

SEC Requests Public Comment on Novel Exchange-Traded Funds

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The U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) issued a request for public comment (the “Request for Comment”) on exchange-traded funds (“ETFs”) that seek to invest in innovative asset classes or employ novel investment strategies (“Novel ETFs”) on June 30, 2026.¹ Novel ETFs to date include ETFs providing exposure to crypto assets, commodity-focused instruments, single-stock strategies, heightened leverage, blockchain-enabled opportunities, private assets, event contracts, and combinations thereof.²

The issuance of the Request for Comment follows a statement about Novel ETFs by SEC Chairman Paul Atkins from May 2026, in which he focused on event contract ETFs and expressed his view that such products raise novel questions.³ He also expressed appreciation for fund sponsors that delayed the effectiveness of certain Novel ETFs to allow the SEC to take additional time to consider the implications of these funds.

¹ See Request for Comment on Novel ETFs, Release No. 33-11426 (June 30, 2026).

² *Id.* at 5.

³ Paul S. Atkins, Chairman, SEC, Statement on Novel Exchange-Traded Funds (ETFs) (May 20, 2026), <https://www.sec.gov/newsroom/speeches-statements/atkins-statement-novel-exchange-traded-funds-052026>.

In the Request for Comment, the Commission seeks input on how the regulatory framework for ETFs can continue to accommodate product innovation while ensuring investor protection, preserving fair, orderly, and efficient markets, and facilitating capital formation. The Commission focuses on three principal topics regarding Novel ETFs: (1) which products should be deemed to be an “investment company” that is eligible to register with the SEC as an ETF; (2) regulation of ETF operations and exchange listings; and (3) the SEC registration process and disclosures.

Background and Regulatory Focus

The Request for Comment states that ETFs have experienced substantial growth, from approximately \$4 trillion in assets and nearly 1,900 funds in 2019, when the SEC adopted Rule 6c-11, to more than \$12 trillion in assets and over 4,600 funds by the end of 2025. In light of the rapid emergence of new strategies offered in the ETF structure and the ability of ETFs to take advantage of SEC rules permitting automatic effectiveness of registration statements with limited review periods, the Commission is seeking comments on whether the existing ETF regulatory framework is appropriate for Novel ETFs and where adjustments or clarifications may be warranted.⁴

A. Status of Certain Novel ETFs as Investment Companies

The Request for Comment solicits views on threshold questions about how certain Novel ETF structures and strategies should be treated under the Investment Company Act of 1940 (the “Act”). Under Section 3(a)(1) of the Act, an issuer is an “investment company” if it satisfies one of two tests. First, the “Subjective Test” asks whether an issuer “is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities.” Second, the “Objective Test” asks whether an issuer “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 or more of such issuer’s total assets (exclusive of Government securities and cash items), on an unconsolidated basis.” Under this framework, a fund may qualify as an investment company by satisfying either test.⁵

The Request for Comment asks whether a Novel ETF with a principal investment strategy to invest in assets that are not securities could still qualify as an investment company under the Subjective Test by “holding itself out” as an investment company. The Request for Comment also asks whether the Commission should apply the factors that historically have been used to evaluate investment company status when considering Novel ETFs or if it should consider different or additional factors.⁶ Related questions include why a Novel ETF with a principal investment strategy to invest in assets that are not securities would seek to register as an investment company rather than operate as another type of exchange-traded product, and how a Novel ETF’s equity interests in certain subsidiaries should be treated under the investment company status analysis.⁷

⁴ See Release No. 33-11426, at 5.

⁵ *Id.* at 6 (Section II, Investment Company Status).

⁶ See *id.* at 7 citing *In the Matter of Tonopah Mining Co.* The *Tonopah* factors used to evaluate investment company status under section 3(a)(1)(A) of the Act include the company’s historical development, public representations of policy, activities of officers/directors, nature of present assets, and sources of present income.

⁷ *Id.* at 8 (Question 2).

B. Regulation of Novel ETFs

The Request for Comment solicits views on applying the operational requirements of Rule 6c-11 under the Act to Novel ETFs and the generic listing standards that are available to ETFs satisfying Rule 6c-11. The release notes that, while Rule 6c-11 requires certain fundamental structural characteristics of ETFs that have supported orderly trading at market prices close to net asset value, the rule does not restrict investment strategies or asset classes. In addition, ETFs are able to rely on a regulatory framework that allows shares to be sold to investors soon after they are registered.⁸ The Commission seeks comments on whether:

- Novel ETFs' assets and strategies present concerns regarding the functioning of the ETF arbitrage mechanism, investor protection, maintaining fair, orderly, and efficient markets, or other structural or operational issues;
- Rule 6c-11 should be amended to include new portfolio requirements for Novel ETFs, such as minimum holdings in securities, restrictions on certain strategies or asset classes, diversification requirements, concentration limits, or issuer-specific limits, and how any such changes would interact with generic listing standards; and
- Novel ETFs that invest in certain assets/strategies should be prohibited from relying on Rule 6c-11.

C. Registration Process and Disclosures for Novel ETFs

Novel ETFs typically register via post-effective amendments pursuant to Rule 485(a) that become automatically effective in 60 or 75 days. The Request for Comment notes that certain post-effective amendments may raise issues that are challenging to address within these prescribed timeframes. The Commission seeks input on whether the automatic effectiveness periods should be extended for Novel ETFs.⁹

The Request for Comment also asks about potential concerns due to rapid successive filings, imitative filings (potentially accelerated by AI), and using repurposed unused series to register funds more quickly. Questions include whether:

- Competitive pressures may incentivize sponsors to submit filings for Novel ETFs quickly and in rapid succession, potentially resulting in rushed or incomplete filings;
- Filings should be allowed to remain nonpublic for part of the pre-effectiveness period; and
- Mechanisms should be put in place to allow Novel ETFs to engage early with the staff of the Commission, such as a pre-filing consultation process or confidential draft registration statements.¹⁰

⁸ *Id.* at 9-10 (Section III, Novel ETFs and Rule 6c-11).

⁹ *Id.* at 10-11 (Section IV, Registration and Rule 485).

¹⁰ *Id.* at 11-12 (Questions 12 and 15).

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In addition, the Request for Comment includes questions about other aspects of the filing process, including whether the Commission should:

- Develop additional mechanisms to address unresolved staff comments;
- Clarify application of the rules when a material investment strategy change is made for a Novel ETF during the review process or before launch;
- Automatically toll effectiveness if a registrant fails to respond to staff comments within a specified period;
- Delay effectiveness of a Novel ETF on its own initiative, subject to specific limitations or notice;
- Automatically deregister funds that become effective but never launch after a defined period; or
- Suspend a registrant's ability to file under Rule 485(b) under certain circumstances.

Enhancing the disclosures included in a Novel ETF's registration statement is another topic covered in the Request for Comment. The Commission seeks input on whether:

- Non-investment company exchange-traded products ("ETPs") (e.g., exchange-traded commodity trusts) using the term "ETF" in their names create investor confusion;
- Changes to the ETF disclosure regime overall should be considered, including the imposition of heightened disclosure requirements for certain Novel ETFs; and
- Further steps should be taken to help investors better understand the features of Novel ETFs and what distinguishes them from other ETFs.¹¹

Comments

The Request for Comment signals the Commission's interest in assessing whether the current regulatory framework for ETFs adequately addresses Novel ETFs or whether any changes are warranted, and the specific questions asked reflect some of the real challenges that the Commission is facing given the rapid growth in ETFs and the pace of product development.

Comments are due 60 days after publication in the Federal Register, and the SEC has provided an online portal for submissions. The Commission encourages feedback and particularly welcomes statistical, empirical, and other data and real-world examples.¹²

¹¹ *Id.* at 10 (Question 7).

¹² *Id.* at 16 (Section VI, General Request for Comment).

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