CHAPMAN
Focused on Finance

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VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

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

Dear Ms. Countryman:

Thank you for the opportunity to comment on the Request for Comment on Novel ETFs (the *"Request"*) issued by the U.S. Securities and Exchange Commission (the *"Commission"* or the *"SEC"*).[1] We commend the Commission for undertaking this examination, and in particular for its stated commitment to fostering innovation in the exchange-traded fund (*"ETF"*) market while preserving the investor protections that have made that market so successful.

Chapman and Cutler LLP's Investment Management Group has extensive experience with ETF products that have helped shaped the industry. Our client base spans the full spectrum of ETF market participants, from emerging sponsors to some of the largest financial institutions in the world. We serve as fund counsel to more than 600 ETFs and our attorneys have assisted our clients in developing many firsts in the ETF marketplace that would likely be deemed "novel" under the framework contemplated by the Request: spot and futures-based cryptocurrency ETFs, defined outcome ETFs, single-stock ETFs, long/short ETFs, and VIX-based products, among others. This depth of experience with products developed for a diverse client base gives us a practical perspective on the issues raised in the Request. The recommendations contained in this letter are based upon input from a range of our clients and our experience in the ETF industry. The Request contemplates a wide variety of issues, and for many of those issues there is not a consensus among our clients; however, we have endeavored to suggest actions that would result in a workable framework. As explained in further detail below, we respectfully submit to the Commission the following in response to the Request:

(i) ETFs utilizing a Subsidiary Structure (as defined below) unambiguously meet the definition of "investment company" under Section 3(a)(1)(A) of the Investment Company Act of 1940, as amended (the *"1940 Act"*), whether by holding

[1] *Request for Comment on Novel ETFs*, Investment Company Act Release No. IC-36228, Securities Act Release No. 33-11426, Securities Exchange Act Release No. 34-105808 (File No. S7-2026-24).

themselves out as investment companies or by virtue of such ETF's portfolio being comprised primarily of securities;

(ii) the creation of a "Novel" ETF classification could lead to confusing and uneven application with the likelihood impeding marketplace innovation;

(iii) significant amendments to Rule 6c-11 or Rule 485 are not necessary, although we see potential value in allowing the staff of the Commission (the *"Staff"*) additional time to review filings made pursuant to Rule 485(a) that present narrowly defined, objectively determined matters of first impression. The Commission should also consistently enforce the existing rules, preserve automatic effectiveness under Rule 485 and permit a voluntary confidential filing process; and

(iv) the Commission should create greater regulatory parity between ETFs and exchange-traded products (*"ETPs"*) that fall outside of the registration framework of the 1940 Act.

I. Funds Utilizing a Subsidiary Structure Meet the 1940 Act Definition of Investment Company

The questions posed in Part II of the Request are closely related and we address them together. In substance, they ask under what circumstances, if any, a pooled investment vehicle (a *"fund"*) that ultimately derives most of its economic exposure from non-securities may properly register and offer its shares to investors under the 1940 Act. In particular, the Commission seeks comment on a structure pursuant to which a fund invests in common shares of a wholly-owned subsidiary, which itself invests in instruments that fall outside the 1940 Act's definition of "security" (the *"Subsidiary Structure"*). Most commonly, the investments comprising the subsidiary's portfolio are derivatives contracts that utilize as a reference asset an asset that is not itself a security (typically, a "commodity," as such term is defined in Section 1a(9) of the Commodity Exchange Act). While the Subsidiary Structure has come under scrutiny as a result of its recent proposed use in ETFs that seek to provide exposure to event contracts, bitcoin volatility and other investment exposures, it is worth noting that the Subsidiary Structure is not novel. No fewer than 75 funds registered under the 1940 Act with cumulative assets under management exceeding $80 billion currently utilize the Subsidiary Structure to provide exposure to commodities by investing, through a wholly-owned subsidiary, in exchange-listed commodity futures contracts (*"1940 Act Commodity Funds"*).[2] The use of the Subsidiary Structure by such funds has allowed investors to derive such exposures in vehicles subject to the provisions of the 1940 Act, and protections thereof, while also benefiting from the favorable tax treatment afforded to such funds by Subchapter M of the Internal Revenue Code of 1986 (the *"Code"*).

[2] These figures are drawn from publicly available data as of July 7, 2026.

Funds seeking to utilize the Subsidiary Structure to provide exposures to assets that the SEC may deem "novel" often structure their investment portfolios in precisely the same manner as existing 1940 Act Commodity Funds. Such funds propose to have investment portfolios composed primarily of securities, as such term is defined in Section 2(a)(36) of the 1940 Act, as their holdings would be common shares issued by a wholly-owned subsidiary, cash, and cash equivalents that are securities, such as U.S. government securities, money market funds, short-term bond ETFs, and/or corporate debt securities such as commercial paper and other short-term unsecured promissory notes issued by businesses that are rated investment grade or of comparable quality. The wholly-owned subsidiary then enters into derivatives contracts that provide the desired investment exposure. The cash equivalents are used to collateralize the derivatives positions. These funds, in exactly the same manner as the 1940 Act Commodity Funds or any other open-end fund registered under the 1940 Act, seek to hold themselves out as being engaged primarily in the business of investing, reinvesting or trading in securities.

The questions at hand, therefore, are whether as a matter of statutory interpretation such funds meet the definition of "investment company" set forth in Section 3(a)(1)(A) of the 1940 Act; and if so, whether questions of public policy ought to persuade the Commission to adopt rules or interpretations that would prevent or dissuade such funds from registering and offering their shares under the 1940 Act.

It is our position that funds utilizing the Subsidiary Structure unambiguously meet the definition of "investment company" set forth in Section 3(a)(1)(A) of the 1940 Act and that allowing such funds to register under the 1940 Act and become subject to its rigorous and comprehensive requirements serves to protect investors and facilitate capital formation.

Section 3(a) of the 1940 Act

Section 3 of the 1940 Act defines the term "investment company" as an issuer that:

(i) Is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities (Section 3(a)(1)(A), which the Request refers to as the *"Subjective Test"*), or

(ii) Is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 percent of such issuer's total assets

(exclusive of Government securities[3] and cash items), on an unconsolidated basis (Section 3(a)(1)(C), which the Request refers to as the *"Objective Test"*).[4]

Funds utilizing the Subsidiary Structure generally seek to qualify as an "investment company" under the definition set forth in Section 3(a)(1)(A) of the 1940 Act.

By its terms, Section 3(a)(1)(A) is satisfied along any of three independent paths. These paths are stated in the disjunctive, joined by the word "or," and thus each is independently sufficient to bring an issuer within the definition. An issuer is therefore within the definition if it (i) *is* engaged primarily in the business of investing, reinvesting, or trading in securities; (ii) *holds itself out as being* engaged primarily in the business of investing, reinvesting, or trading in securities, or (iii) *proposes to* engage primarily in the business of investing, reinvesting, or trading in securities (emphasis added).

The first path by which an issuer may be deemed to be an investment company under the Section 3(a)(1)(A) definition is an examination of its actual activities. The critical inquiry is whether the primary business activity of the issuer is investing, reinvesting, or trading in securities.

The inclusion of *"holds itself out"* as a distinct second path in the Section 3(a)(1)(A) definition indicates that while an issuer may be deemed to be an investment company if it is engaged primarily in the business of investing, reinvesting, or trading in securities, an issuer may *also* be deemed to be an investment company if it is determined that *it has held itself out* as having been primarily engaged in such activities.

If the sole means of determining an issuer's status under Section 3(a)(1)(A) was whether it was actually engaged primarily in the business of investing, reinvesting, or trading in securities, whether the issuer was subjectively holding itself out as being engaged in such activities would be irrelevant and there would be no need to include it in the definition. Section 3(a)(1)(A) would simply be drafted as "... "investment company" means any issuer which is engaged primarily in the business of investing, reinvesting, or trading in securities."

The inclusion of *"holds itself out"* in the definition set forth in Section 3(a)(1)(A) and the interpretation that it presents a sufficient condition are natural and important from an investor protection perspective. An issuer's outward facing statements and activities are an investor's most

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[3] *See* 15 U.S.C. § 80a-2(a)(16) (which defines "Government security" for the purposes of the 1940 Act).

[4] *See id.* § 80a-3(a)(1)(C). *See also id.* § 80a-3(a)(2) (which defines "investment securities" for the purposes of the "Objective Test," as relevant here, to include all securities except (a) Government securities and (b) securities issued by majority-owned subsidiaries of the issuer which are (i) not investment companies, and (ii) not relying on the exclusion from the definition of investment company in Section 3(c)(1) or (7) (*i.e.*, private funds)).

critical means of determining that issuer's status under the 1940 Act. If an issuer presents itself as being primarily engaged in the business of investing, reinvesting, or trading in securities, a reasonable investor will believe that an investment in the securities of such issuer will be subject to the protections offered by the 1940 Act. If an issuer's outward facing representations that it was an investment company were not sufficient to establish its status as such, it would lead to the implausible conclusion that an issuer that has held itself out as an investment company, and induced investment in reliance on those representations, could nonetheless argue that it need not conform to the requirements of the 1940 Act because it was not actually primarily engaged in the business of investing, reinvesting, or trading in securities.

As such, the plain text interpretation of Section 3(a)(1)(A) is that an issuer holding itself out as being engaged primarily in the business of investing, reinvesting, or trading in securities is sufficient to determine that such an issuer is an investment company and thus subject to the requirements of the 1940 Act. Accordingly, funds utilizing the Subsidiary Structure that hold themselves out as investment companies, such as the 1940 Act Commodity Funds, are investment companies pursuant to Section 3(a)(1)(A) of the 1940 Act.

However, even if the Commission were to disagree with this interpretation and conclude that an issuer having subjectively held itself out as an investment company was itself not sufficient for establishing its status as an investment company, and that an additional objective finding that such issuer was also engaged primarily in the business of investing, reinvesting, or trading in securities was necessary for determining investment company status, funds utilizing the Subsidiary Structure would still meet this threshold.

As recited above, funds utilizing the Subsidiary Structure invest in a portfolio of investments composed primarily of securities, as such term is defined in the 1940 Act. The instruments comprising such funds' portfolios are common shares of a wholly-owned subsidiary and cash equivalents, most commonly U.S. government securities, money market funds, short-term bond ETFs, and/or corporate debt securities such as commercial paper and other short-term unsecured promissory notes issued by businesses that are rated investment grade or of comparable quality. All such investments meet the definition of security as set forth in Section 2(a)(36) of the 1940 Act.

The common shares of a wholly-owned subsidiary constitute "stock," "transferable shares," or an "interest commonly known as a 'security'" and therefore are a "security" by the terms of Section 2(a)(36). If common shares of a subsidiary were not to be deemed a "security," the carveout from the definition of "investment securities" in Section 3(a)(2) of the 1940 Act of securities issued by a majority-owned subsidiary would not be necessary. Additionally, the Commission has already determined that U.S. government securities meet the definition of security set forth in Section 2(a)(36) in *J.D. Gillespie, 13 S.E.C. 470 (1943).* In *J.D. Gillespie*, the

Commission found that a trust may be deemed to be an investment company under Section 3(a)(1)(A) if it holds exclusively U.S. government obligations.[5]

While common shares of wholly-owned subsidiaries and U.S. government securities are excluded from the definition of "investment securities" in Section 3(a)(2), such exclusion is inapplicable in the context of Section 3(a)(1)(A) as Section 3(a)(1)(A) uses the term "securities" instead of "investment securities." In fact, the explicit exclusion of U.S. government securities and shares of majority-owned subsidiaries from the definition of "investment securities" in Section 3(a)(2) is itself compelling evidence that Congress considered such instruments to be securities under Section 2(a)(36). The text of Section 3(a)(2) confirms this understanding:

> "As used in this section, "investment securities" includes ***all securities*** except (A) Government securities, . . . and (C) securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exception from the definition of investment company in paragraph (1) or (c) of subsection (c)."[6]

The structure of the definition is that it applies to all securities, except for the three carveouts, two of which are U.S. government securities and shares of majority-owned subsidiaries. If U.S. government securities or common shares of majority-owned subsidiaries were not securities, there would be no need to explicitly exclude them from the definition of "investment securities."

Accordingly, when evaluating an issuer's assets under Section 3(a)(1)(A) there is no statutory basis for determining that common shares of wholly-owned subsidiaries or U.S. government securities do not meet the definition of security under Section 2(a)(36).

Funds utilizing the Subsidiary Structure that invest in a portfolio composed of common shares of a wholly-owned subsidiary, cash and cash equivalents, are, as a factual matter, engaged primarily in the business of investing, reinvesting, or trading in securities and are therefore most properly classified as investment companies subject to the 1940 Act.

This interpretation has also been long-established through precedent. As mentioned above, since at least July 2009 funds have been utilizing the Subsidiary Structure. This includes some of the most high-profile ETF launches of recent years, most notably the launches of ETFs that provide exposure to bitcoin through the use of bitcoin futures contracts. The Commission has, in practice,

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[5] *J.D. Gillespie,* 13 S.E.C. 470 (1943) at fn. 4.

[6] 15 U.S.C. § 80a-3(a)(2).

permitted funds utilizing the Subsidiary Structure to register and offer their shares under the 1940 Act. These funds have operated without issue for over 15 years and investors in the funds have benefited from the robust protections set forth in the 1940 Act and from the favorable tax treatment afforded to such funds by the Code.

Given that such funds appear to unambiguously meet the definition of investment company set forth in Section 3(a)(1)(A), and funds utilizing the Subsidiary Structure have operated as registered open-end funds under the 1940 Act for over twenty years without issue, it is unclear what statutory basis the Commission would have to now limit, by rule or interpretation, use of the structure and how the Commission's twin mandates of investor protection and capital formation would be best served by narrowing the application of the 1940 Act to prevent funds seeking to utilize the Subsidiary Structure to provide novel investment exposure.

The 1940 Act provides, by far, the most substantive and protective framework of any of the federal securities laws. Where the Securities Act of 1933 (the *"1933 Act"*) rests principally on disclosure and the Securities Exchange Act of 1934 (the *"1934 Act"*) relies on a dual mandate of disclosure and the maintenance of fair, orderly, and efficient markets,[7] the 1940 Act adds a layer of substantive and structural protection: governance by a board of directors that must include a meaningful proportion of directors independent of the adviser and owing fiduciary duties to the fund and its shareholders; prohibitions on and Commission oversight of affiliated transactions and self-dealing; independent custody of fund assets; strict limits on leverage and capital structure; a statutory fiduciary duty with respect to the compensation the adviser receives; and mandatory compliance programs overseen by a chief compliance officer.[8]

The contrast with the regime applicable to commodity pools is instructive. A commodity pool that offers its interests publicly registers those interests under the 1933 Act and is operated by a commodity pool operator that must register with the Commodity Futures Trading Commission (the *"CFTC"*) and maintain membership in the National Futures Association. Such a pool is subject to the antifraud provisions of the Commodity Exchange Act and to the disclosure, reporting, and recordkeeping requirements of Part 4 of the CFTC's regulations, which require

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[7] *See*, *e.g.*, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, Release Nos. 33-11216; 34-97989, at 110-11 (July 26, 2023); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976); *Pinter v. Dahl*, 486 U.S. 622 (1988); *Lawson v. FMR LLC*, 571 U.S. 429, 451 (2014).

[8] *See*, *e.g.*, *id.* § 80a-10 (board composition, including the requirement that a specified proportion of directors be independent of the adviser and principal underwriter); *id.* § 80a-15 (shareholder and independent-director approval of advisory and underwriting contracts); *id.* § 80a-17 (prohibitions on and Commission oversight of affiliated transactions, joint arrangements, and self-dealing, and the custody requirements of Section 17(f)); *id.* § 80a-18 (limits on capital structure and senior securities); *id.* § 80a-35(b) (adviser fiduciary duty with respect to the receipt of compensation); and 17 C.F.R. § 270.38a-1 (mandatory compliance programs and chief compliance officers).

delivery of a disclosure document, periodic account statements, and an annual report certified by an independent public accountant. These are meaningful protections, but they are overwhelmingly disclosure-based, and they are not accompanied by the substantive, structural safeguards that distinguish the 1940 Act. A commodity pool is not required to have a board of directors, and it consequently has no independent directors owing fiduciary duties to participants, no independent approval of the operator's compensation, and no independent body charged with overseeing conflicts of interest. There is no analogue to Section 17's prohibitions on affiliated transactions and self-dealing; no analogue to Section 17(f)'s custody requirements, although margin posted with a futures commission merchant is subject to segregation under the Commodity Exchange Act; no analogue to Section 18's limits on leverage and capital structure; no analogue to Section 15's requirement that advisory arrangements be approved by independent directors; no analogue to Section 36(b)'s fiduciary duty with respect to advisory compensation; and no analogue to Rule 38a-1's mandatory compliance program administered by a chief compliance officer. Nor is a commodity pool subject to Section 22's daily valuation and redemption requirements or to Section 13's requirement that fundamental investment policies be changed only upon shareholder approval. An investor who purchases shares of a fund utilizing the Subsidiary Structure accordingly receives materially greater protection than an investor who acquires an interest in a commodity pool providing the same underlying economic exposure.

Registered investment companies have experienced extraordinary growth not in spite of the 1940 Act's enhanced protections, but because of them. Robust investor protection has generated the confidence in which innovation and capital formation flourish. Investors are willing to allocate capital to new and sophisticated strategies precisely because they trust that a registered fund wrapper carries the safeguards that the 1940 Act guarantees. Nowhere is that clearer than in the market for ETFs. As the Commission observes in the Request, total net assets under management in ETFs grew from over $4 trillion at the end of 2019 to over $12 trillion at the end of 2025.[9]

It follows that, when an issuer seeks to bring itself and its shareholders within this regime, the Commission's twin mandates of protecting investors and facilitating capital formation counsel strongly in favor of permitting it to do so. The Commission should read the definition of "investment company" in Section 3 with those mandates in view. A construction that welcomes issuers who wish to accept the 1940 Act's obligations advances investor protection; a construction that turns such issuers away, and channels them into less-protective vehicles, does the opposite.

Such a determination would not conflict with other positions that the Commission has taken with regard to its interpretation of Section 3 of the 1940 Act. The five factors that the Request labels the *"Tonopah Factors"* originated in a materially different setting and are most properly

[9] *Request* at page 3 (observing that, between the end of 2019 and the end of 2025, total net assets under management in ETFs grew from over $4 trillion to over $12 trillion).

applied in circumstances distinct from those considered when a fund holds itself out as being primarily engaged in investing, reinvesting, or trading in securities. *Tonopah* was an operating company that did not hold itself out as an investment company and sought to avoid classification as one. More than 40 percent of its assets, exclusive of cash and U.S. government securities, were investment securities, and it therefore fell within the numerical definition then codified at Section 3(a)(3), the predecessor of today's Section 3(a)(1)(C).[10],[11] It applied to the Commission under Section 3(b)(2) for an order declaring that it was primarily engaged in a business other than investing in securities, namely metal mining.[12] It was to resolve that contested "primarily engaged" question, for an issuer already caught by the numerical test and seeking to escape it, that the Commission articulated the five considerations, describing them as the "principal relevant considerations."[13]

The Tonopah Factors remain sound interpretive guidance in the context that gave rise to them. They are a useful tool for distinguishing a genuine operating company from an inadvertent investment company when an issuer is ensnared by the numerical test set forth in Section 3(a)(1)(C) and asserts that it is primarily engaged in a non-investment business. They should not, however, be transplanted into analyses taking place under Section 3(a)(1)(A) in order to exclude issuers that hold themselves out as, and wish to be, investment companies. Repurposing a doctrine designed to prevent operating companies from evading the 1940 Act so as instead to prevent willing issuers from entering the 1940 Act would invert its function. As Judge Easterbrook reasoned, "the Commission thought in Tonopah that what principally matters is the beliefs the company is likely to induce in investors. Will its portfolio and activities lead investors to treat a firm as an investment vehicle or as an operating enterprise?"[14] In the case of funds that hold themselves out as, and operate as, investment companies, there can be no mistake in this regard; investors could not reasonably believe, taking into account the entire context of, and disclosure relating to, a fund's offering, that a fund is an operating company rather than an investment vehicle.

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[10] In the Matter of Tonopah Mining Co. of Nevada, 26 S.E.C. 426 (1947) (*"Tonopah"*).

[11] *Tonopah*, 26 S.E.C. at 426 (noting that it was undisputed that more than 40 percent of the applicant's assets, exclusive of cash and Government securities, were investment securities, such that the applicant fell within the definition then codified at Section 3(a)(3), the predecessor of the present Section 3(a)(1)(C)).

[12] Section 3(b)(2) of the 1940 Act permits the Commission, upon application, to declare an issuer that is within the numerical definition to be primarily engaged in a business other than investing in securities and therefore not an investment company. *See* 15 U.S.C. § 80a-3(b)(2). The analogous self-executing exclusion for issuers primarily engaged in a non-investment business through majority-owned subsidiaries appears in Section 3(b)(1), and the objective safe harbor appears in Rule 3a-1. *See* 17 C.F.R. § 270.3a-1.

[13] *Tonopah*, 26 S.E.C. at 426.

[14] *Securities and Exchange Commission v. National Presto Industries, Inc.*, 486 F. 3d. 305, 315 (7th Cir. 2007).

In sum, under either reading of Section 3(a)(1)(A), whether the act of holding itself out is alone sufficient or an examination of the issuer's actual activities is also required, there is compelling statutory support for the position that funds utilizing the Subsidiary Structure meet the definition of investment company and should be permitted to register and offer their shares as such. That conclusion rests not only on the plain text of the statute, but also on sound policy and on the Commission's own longstanding practice.

II. Additional Classification for "Novel ETFs" Is Unnecessary

We do not believe a specific classification of "Novel ETFs" or accompanying rule amendments to contemplate such a classification are necessary or appropriate. The existing disclosure requirements under the 1933 Act, the 1934 Act and the 1940 Act are sufficient to inform investors about the characteristics, risks, and strategies of ETFs, regardless of how innovative or unfamiliar those products may be. This disclosure regime has long been the foundation of U.S. securities regulation and has served as an educational tool that provides investors with the information necessary to make informed investment decisions. A "Novel" classification would require the Commission or its Staff to make subjective, and potentially merit-based determinations about which products warrant additional scrutiny, a role inconsistent with the existing statutory framework. Accordingly, the implementation of a "Novel" definition could present significant operational concerns and ongoing implementation difficulties.

As a threshold matter, it is difficult, if not impossible, to define in advance what is "novel." Novelty, like materiality, is inherently contextual and resists reduction to a fixed formulation; that is precisely why the federal securities laws have never adopted a bright-line definition of "material" and instead rely on a facts-and-circumstances analysis informed by decades of judicial and administrative interpretation. Unlike materiality, however, a "Novel" classification has no comparable body of interpretive guidance, and as contemplated by the Request, the Commission or its Staff would appear to retain unilateral discretion to apply a "Novel" standard to any new filing that is not materially consistent with a previously effective fund. Such Staff determinations could be subject to the views and perspectives of a small number of individuals, and those views and perspectives could change depending on administration and staffing changes. Left unchecked, that discretion would allow the designation to expand well beyond genuinely unprecedented products, with no meaningful way for sponsors to predict its application. A product that the Commission may designate as "Novel" at one point in time may become commonplace in a very short period. ETFs providing exposure to digital assets and ETFs employing defined outcome strategies illustrate how new and innovative products driven by market demand can become widely adopted. The continued application of "Novel" to products that have become standard in the industry risks chilling innovation in the market, impeding capital formation, may inadvertently or inefficiently re-order the competitive landscape and may inefficiently allocate Staff resources.

Additionally, a "Novel" classification may create an unwarranted stigma in the marketplace, disadvantaging certain ETFs relative to "traditional" products and creating an uneven playing field. Regulatory certainty has been central to the growth of the ETF market, and the classification of "Novel" would erode the certainty that Rule 6c-11 was designed to provide.[15] Sponsors may face uncertainty about whether a particular product will trigger enhanced regulatory burdens and may ultimately abandon innovative products rather than navigate a bifurcated regulatory framework. In this way, we believe it is possible that a "Novel" classification could produce a similar outcome as the Financial Industry Regulatory Authority, Inc.'s "complex product" designation.[16] Specifically, ambiguity in applying the standard may create uncertainty as to which products are "Novel," and any products that do bear such distinction may be excluded from certain distribution platforms. The resulting confusion, as well as any stigma or uneven playing field created by a "Novel" classification, could impede innovation in the marketplace and repress capital formation, contrary to the Commission's mission. These concerns are compounded by a further distinction: unlike a "complex" product, a product should be considered "Novel" only for a limited period following its initial launch and determining when that period ends would necessarily require some authority to make a subjective, product-by-product determination.

The Request also asks whether ETFs pursuing novel strategies or structures present issues with the arbitrage mechanism, the maintenance of fair, orderly, and efficient markets, or market surveillance. Based on our experience, ETFs employing the types of strategies and structures contemplated by the Request have not experienced operational issues because of these strategies or structures. We are aware of no instances, and none of our clients have experienced instances, where such ETFs have presented issues with respect to arbitrage, market integrity, or surveillance. Importantly, these ETFs are already subject to the same comprehensive 1940 Act compliance framework as all other registered funds. This includes the valuation requirements of Rule 2a-5, the liquidity risk management requirements of Rule 22e-4, and the derivatives risk management requirements of Rule 18f-4, among others, each of which imposes substantive obligations designed to protect investors and promote market integrity regardless of the fund's investment strategy or structure.[17] Before any product launch, the ETF board and investment adviser are required to conclude that a product is viable based upon these operational and compliance considerations. The marketplace itself imposes strict discipline: authorized participants, who play a vital role in the

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[15] The Adopting Release for Rule 6c-11 provided "[t]he rule is designed to further important Commission objectives, including establishing a consistent, transparent, and efficient regulatory framework for ETFs" *Exchange-Traded Funds*, Investment Company Act Release No. IC-33646, at pg. 5 (Oct. 24, 2019).

[16] In this instance, the term "complex product" has no specific definition and has created a vastly uneven playing field. Notwithstanding the attempt to dissuade such practices through Regulation BI, wirehouses are free to exclude from consideration non-proprietary products because they are "complex" but include on their platforms and among their offerings, similar proprietary products.

[17] *See* 17 C.F.R. § 270.2a-5; 17 C.F.R.§ 270.22e-4; and 17 C.F.R. § 270.18f-4.

creation and redemption mechanism, listing exchanges and other service providers will not engage with a product unless there is sufficient surveillance of the underlying assets and operational issues have been adequately addressed. Moreover, the requirements of Rule 6c-11, such as the daily publication by an ETF of its trading price premium or discount relative to NAV (including a table showing the number of days that the ETF's shares traded at a premium or discount), a line graph showing the ETF's premiums and discounts, and the ETF's median bid-ask spread, among others, are designed to, in part, protect the arbitrage mechanism. As discussed further below, we believe adding a "Novel" classification to Rule 6c-11 or any significant amendment thereto, which has successfully obtained the stated goals articulated in the adopting release, would be a step backwards in the industry.

If the Commission determines to create an additional classification, such designation must be limited to a narrowly defined subset of filings that present truly unique matters of first impression. Critically, the criteria must be clear, objective, and capable of being anticipated by ETF sponsors in advance so that sponsors can plan product development and launches with reasonable certainty. In our view, any such additional designation would be appropriate only under the following limited circumstances: (1) the asset(s) the ETF seeks to invest in is not yet available for investment; (2) the ETF seeks to invest a significant percentage of its portfolio in asset(s) that have not been previously invested in by a registered ETF and such inclusion in an ETF's portfolio presents unique regulatory considerations; or (3) the ETF employs a legal structure that is new to the ETF marketplace. For example, under this framework, the first ETF to use the Subsidiary Structure discussed above could have been deemed "a matter of first impression" and subject to a defined period of additional review. However, subsequent ETFs utilizing the Subsidiary Structure after the initial product launch would no longer be considered a matter of first impression, as the relevant legal and structural questions would have been resolved. As discussed further below, only to the extent the Commission applied a narrow, objective classification would amending Rule 485 to provide additional time prior to the automatic effectiveness of a registration statement be reasonable. This approach would allow the Commission to give due consideration to genuinely novel issues while preserving the predictability that sponsors need to bring innovative products to market without undue delay.

III. A Significant Overhaul of Rule 6c-11 or Rule 485 is Not Required

Rule 6c-11 of the 1940 Act and Rule 485 of the 1933 Act have been critical to the growth of the ETF marketplace. Together, these rules have removed barriers to entry and established a predictable regulatory framework that has enabled sponsors to plan product development and go-to-market strategies with confidence. Rule 6c-11 was designed to create a consistent, transparent and efficient regulatory framework for ETFs, and facilitate greater competition and innovation in the marketplace by lowering barriers to entry and leveling the playing field among similarly

situated products.[18] Rule 6c-11 represented over ten years of work by the Commission to create a standardized regulatory framework for ETFs. As a result of these efforts, as the Commission notes in the Request, the ETF market has grown significantly since the adoption of Rule 6c-11, tripling net assets under management and more than doubling the number of ETFs in the marketplace between 2019 and the end of 2025. This was the exact result the Commission sought, as in the adopting release it provided "[t]he rule is designed to further important Commission objectives, including . . . facilitating greater competition and innovation among ETFs."[19] We believe that adding a "Novel" classification would be a step backwards. Rule 6c-11 facilitated this significant growth through creating a certain pathway and removing barriers to launch new products. A "Novel" classification, as discussed above, undermines that certainty and inevitably would place the Commission in the position of merit regulation; actions which run afoul to the Commission's mission. Further, as the Commission is aware, Rule 485 governs the timing of effectiveness for post-effective amendments to registration statements filed by open-end funds, including ETFs, by providing defined effectiveness periods for various types of post-effective amendment.[20] These defined periods provide the Commission with a reasonable timeframe to conduct meaningful review while giving sponsors the certainty they need to coordinate product launches with authorized participants, exchanges, service providers, and other market participants. We believe these timeframes are generally sufficient, provided that registrants are responsive to reasonable Staff comments.

While the automatic effectiveness mechanism provided by Rule 485 is of paramount importance, to the extent the Commission deems an additional classification necessary for the limited matters of first impression described in Section II above, we believe Rule 485 could be amended to provide that such ETFs are allocated an additional limited number of days for Staff review. Consistent with Section II, any such classification must be based on a finite number of

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[18] *See Exchange-Traded Funds*, Investment Company Act Release No. IC-33646 (Oct. 24, 2019).

[19] *Id.* at pg. 5.

[20] Under Rule 485(a), a post-effective amendment that adds a new series (*i.e.*, a new ETF) becomes effective seventy-five days after filing (or up to ninety-five days after filing if a later date is designated by the registrant), unless the Commission accelerates effectiveness of the post-effective amendment. *See* 17 C.F.R. § 230.485(a)(2). For currently effective open-end management investment companies, a filing under Rule 485(a) for the purpose of making a material change becomes effective on the sixtieth day after filing (or up to eighty days after filing if a later date is designated by the registrant). *See id.* § 230.485(a)(1). Under Rule 485(b), a post-effective amendment that updates disclosure for an existing series, such as annual prospectus updates or non-material disclosure changes, becomes effective immediately (or up to thirty days after filing if a later date is designated by the registrant), provided that (i) the registrant represents that the amendment does not contain disclosures that would render it ineligible for filing under Rule 485(b) and (ii) to the extent counsel has prepared or reviewed the post-effective amendment filed under Rule 485(b), counsel provides a written representation that the amendment does not contain disclosures that would render it ineligible to become effective under Rule 485(b). *See id.* § 230.485(b)(4).

objective criteria. These ETFs must also preserve the ability to go automatically effective at the end of that period, and the criteria must be applied consistently to maintain a level playing field.

Separately, much of the Request considers altering this framework to address "Novel" ETFs and give the Commission additional tools to address perceived vulnerabilities. We believe that Rule 485 is adequately constructed and that the Commission already has the tools it needs to enforce the regulatory framework. We have previously discussed with the Commission and the Staff examples where industry participants have used various tactics to circumvent the framework, including, for example filing pursuant to Rule 497(c) to make a material change to an investment strategy after the effectiveness of a registration statement and without review from the Staff to beat competing products to market that underwent the proper review process. To address those abuses and preserve the integrity of the regulatory structure, we believe the following goals must be met:

(1) clear and consistently applied rules that maintain filing order and prevent queue-jumping;

(2) certainty in the timing of bringing products to market through adherence to defined effectiveness periods; and

(3) optional confidential filing procedures that afford innovative sponsors protection from premature disclosure of proprietary strategies.

The Commission already has the enforcement tools necessary to make the Rule 485 filing system work as intended. Consistent application of these tools, rather than new rulemaking, is the appropriate response to any abuses of the filing framework. In particular, we believe the principles articulated in the Division of Investment Management's 1995 no-action letter—which established that a registrant may not materially alter the nature of a fund contemplated in a pre-effective amendment via a Rule 497(b) or (c) prospectus filing—should be expanded upon and serve as the foundation for both guidance and enforcement.[21] The Staff should publish additional guidance reiterating and elaborating on this position, including examples of permissible and impermissible changes under Rule 497 (whether under subparagraph (c) or via a Rule 497(e) supplement filing) and examples of changes that are sufficiently material as to require a new post-effective amendment pursuant to Rule 485(a). Such guidance would provide the industry with clear standards and correct the abuses of the filing apparatus that have occurred. Guidance alone, however, is insufficient without credible enforcement. The Commission should use the tools at its

[21] *See* U.S. Sec. & Exch. Comm'n, Div. of Inv. Mgmt., No-Action Letter to Investment Companies (Feb. 3, 1995), *available at* https://www.sec.gov/divisions/investment/noaction/1995/icregistrants020395.pdf.

disposal to address violations of these principles.[22] A regulatory environment that is predictable, consistently applied, and backed by a credible enforcement posture will do more to promote investor protection, market integrity, and capital formation than additional layers of rulemaking that may chill legitimate innovation and impose undue costs on sponsors and investors.

An additional amendment to Rule 485 that we believe could be beneficial would be to revise the rule as necessary to contemplate optional confidential filings. We have clients that would strongly prefer this ability for certain filings, for example, if there is an unprecedented strategy or asset exposure or if the sponsor has invested substantial resources in developing proprietary investment or portfolio construction strategies, operational arrangements, or risk-management techniques that are highly competitive, easily replicated, or otherwise susceptible to imitation by other market participants. Conversely, we have other clients who would oppose this mechanism, as they favor early public disclosure because it promotes transparency, permits investors and other market participants to understand the products under consideration, and helps ensure that similarly situated sponsors compete on equal information. On balance, we believe that permitting the voluntary submission of registration statements for confidential review would be beneficial to protecting innovation in the marketplace.[23] Copycat filings are rampant, and they are often submitted in rapid succession using largely identical disclosure. Confidential filings would let a sponsor present a complete analysis and work through issues with the Staff before public disclosure exposes a proprietary strategy to competitors and could remove additional timing pressure to work through comments received from the Staff. Further, a confidential filing process would give sponsors a meaningful degree of certainty that a product could be developed and reviewed without being immediately replicated by competitors upon public disclosure, thereby fostering the kind of product-development innovation that the Request and mission of the Commission both contemplate. That notwithstanding, we recognize the vital importance of transparency that public filings provide. The market benefits when investors, exchanges, service providers, and competing sponsors can see the products under consideration and plan accordingly. Accordingly, a confidential filing process must become public at some point so that the registration and review process retains the openness upon which fair competition and investor protections depend.

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[22] Notably, in addition to stop orders, the Commission currently has significant authority under Rule 485(c) to prevent the effectiveness of a post-effective amendment and suspend the ability of a registrant to use Rule 485. *See* 17 C.F.R. § 230.485(c).

[23] The Division of Corporation Finance allows for non-public review of draft registration statements filed by non-investment company issuers. In our experience, the non-public review of draft registration statements has provided positive engagement between issuers and the Staff and has been beneficial. We see no reason for a differentiated framework between non-investment company issuers and investment companies, and believe a parallel framework is reasonable.

If the Commission proceeds with a confidential filing mechanism, we believe it could be modeled in part on the Division of Corporation Finance's non-public review accommodations for draft registration statements filed by non-investment company issuers,[24] but the Commission should tailor it to the timing and series-based structure of ETF registration. Any confidential filing ability must be accompanied with clear guidance on the mechanics and the impacts on the timing of effectiveness of a registration statement. Specifically, the guidance should address, at a minimum: (i) the manner in which a confidential filing will be made and the information that must accompany it; (ii) how confidential review will affect the timing of a product's launch, including whether and when the Rule 485(a) effectiveness period begins to run; and (iii) how competing filings, whether confidential or public, will be prioritized, sequenced, and maintained in an orderly queue. Without clarity on each of these points, sponsors will lack the predictability necessary to elect into the process, and the Commission's goal of facilitating innovation while maintaining fair and efficient markets will be undermined. However, with adequate guidance and design, a voluntary confidential filing process could advance the Commission's investor-protection and capital-formation mandates while simultaneously allowing the Staff to carefully engage with sponsors regarding new products.

IV. Creating Greater Regulatory Parity Between ETFs and ETPs

The adoption of Rule 6c-11 marked a turning point for the ETF industry, replacing a patchwork of exemptive orders with a unified regulatory framework that streamlined the path to market, brought operational consistency across sponsors, and preserved the investor protections that have underpinned the market's extraordinary growth. The ability to register new ETFs through post-effective amendments that become automatically effective under Rule 485 has proven to be both cost-effective and operationally efficient, and as discussed throughout this letter, we believe the existing framework has been effective in fostering ETF innovation and investor protection, and while targeted refinements to Rule 485 may be appropriate, a significant overhaul of these rules is not warranted. That said, we see a meaningful opportunity for the Commission to catalyze further product development by narrowing the regulatory gap between ETFs and ETPs that fall outside the 1940 Act's registration framework. Providing ETPs with a clearer, more predictable path to effectiveness, whether through mechanisms analogous to automatic effectiveness or through defined review timelines, would allow sponsors to bring ETP offerings to market with a degree of certainty and efficiency comparable to what currently exists for ETFs and mutual funds.

Aligning the regulatory treatment of ETPs more closely with that of ETFs would broaden the universe of investment vehicles available to investors, encourage sponsors to develop differentiated products, and reduce the risk that structural regulatory disparities, rather than

[24] *See Enhanced Accommodations for Issuers Submitting Draft Registration Statements,* SEC Division of Corporation Finance (Mar. 3, 2025), available at https://www.sec.gov/about/divisions-offices/division-corporation-finance/draft-registration-statement-processing-procedures-expanded.

investor demand or product merit, dictate which offerings reach the market. A cohesive framework would also diminish incentives for regulatory arbitrage by ensuring that functionally similar products are not subject to materially different regulatory burdens. To that end, we respectfully urge the Commission to pursue the following specific measures:

(1) *Adopt an automatic effectiveness rule for ETPs.* The Commission should develop a rule for ETP registration filings analogous to Rule 485, providing defined effectiveness periods that give ETP sponsors the same certainty and efficiency in bringing products to market that ETF and mutual fund sponsors currently enjoy.

(2) *Establish generic listing standards for ETPs.* The Commission should work with the national securities exchanges to develop standardized listing standards for ETPs that harmonize the listing process with the framework available to ETFs relying on Rule 6c-11, reducing unnecessary friction and delay in the listing of new ETP products.

(3) *Modernize registration statement forms for ETPs.* The Commission should adopt modifications to Forms S-1 and S-3 that are better tailored to the structure and operations of ETPs, ensuring that the disclosure framework reflects the distinct characteristics of these products rather than requiring sponsors to adapt forms designed primarily for other types of offerings.

Achieving these objectives will require coordination across the Commission. We respectfully urge the Division of Investment Management to work in concert with the Division of Corporation Finance and other relevant offices to assess and, where warranted, implement these reforms. This kind of deliberate, cross-divisional engagement would go a long way toward establishing a more balanced competitive environment for ETFs and ETPs alike, advancing the Commission's core objectives of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

V. Conclusion

We applaud and support the Commission for undertaking this examination and its willingness to engage with the industry on these matters. The ETF industry has experienced remarkable growth and remains at the forefront of innovative investment products. This success speaks to the regulatory framework and dedicated professionals both in the industry and the Staff. The questions raised in the Request are among the most consequential facing the industry today, and we believe the concepts discussed herein will help protect and foster growth in this vital industry while furthering the Commission's mandate. Regardless of any specific actions taken here by the Commission, we believe one of the most critical aspects to the application of the regulatory framework is to ensure a level playing-field and maintain fairness in the marketplace. Any action

taken by the Commission in connection with the Request should further advance these principles. We further respectfully submit to the Commission:

(1) ETFs that utilize the Subsidiary Structure meet the definition of investment company and should be permitted to register and offer their shares as such, as supported by the plain text of the statute, sound policy, and the Commission's own longstanding practice;

(2) A specific classification of "Novel" ETFs is not necessary; however, if the Commission adopts an additional classification, it must be limited to a very narrowly tailored subset of filings that present truly unique matters of first impression based on objective criteria;

(3) Significant amendments to Rule 6c-11 or Rule 485 are not necessary; to the extent the Commission determines an amendment is warranted for matters of first impression, Rule 485 may be amended to provide the Staff an additional finite number of days for review, provided that automatic effectiveness under Rule 485 is preserved;

(4) The Commission already has the tools it needs to enforce the existing regulatory framework and should apply those rules consistently;

(5) The Commission should permit a voluntary confidential filing process; and

(6) The Commission should create greater regulatory parity between ETFs and ETPs not registered under the 1940 Act.

We would welcome the opportunity to answer any questions or discuss our response to the Request. Please contact Morrison Warren on behalf of the Firm's Investment Management Group at (312) 845-3484 or warren@chapman.com.