.

21 Hu and Morley, 92 S. Cal. L. Rev. at 1167; *see also Exchange-Traded Funds: Issues for Congress*, supra note 13 (discussing the risks of ETFs that are "not physically backed).

The SEC has already blurred the line between investing and gambling in the ETF space by approving single-stock ETFs. Single-stock ETFs are inappropriate for retail investors.[22] They use leverage, which can both magnify gains and exacerbate losses, and are not meant to be held for more than a day.[23] As a result, they are not really used for investing but rather tap into the "'gambling mindset.'"[24] Approving these Novel ETFs would eliminate the line completely.

That is because these ETFs would not be used as an investment. As Dave Nadig, the president of ETF.com, said recently about proposed ETFs tracking NHL teams,

> Nothing about these contracts is an investment. Nothing about them is a rational hedge for a financial position. The are pure and simple gambling vehicles running through a U.S. government-regulated exchange.[25]

The CFTC is already allowing prediction market companies to offer unregulated sports betting under the guise that event contracts on sporting events are legitimate financial derivatives.[26] The SEC should not similarly disguise election betting or sports wagering as ETF investments. In the case of ETFs tied to the performance of a specific hockey team, for example, there is no question that they "are designed for investors who want a direct, transparent bet on the on-ice fortunes of one specific hockey team, expressed through a regulated fund wrapper rather than a sportsbook."[27] But the SEC should not allow gambling products to be wrapped as ETFs. The SEC should not turn national securities exchanges into vehicles for gambling.

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22 Benjamin Schiffrin, *Perpetual Futures Are Inappropriate For Retail Investors, Just Like Single-Stock ETFs*, Better Markets (July 13, 2026), https://bettermarkets.org/analysis/perpetual-futures-are-inappropriate-for-retail-investors-just-like-single-stock-etfs/.

23 Ryan Jackson, CFA, *For Most Investors, Single-Stock ETFs Are Best Left Alone*, Morningstar (Apr. 9, 2024), https://www.morningstar.com/funds/most-investors-single-stock-etfs-are-best-left-alone.

24 Cheryl Winokur Munk, *Single-Stock ETFs tap into the market's 'gambling mindset,' expert says. What investors need to know.*, CNBC (Dec. 20, 2023), https://www.nbclosangeles.com/news/business/money-report/single-stock-etfs-tap-into-the-markets-gambling-mindset-expert-says-what-investors-need-to-know/3294880/; *see also* Alex Nicoll, *Funds that multiply the stakes of stock bets are more popular than ever—and facing bans overseas*, Business Insider (Jul. 20, 2026), https://www.businessinsider.com/leveraged-etfs-explained-volatility-risks-2026-7 (noting that the use of single-stock ETFs "often draws comparisons to gambling and can be called 'portfolio gambling'"); *Exchange-Trade Funds; Issues for Congress*, supra note 13 ("Investor protection is a concern even for industry experts who would normally promote the products. For example, leveraged funds are widely criticized for their retail investor education practices, because they can multiply both investment gains and losses, thus amplifying the risks and the needs for investor education and understanding of the product features. An inventor of the first U.S. ETF characterized leveraged ETFs as 'akin to gambling' and as presenting 'extreme' retail investor education challenges.").

25 van Doorn, supra note 11.

26 *See, e.g.*, Press Release, *CFTC's Prediction Markets Rules Cement Its Role as Industry Cheerleader*, Better Markets (June 10, 2026), https://bettermarkets.org/newsroom/cftcs-prediction-markets-rules-cement-its-role-as-industry-cheerleader/.

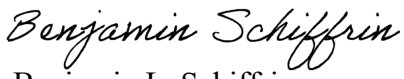
27 Jake Fitzgerald, *Wall Street Just Filed to Launch an ETF for All 32 NHL Teams. Here's What They Would Actually Track*, 24/7 Wall St. (Aug. 14, 2026), https://finance.yahoo.com/markets/options/articles/wall-street-just-filed-launch-000656342.html.

The SEC is supposed to protect investors. But approving these types of Novel ETFs would only serve to deceive investors into believing that these ETFs are similar to the ETFs tied to a securities index with which they have long been familiar. Indeed, the request for comment recognizes that many exchange-traded products (ETPs) that are not investment companies nonetheless refer to themselves as ETFs and ask how investors interpret this.[28] The answer is that investors likely do not understand that these products are vastly different from investment company ETFs.[29] Approving these Novel ETFs would only exacerbate this issue by treating these funds as no different than traditional ETFs. The SEC should not use the ETF wrapper to make it more difficult for investors to "recognize the difference between a prudent investment and a speculative" bet.[30] Yet that is exactly what approving these types of Novel ETFs would do.

Conclusion

We hope these comments are helpful as the Commission considers this matter.

Sincerely,



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28 91 Fed. Reg. at 40,649.

29 *See* Commissioner Caroline A. Crenshaw, *Passing the Buck on Reviewing Proposals to List and Trade Digital Asset ETPs* (Sept. 17, 2025) ("Conflating these two products is legally incorrect and practically dangerous for investors. I previously stated my concern that there will be confusion about what exactly ETPs are and that investors may infer they have protections in this product category that do not in fact exist. To be clear, these ETPs are **not** 40 Act ETFs that today are used by millions of American investors—despite the fact that some of these products may have "ETF" in their name.") (emphasis in original), https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-commodity-based-etps-091725; *Exchange-Traded Funds: Issues for Congress*, supra note 13 ("ETFs are one main type of investment within a broader category of all portfolio products that trade on exchanges called exchange-traded products (ETPs). Not all ETPs are created equal. Certain ETPs that represent a relatively small portion of the overall market are highly controversial. To add to the confusion, many of the complex and high-risk ETPs are also referred to as ETFs. The industry has not adopted a consistent naming convention for ETFs and ETPs.").

30 Dylan Dittrich, *Skate to where the puck is going*, Yahoo Sports (Aug. 5, 2026), https://sports.yahoo.com/articles/y-sports-biz-skate-to-where-the-puck-is-going-151931409.html.