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August 31, 2026

VIA ELECTRONIC SUBMISSION

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

Re: Request for Comment on Novel ETFs (Release Nos. 33-11426; 34-105808; IC-36228; File No. S7-2026-24)

Dear Ms. Countryman:

We appreciate the opportunity to respond to the request by the U.S. Securities and Exchange Commission ("***SEC***" or "***Commission***") for comments regarding the above-referenced release.[1] Dechert LLP maintains a broad and diversified registered fund practice, including a significant focus on exchange-traded funds ("***ETFs***"). Our clients span the full breadth of the ETF ecosystem, including some of the largest and longest-operating ETF complexes, emergent ETF sponsors with specialized product strategies, ETF boards and service providers, as well as sponsors of exchange-traded products not structured as investment companies under the Investment Company Act of 1940, as amended (the "***1940 Act***"). The views expressed in this letter are drawn from our extensive experience and engagement in the financial services industry in general, and in ETFs in particular. Although we have discussed certain matters addressed in the Release with some of our clients, the comments that follow reflect only the views of a group of attorneys in our financial services practice, and do not necessarily reflect the views of our clients, other members of our financial services group or the firm generally.

We strongly support the objectives the Commission articulates in the Release: facilitating innovation in the ETF space while protecting investors; maintaining fair, orderly and efficient markets; and facilitating capital formation. Innovation in ETFs has been one of the great fund industry success stories of the past three decades, delivering lower costs, liquidity, portfolio transparency, tax efficiency and access to asset classes and strategies once reserved for institutions.

Our comments are organized around three points. First, the existing regulatory framework for ETFs has provided the consistent, transparent and efficient foundation for ETFs the

[1] Request for Comment on Novel ETFs, Securities Act Release No. 33-11426, Exchange Act Release No. 34-105808, Investment Company Act Release No. IC-36228 (June 30, 2026) (the "***Release***").

Commission sought, evidenced by the ETF market's growth since the adoption of Rule 6c-11.[2] This growth has been accompanied by expanded investor choice and increased competition. As such, we do not believe material changes to this framework are warranted at this time; to the extent the Commission identifies discrete areas for improvement, the appropriate approach should be modest, targeted refinements, as discussed below.

Second, any material changes the Commission ultimately pursues should be adopted through notice-and-comment rulemaking. While a request for comment is a valuable tool for gathering information, it is not a substitute for that process. In particular, we would be concerned by any evolution of review practices or informal positions by the staff of the Commission ("***Staff***") implemented without notice and comment that effectively imposed new substantive conditions on registrants.

Third, we note that the term "Novel ETFs" as used in the Release is not well-defined and we do not believe the term can be easily or objectively defined. The categories of Novel ETFs the Release offers as examples, from crypto assets and single-stock strategies to event contracts and blockchain-enabled opportunities, have little in common beyond the fact that each was, at some point, new. Liquid alternatives, single-country and defined-outcome strategies were once considered novel; they are now conventional. Anchoring a rule amendment, review standard or grant of discretion to so fluid a label would risk regulatory overburden and uneven application, and could extend heightened scrutiny to products beyond what the Commission intends. If the Commission determines to act on any of the areas discussed in the Release, it should define the scope of that action by reference to precise, objective product characteristics rather than a "novelty" label.

Consistent with the structure of the Release, our comments are organized around its three principal topics: investment company status; Novel ETFs and Rule 6c-11; and the registration process under Rule 485 under Securities Act of 1933, as amended (the "***Securities Act***"). Additionally, while not within the scope of the Release, we have also included a recommendation to expand the scope of relief of Rule 6c-11, which we believe would be in the interests of ETFs and their shareholders.

I. Investment Company Status

The Release asks (Questions 1 through 4) whether an ETF whose principal investment strategy is to invest in assets that are not securities should be an "investment company" under Section 3(a)(1) of the 1940 Act. The current analytical framework is well known: an issuer is an "investment company" if it passes the "Subjective Test" of Section 3(a)(1)(A), including the five factors articulated in *Tonopah Mining* (the "***Tonopah Factors***"),[3] or the "Objective Test" of

[2] *See* the Release at 3 (noting that, between the end of 2019 and the end of 2025, total net assets of ETFs grew from over $4 trillion to over $12 trillion, and the number of ETFs grew from almost 1,900 to over 4,600).

[3] Section 3(a)(1)(A) of the 1940 Act; In the Matter of Tonopah Mining Co., 26 S.E.C. 426 (July 21, 1947); *see also* SEC v. Nat'l Presto Indus., 486 F.3d 305 (7th Cir. 2007) (finding an operating company not an "inadvertent" investment company by applying the Tonopah Factors).

Section 3(a)(1)(C),[4] unless it qualifies for an exemption under Section 3(b).[5] That framework has served the Commission, issuers and investors for nearly eight decades, across successive waves of financial innovation, precisely because it is a flexible, facts-and-circumstances analysis rather than a rigid categorical rule. We recommend that the Commission not impose additional requirements beyond this well-established framework, as interpreted by the courts, and that the framework's flexible nature be preserved. With respect to Question 3, we believe the Tonopah Factors remain the appropriate analysis, and we see no current need for different or additional factors specific to any category of ETF. Codifying new factors, including those that are driven by specific strategies, could unsettle decades of interpretive practice on which operating companies, holding companies and funds have reasonably relied, with potential consequences extending well beyond the ETF market.

The above point is a practical one: sponsors should be able to rely on the flexible nature of the current framework to determine whether to register under the 1940 Act. Where a sponsor concludes that the 1940 Act framework is appropriate for a product and the fund satisfies the statutory definition (including under the Subjective Test where applicable), the fund should be permitted to register and operate under the 1940 Act, even where its principal strategy involves significant exposure to assets that are not securities. Registration under the 1940 Act should turn on the statute and established interpretations, not on favor or disfavor for particular asset classes or strategies.

Permitting registration also ultimately serves investors. The 1940 Act is a comparatively more protective regime: oversight by a board with independent directors; statutory custody requirements; prohibitions on affiliated transactions; limitations on leverage and derivatives use; compliance program requirements; and a comprehensive disclosure and reporting framework.[6] Sponsors seek 1940 Act registration for products with non-securities exposure precisely because many investors and intermediaries value those protections and the familiarity of the registered fund structure. There is little investor protection rationale for barring an issuer from submitting to a more protective framework where the statutory tests are met, especially if such issuer has concluded that the framework benefits its investors.

II. Novel ETFs and Rule 6c-11

To date Rule 6c-11 has largely functioned as intended. By focusing on the structural characteristics of ETFs, namely daily portfolio transparency, website disclosure of premiums, discounts and bid-ask spreads, and policies governing baskets, while deliberately remaining

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4 Section 3(a)(1)(C) of the 1940 Act.

5 *See* Peavey Commodity Futures Fund, SEC Division of Investment Management No-Action Letter (June 2, 1983) ("***Peavey***"). In *Peavey*, the Staff provided no-action relief for the position that certain public commodity pools are not "investment companies" for purposes of Section 3(a)(1) of the 1940 Act because those commodity pools primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities and thus were exempted pursuant to Section 3(b)(1). In reaching this determination, the Staff listed a number of factors relevant for its analysis, including the composition of the entity's assets, the sources of its income, the area of business in which it anticipated realization of the greatest gains and exposure to the largest risks of loss, the activities of its officers and employees, its representations, its intentions as revealed by its operations and its historical development.

6 *See, e.g.*, Sections 17(a), 17(f) and 18 of the 1940 Act and the rules thereunder, including Rules 18f-4 and 38a-1.

agnostic to the strategies or asset classes, the Rule has created the level playing field the Commission sought and enabled the innovation, growth and competition reflected in the Commission's own data.[7] Together with the exchanges' generic listing standards[8] and other 1940 Act provisions applicable to registered funds in general, we believe the Rule 6c-11 framework has been well calibrated to meet investor protection goals. In our experience, this framework has operated effectively across a wide range of asset classes and strategies, including those the Release describes as "novel." We are not aware of structural problems with these "novel" products that the existing framework has so far failed to address.

Accordingly, we recommend against amending Rule 6c-11 to add prescriptive portfolio conditions, such as minimum holdings of securities, diversification or concentration requirements, issuer-specific limits or exclusions of particular assets or strategies. Such additional prescriptive requirements would undermine Rule 6c-11's central achievements, namely regulatory simplicity and predictability. By drawing imprecise regulatory lines based on asset classes or strategies, the Commission would inevitably risk recreating the unevenness that Rule 6c-11 was adopted to eliminate. New portfolio conditions could also force currently operating ETFs to restructure or deregister, disrupting funds and their shareholders. In addition, asset class-based lines drawn today would embed a static judgment about novelty into a rule of general application, with the risk that such judgment may age poorly.

On investor understanding (Questions 7 through 9), we believe the focus should be on disclosure. Form N-1A already requires clear, plain-English disclosure of a fund's principal investment strategies and risks, refined through the Staff's review process, and Rule 6c-11's website disclosure requirements provide investors with daily portfolio and trading information. Where the Commission believes investors would benefit from a better understanding of a particular product and its features, such as leverage resets, single-issuer concentration or custody of digital assets, targeted disclosure enhancements and investor education are ready tools.

III. Registration and Rule 485

Rule 485's mechanisms are central to how sponsors plan and launch products. The Release's registration process questions (Questions 10 through 25) have understandably generated significant discussion among market participants. Two principles inform our comments in this section: the Commission and its Staff should consistently and transparently use the substantial tools they already possess before creating new ones; and any new mechanism should be designed so that it does not penalize registrants that act diligently and engage with the Commission or the Staff in good faith, or advantage any class of sponsor over another.

A. Expanding Commission Authority

The Commission already possesses meaningful authority to address materially deficient filings: Rule 485(c) permits suspension of the ability to file under Rule 485(b) and suspension of the effective date of a Rule 485(a) filing that is materially incomplete or inaccurate, and Section

[7] *See supra* note 2.

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

8(d) of the Securities Act provides stop-order authority.[9] To the extent the Staff has found these tools cumbersome in practice, we respectfully suggest that the answer is more consistent and confident use of existing authority, supported by published procedures, rather than the creation of new, open-ended authorities.

B. Early Engagement Mechanisms and Confidential Submissions

We support, in principle, the concept raised in Question 15: a voluntary pre-filing consultation process and/or an option to submit draft registration statements confidentially for Staff review, modeled on the accommodations the Division of Corporation Finance has long made available to operating companies.[10] Genuinely novel products raise legal and disclosure questions that can benefit from early, candid dialogue, and a structured channel for that dialogue would improve disclosure quality, make Staff review more efficient and reduce the incidence of public filings that raise unresolved issues on a running effectiveness clock.

How such a mechanism is designed will determine whether it achieves its objectives. In particular, participation must not disadvantage sponsors who engage in good faith. A sponsor that consults early, submits a thoughtful draft and works diligently with the Staff should not find itself behind a competitor that declines to engage, files publicly and/or benefits from positions developed through the initial sponsor's effort. Details such as eligibility, submission logistics and timing also warrant further development.

C. Timing of Effectiveness under Rule 485

In response to Questions 10 and 14, we do not believe a general extension of the 75-day and 60-day automatic effectiveness periods, whether for all ETFs or for a defined subset, is necessary. We observe that a substantial majority of Rule 485(a) filings, including filings for products with newer asset classes or strategies, are resolved within the current regulatory periods, and a blanket extension would delay investor access, dampen competition and impose the costs of a few outlier filings on other registrants. In response to Question 11, to the extent the Commission considers tolling automatic effectiveness where a registrant fails to respond to Staff comments within a defined period before the effective date, we believe such mechanism could be supportable, but its parameters should be clearly specified. In response to Question 12, we respectfully would not support amending Rule 485 to permit the Commission to delay effectiveness of a filing on its own initiative without defined standards, required findings, prompt notice to the registrant and/or firm time limits. A unilateral authority to delay, particularly one keyed to an undefined "Novel ETF" category, would convert a rule whose value lies in its predictability into a source of discretionary uncertainty for all registrants. In addition, it is unclear whether the Commission has statutory authority under the Securities Act to adopt a rule permitting it to unilaterally delay the effectiveness of a registration statement beyond the triggers set forth in the Act. Sections 8(b) and 8(d) of the Securities Act identify the specific circumstances that justify a delay or suspension of effectiveness of a registration statement by the Commission, and they also prescribe the procedural

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[9] Rule 485(c)(1) and (2) under the Securities Act; Section 8(d) of the Securities Act.

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

safeguards that must accompany any such action.[11] Section 19(a) of the Securities Act provides the Commission with rulemaking authority to implement Sections 8(b) and 8(d), but arguably does not authorize the Commission to grant itself an *ultra vires* delay power that Congress did not intend, particularly if such power is key to an inherently amorphous category such as "Novel ETFs."[12]

D. Unresolved Staff Comments

In considering Question 22, we urge the Commission to maintain a distinction that is sometimes ignored: a registrant that fails to *respond* to Staff comments is differently situated from a registrant that responds fully and in good faith but *disagrees* with a comment. Staff comments are not adjudications, and the current regime for effectiveness has generally contemplated that responsibility for the registration statement rests with the registrant. Good faith disagreements that are adequately explained are legitimate outcomes of the review process. Any mechanism designed to address the former situation, such as a tolling provision as discussed above, should be tailored not to penalize the latter.

E. Competitive Pressure and Filing Practices

The Release asks (Questions 17 through 20, 23 and 24) about competitive pressure and resulting behaviors by some registrants, such as rapid and imitative filings, the repurposing of dormant series and material changes made shortly before or at launch, including through Rule 497 filings. These behaviors have been observed in certain instances, and we understand the Staff's interest in addressing them. However, we caution against broad restrictions on post-effective amendments and Rule 497 flexibility, which serve legitimate and routine operational needs for funds of all kinds. A broad restriction would burden those legitimate uses across the entire fund industry to reach a narrow set of behaviors, and would potentially vest the Staff's review process with substantial new discretion.

IV. Additional Enhancements to Rule 6c-11

While not raised in the Release, one area of enhancement to Rule 6c-11 would be to permit affiliated broker-dealers of an ETF to transact in-kind with the ETF regardless of the source of affiliation. Rule 6c-11 provides an exemption from Sections 17(a)(1) and (2) of the 1940 Act to allow an ETF to effect in-kind transactions with persons who are first- or second-tier affiliates of the ETF solely by reason of holding with the power to vote 5% or more of (i) the ETF's shares or (ii) any investment company that is an affiliated person of the ETF. In the adopting release for Rule 6c-11, the Commission declined to expand this relief to cover additional types of affiliated relationships, such as exempting broker-dealers that are affiliated with the ETF's adviser or permitting an ETF's adviser or its affiliates to transact with the ETF to provide in-kind seed capital.[13] At the time, the Commission noted that Rule 6c-11 was "generally intended to codify existing relief for ETFs," and that, as of the time of adoption of Rule 6c-11, exemptive orders had

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[11] Sections 8(b) and 8(d) of the Securities Act.

[12] Section 19(a) of the Securities Act.

[13] Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019) (the "***Rule 6c-11 Adopting Release***") at 45-46.

been narrowly tailored to permit in-kind purchases and redemptions between an ETF and certain affiliates to facilitate efficient arbitrage.[14]

We urge that the Commission reconsider this limitation and that relief from Sections 17(a)(1) and (2) be extended to parties that are affiliated persons of an ETF for other reasons, such as broker-dealers who are affiliated with the ETF's adviser ("***Adviser Affiliates***"). The Rule 6c-11 Adopting Release acknowledged that "permitting additional types of affiliated entities to transact with the ETF could provide additional benefits to an ETF."[15] We believe that expanding the relief from Sections 17(a)(1) and (2) to include Adviser Affiliates would benefit ETFs and their shareholders because it would provide for more flexible seeding arrangements, improve the efficiency of the arbitrage mechanism by increasing the number of authorized participants able to create or redeem shares, reduce concentration risk and lower transaction costs.

While we acknowledge the Commission's concerns with the potential for abusive practices that may arise when an ETF transacts with Adviser Affiliates, we believe that federal securities laws already provide multiple layers of protections for the ETFs and their shareholders from the conflict of interest concerns at which Section 17(a) of the 1940 Act is directed. For example, under Rule 6c-11, an Adviser Affiliate would be required to transact with the ETF strictly in accordance with board-approved basket policies and procedures applicable to all authorized participants. Daily public disclosure of ETF portfolio holdings would ensure Adviser Affiliates will arbitrage on the same information as the broader market, and valuation provisions of the 1940 Act, including Rule 2a-5, would guarantee that baskets are priced uniformly at the ETF's publicly disclosed net asset value regardless of the identity of the authorized participant. Adviser Affiliates that are broker-dealers are also bound by FINRA Rule 5310 to "seek the most favorable terms reasonably available under the circumstances for a customer's transaction," thus mitigating the risk that they will treat an affiliated ETF differently from other ETFs.[16] Finally, the recordkeeping requirements of Rule 6c-11 and filings on Form N-PORT would provide the Staff with the ability to monitor how ETF purchase and redemption activity is conducted across authorized participants, including Adviser Affiliates.

V. Conclusion

Rule 6c-11 is among the Commission's most effective modern rulemakings, and the broader ETF regulatory framework has demonstrated that investor protection and product innovation can coexist. We encourage the Commission to preserve what is working and ensure that any new regulatory mechanisms are carefully tailored, adopted through notice and comment and driven by principles of fairness and transparency.

We appreciate the Commission's consideration of these comments and would welcome the opportunity to discuss them further. Please do not hesitate to contact David P. Bartels at (202) 261-3375, Stephanie A. Capistron at (617) 728-7127, Allison M. Fumai at (212) 698-3526, Megan C.

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14 *Id*. at 46.
15 *Id.*
16 FINRA Rule 5310.

Johnson at (202) 261-3351, Vince T. Nguyen at (212) 698-3566 or Adam T. Teufel at (202) 261-3464 with any questions.

Respectfully submitted,

Dechert LLP

Dechert LLP

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