GRAYSCALE®

August 31, 2026

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

Re: Request for Comment on Novel Exchange-Traded Funds (Release No. 33-11426; 34-105808; IC-36228; File No. S7-2026-24) (the "Request")

Dear Ms. Countryman,

Grayscale Operating, LLC ("Grayscale" d/b/a Grayscale Investments) appreciates the opportunity to provide the Securities and Exchange Commission (the "Commission" or "SEC") with our comments regarding the Request for Comment on Novel ETFs, and on ways to facilitate innovation in the ETF space while protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

The Request seeks a wide variety of information regarding Novel ETFs, including their treatment under the definition of "investment company" in the Investment Company Act of 1940, as amended (the "40 Act"), their interaction with Rule 6c-11's structural conditions, and the adequacy of Rule 485's registration and effectiveness timelines, all aimed at informing potential Commission action to facilitate innovation while protecting investors and maintaining fair, orderly, and efficient markets.

Grayscale is the world's largest digital asset-focused investment platform, with a mission to make digital asset investing simpler and open to all investors. Founded in 2013, Grayscale has been at the forefront of engaging with the SEC on the regulatory treatment of digital asset investment products, including through rulemaking petitions and comment letters, to clarify the standards governing this asset class. Grayscale's product history includes numerous regulatory firsts, including sponsoring the first Bitcoin and Ethereum exchange-traded products registered in the United States. Critically, Grayscale's sponsorship experience spans both principal registration frameworks relevant to this rulemaking. Grayscale and its affiliates sponsor ETFs operated as series of Grayscale Funds Trust, a registered open-end management investment company under the 40 Act ("40 Act ETFs"), the shares of which are registered under the Securities Act of 1933, as amended (the "Securities Act"), as well as exchange-traded commodity trusts that are not registered under the 40 Act and whose shares

are registered under the Securities Act and listed pursuant to rules under the Securities Exchange Act of 1934, as amended (the "Exchange Act") ("33 Act ETFs"). This dual operating record gives Grayscale direct, practical experience navigating the distinct disclosure, custody, creation/redemption, and listing standards applicable under each structure.

Grayscale is committed to assisting the Commission in establishing a principled and durable framework for Novel ETFs that serve investors, facilitate responsible innovation, and affirm the United States' position as the global leader in regulated digital asset investment products. We wish to express our gratitude to the Commission for its engagement with the public regarding this significant matter.

I. Executive Summary

Grayscale's comments will focus on five key areas where our direct operational experience is most relevant and where the Commission's decisions will have the greatest impact on shaping the regulated digital asset investment product market.

- The Commission should issue a clear statement confirming that the Tonopah Factors do not automatically classify exchange-traded commodity trusts as Investment Company Act issuers. These trusts were not intended to carry such a classification, and registered 40 Act ETFs operating under Rule 6c-11 meet the Subjective Test through regulatory judgment alone, without needing a Tonopah analysis. The existing analytical approach leads to legally inconsistent outcomes when applied rigidly to either structure. (*Section II, Questions 1, 2, 3, and 4*)
- The Commission should refrain from imposing restrictions on the usage of the term "ETF" exclusively to registered investment companies. The term "ETF" precisely denotes any exchange-traded product that possesses a functional arbitrage mechanism, exchange listing, and transparent pricing—characteristics that are common to both 40 Act ETFs (*i.e.*, registered investment companies) and 33 Act ETPs (*e.g.*, exchange-traded commodity trusts). In our experience, imposing labeling restrictions has led to increased investor confusion rather than mitigating it; therefore, a standardized disclosure of registration status would constitute the most appropriate measure. (*Section III, Questions 2 and 8*)
- Rule 6c-11 should not be amended to impose portfolio conditions, minimum securities holding requirements, or asset class restrictions on 33 Act ETFs such as registered digital asset commodity trusts with established compliance records. (*Section IV, Questions 5,6, and 9*)

- The Commission should address investor clarity through a standardized summary disclosure applied consistently across all exchange-traded products, rather than through new disclosure requirements layered on products with proven operating histories. (*Section V, Questions 7 and 26*)
- The Commission should establish an optional, confidential pre-filing consultation process with a defined staff response timeline, and aggregate public reporting. (*Section VI, Question 15*)

II. Investment Company Status: The Commission Should Not Disturb Existing Classification Standards

The Request raises, in Questions 1-4, the fundamental issue of how the 40 Act's Subjective Test and the five-factor Tonopah analysis that the Commission has employed since 1947 should function concerning Novel ETFs whose primary holdings are not securities. Grayscale operates in both contexts: our 40 Act ETFs are registered equity and derivatives-based ETFs classified as open-end investment companies under the 40 Act; our 33 Act ETFs are spot crypto exchange-traded commodity trust products that were intentionally designed from inception to function outside the purview of the 40 Act, being registered under the Securities Act.

Grayscale does not believe that a fund whose principal investment strategy is to hold assets that are not "securities" should satisfy the 40 Act's Subjective Test, nor should such a fund be incentivized to seek registration as an investment company in the first place rather than operate as an exchange-traded commodity trust. Allowing such funds to hold primarily non-securities would have unintended consequences. For example, consider the implications for the "Listed ETF" prong of Generic Listing Standards for Commodity-Based Trust Shares. Under the Listed ETF prong, a commodity-based trust holding a digital asset or other commodity may qualify if, on an initial basis only, an ETF providing no less than 40% of its net asset value to that same commodity is already listed and trading. That prong depends entirely on the ETF in question qualifying as an "ETF" as defined by reference to the 40 Act. The Listed ETF Prong therefore immediately and automatically bestows generic-listing eligibility on a crypto asset solely because it is held in a 40 Act ETF, even where it might not otherwise qualify. The Generic Listing Standards for Commodity-Based Trust Shares[1] allow a single, potentially transient classification decision at the 40 Act ETF level to unlock indefinite generic-listing eligibility for an

[1] SEC, "SEC Approves Generic Listing Standards for Commodity-Based Trust Shares," (Sep. 17, 2025), https://www.sec.gov/newsroom/press-releases/2025-121-sec-approves-generic-listing-standards-commodity-based-trust-shares.

entirely separate commodity trust ETF. This could be abused if non-security digital assets are permitted to be included as the primary holding of a 40 Act ETF.

Our primary recommendation is to maintain regulatory stability: the Commission should continue to apply the Tonopah Factors consistently as a facts-and-circumstances analysis and should not adopt a categorical rule based solely on an issuer's wrapper, label, or decision to seek registration. Properly applied, the existing framework preserves the statutory distinction between registered investment companies and commodity-trust 33 Act ETFs while allowing funds whose portfolios and businesses satisfy Section 3 to register under the 40 Act. The Commission should provide interpretive guidance to reduce unnecessary legal uncertainty without displacing the statutory inquiry.

III. The Commission Should Preserve the Current, Function-Based Understanding of the "ETF" Label

The Request asks whether investors are confused by the use of ETF or fund terminology for 33 Act ETFs (*i.e.*, exchange-traded commodity trusts that are not registered investment companies). Grayscale has direct experience with this question from both sides of the registration process. Our 33 Act ETFs operated as publicly traded commodity trusts for years before converting to exchange-traded commodity trusts. Our experience leads us to a clear answer. The term ETF accurately describes the economic reality of exchange-traded commodity trusts, and restricting its use to registered investment companies would create investor confusion rather than resolve it. An alternate naming convention, such as 'ETP', only increases investor confusion. If the goal is to highlight the differences between a 40 Act ETF and a 33 Act ETF, rather than rely on such naming conventions, the Commission should, and FINRA currently does, require a standardized, prominent disclosure of registration structure and associated investor protections in all exchange-traded product offering materials, a targeted instrument that gives investors the information that actually matters without disrupting nomenclature that accurately reflects how these products function in markets.

Grayscale's own experience bears this out: Grayscale's products such as Grayscale Bitcoin Mini Trust ETF (Ticker: BTC), Grayscale Ethereum Staking Mini ETF (Ticker: ETH), Grayscale Hyperliquid Staking ETF (Ticker: HYPG), The Zcash ETF (Ticker: ZCSH), and Grayscale CoinDesk Crypto 5 ETF (Ticker: GDLC) are 33 Act ETFs that are not registered investment companies, yet use the term "ETF" in their name and are labeled as ETFs in the marketplace without issue. We note other digital asset ETF issuers follow this convention as well. Investors generally interpret this labeling based on how a product functions and trades, not on its underlying registration status. Moreover, each product's marketing materials include clear risk

disclosures specifying that the product is not registered under the 40 Act and is therefore not subject to the same regulations and protections as 40 Act-registered ETFs and mutual funds. The following is a sample of what Grayscale currently uses in promotional materials related to its 33 Act ETFs:

[33 Act ETF Name] (the "Fund"), an ETP is not an investment company registered under the Investment Company Act of 1940 ("40 Act"), and therefore is not subject to the same regulations and protections as 40 Act registered ETFs and mutual funds. An investment in the Fund is subject to significant risk, heightened volatility, and is not suitable for an investor that cannot afford the loss of the entire investment. An investment in the Fund is not a direct investment in [asset underlying Fund].

This existing practice demonstrates that the "ETF" label, and the investor protections that actually matter, can and do turn on disclosure and function, rather than on registration status under the 40 Act.

IV. Rule 6c-11: Preserve the Existing Framework for Digital Asset ETFs with Established Track Records, Do Not Extend the Rule to Exchange-Traded Commodity Trusts

Rule 6c-11 provides exemptions from specified provisions of the Investment Company Act and the rules thereunder and establishes the conditions under which a registered open-end management investment company that satisfies the Rule's definition and conditions may operate as an ETF without obtaining an individual exemptive order. The Rule defines "basket" and "portfolio holdings" to include "securities, assets or other positions," and, although paragraph (c)(4) requires certain leveraged and inverse index ETFs to comply with Rule 18f-4, does not itself impose minimum securities-holding requirements, categorical asset-class exclusions, or portfolio diversification, concentration, or issuer-specific limits on an otherwise eligible ETF. Rule 6c-11 also imposes significant eligibility and operational conditions, including full portfolio transparency. Grayscale does not believe that new portfolio or structural conditions are needed.

The perceived novelty of an ETF's assets or investment strategy does not, by itself, demonstrate that the ETF arbitrage mechanism is impaired or that categorical portfolio restrictions are warranted. Rule 6c-11's daily portfolio-holdings disclosure requirement is designed to enable authorized participants and other market participants to value the ETF's portfolio intraday, identify arbitrage opportunities, and hedge their positions. The Rule also requires website disclosure regarding the ETF's prior-business-day NAV, market price, premiums or discounts, and median bid-ask spread, as well as written policies and procedures

governing the construction and acceptance of baskets. This information flow is designed to support for an effective and efficient ETF arbitrage mechanism and most, if not all, 33 Act ETFs provide analogous information, notwithstanding that they are not subject to Rule 6c-11. For example, the websites of Grayscale's BTC, ETH, HYPG, ZCSH, and GDLC products, several of our 33 Act ETFs, publicly provide NAV per share, GAAP NAV per share, market price, premium or discount, 30-day median bid-ask spread, total digital assets held by such 33 Act ETFs, and digital assets per share.

Whether an issuer is an investment company should be addressed under Section 3 of the Investment Company Act, rather than through a separate portfolio-composition test embedded in Rule 6c-11. Grayscale therefore does not believe the Commission should amend Rule 6c-11 to impose minimum holdings in securities, categorical asset-class or strategy exclusions, or Rule 6c-11-specific diversification, concentration, or issuer-specific limits solely because an ETF is characterized as "novel."

33 Act ETFs are outside Rule 6c-11 by definition and should continue to be regulated under the Securities Act, the Exchange Act, applicable exchange-listing frameworks, and other applicable law. Concerns specific to exchange listing or market surveillance should be addressed within those frameworks and should not be used as a basis for converting the Rule into a substantive portfolio-eligibility regime for registered open-end ETFs.

V. Investor Clarity: Standardize Existing Disclosures Rather Than Layer New Regimes on Proven Products

The Request asks whether the Commission should adopt new or heightened disclosure requirements for Novel ETFs. Grayscale believes that the information investors need to understand exchange-traded products is already required to be disclosed. The Commission's priority in this area should be standardizing and improving the consistency of existing disclosures, not creating additional regulatory burden by adding new disclosure regimes that add cost and complexity for products with established operating histories.

Grayscale does not support increased disclosure requirements specific to registered digital asset ETFs or commodity trusts with proven operating histories. These products have already disclosed their structures, risks, and mechanics to investors through multiple market conditions and regulatory reviews by the Division of Corporation Finance that now has several years of experience reviewing digital asset disclosures. In the case of Grayscale, this dates back to 2020 when our Bitcoin commodity trust became the first digital asset SEC reporting investment vehicle in the U.S. Since then, the Commission's staff has examined these and other digital asset disclosures repeatedly through various post-effective amendments and has

released guidance on expectations for digital asset disclosures for crypto exchange-traded products.[2] Imposing new, product-specific disclosure rules on well-established products would add costs for sponsors — costs that are ultimately passed on to investors via higher expense ratios — without significantly enhancing investor protection. If the Commission believes increased disclosure is necessary for Novel ETFs, such requirements should focus on truly new product categories where existing disclosure frameworks face significant challenges, rather than on digital asset products with proven disclosure records.

VI. An Optional Confidentiality Period Would Reduce Imitative Filings and Protect Sponsor Investment

Grayscale supports the establishment of an optional, confidential pre-filing consultation process for Novel ETFs and submits that our direct experience uplisting our Grayscale CoinDesk Crypto 5 ETF (Ticker: GDLC) as an ETF provides the Commission with a concrete case study for why such a process is needed and what it would accomplish.

Grayscale worked collaboratively and extensively with both NYSE Arca and the SEC's Division of Trading and Markets over several months to design a generic listing rule framework tailored to multi-asset digital asset ETFs. That collaborative process culminated in Trading and Markets' approval of NYSE Arca's Rule 19b-4 filing on June 30, 2025 pursuant to delegated authority. Notwithstanding this staff-level approval, reached after substantial engagement between Grayscale, the exchange, and the Division, the Commission subsequently issued a notice of its intent to review the delegated approval and imposed a stay, and the matter was not fully resolved until GDLC's listing and uplisting to NYSE Arca on September 19, 2025. The intervening period between staff approval and final Commission resolution introduced significant market and operational uncertainty for Grayscale, NYSE Arca, and investors, notwithstanding the extensive substantive work already completed at the staff level. Grayscale believes this experience illustrates precisely the value a confidential pre-filing consultation process would provide: by surfacing and resolving substantive and procedural questions, including any Commission-level concerns, before a public filing is made and before staff delegated authority is exercised, such a process would reduce the risk of post-approval review periods and stays, shorten time-to-market, and provide greater certainty to sponsors, exchanges, and investors alike, all without sacrificing the Commission's ability to fully evaluate novel product structures.

We believe that a confidential draft registration statement period for Novel ETFs would provide immense benefit to the market. Because Novel ETFs often require significant

[2] SEC Division of Corporation Finance, "Crypto Asset Exchange-Traded Products," (July 1, 2025), https://www.sec.gov/newsroom/speeches-statements/cf-crypto-asset-exchange-traded-products-070125.

investment in developing new structures and investment strategies, a period of confidentiality would allow sponsors to protect this investment and their underlying intellectual property while their filing is under review, rather than exposing that work to competitors before the product has launched. A confidential filing period would also reduce the incentive for competing sponsors to file imitative or duplicative registration statements simply to avoid losing ground while an original filing remains under staff review.

VII. Conclusion

Grayscale has developed regulated digital asset investment products under the Commission's oversight, navigating multiple market cycles, regulatory uncertainties, and legal challenges. Our core focus remains investor protection in all that we create. We have experience as both a registered investment company sponsor under Rule 6c-11 and as an exchange-traded commodity trust sponsor under the Securities Act. This dual experience provides us with unique insights into the issues raised by this Request, which we fully share. Grayscale respectfully urges the Commission to:

- Issue interpretive guidance preserving regulatory stability for both 40 Act ETFs/registered investment companies and 33 Act ETFs/exchange-traded commodity trusts, confirming that affirmative election of 40 Act registration satisfies the Subjective Test for registered ETFs, and that the Tonopah Factors do not sweep commodity trust structures into 40 Act requirements they were not designed to carry;
- Decline to restrict use of the term "ETF" to registered investment companies, and instead require standardized Product Structure Summary disclosures applied consistently across all exchange-traded products;
- Preserve Rule 6c-11 as written for registered digital asset ETFs with established compliance track records; decline to extend it to exchange-traded commodity trusts; and address any additional conditions only for genuinely novel product categories on a tiered, evidence-based basis coordinated with concurrent generic listing standard proceedings;
- Address investor clarity through standardization of existing disclosure requirements rather than new regimes for products with proven operating histories; and
- Establish an optional, confidential Novel ETF pre-filing consultation process with a 45-day staff response commitment, an expedited effectiveness incentive for responsive filings, and aggregate annual public reporting for accountability.

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Grayscale is available to meet with the Division of Investment Management, the Division of Trading and Markets, or the Office of General Counsel at the Commission's convenience to discuss any aspect of these comments. We are prepared to provide additional analysis or technical input on any of the issues raised in the Request. Our Chief Legal Officer, Craig Salm, is available at the Commission's request.

We appreciate the Commission's consideration of these comments and look forward to the Commission's action on this important proceeding.

Respectfully submitted,

/s/ Craig Salm

Craig Salm
Chief Legal Officer