ROPES & GRAY

# Ropes & Gray's Investment Management Update July – August 2026

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Since our prior IM Update, in separate Alerts, we covered (i) two recent decisions by the Delaware Superior Court and the New York State Supreme Court, respectively, that each dismissed with prejudice nearly identical cases brought against mutual funds relating to the funds' application of industry standard accounting practices, (ii) the SEC's proposed rule changes that would permit registered funds to satisfy shareholder-delivery obligations through electronic means, including by default, and (iii) the SEC staff's clarification regarding how an ETF may treat the receipt of creation baskets (i.e., in-kind share purchases) while the ETF has passively exceeded its disclosed concentration policy. The following are summaries of (with links to) our coverage:

## Delaware and New York State Courts Reject Unusual Theory Under the Securities Act

*August 14, 2026*

In a pair of recent decisions, the Delaware Superior Court and the New York State Supreme Court each dismissed with prejudice nearly identical cases brought against the First Eagle and JPMorgan mutual fund complexes, respectively, relating to their application of industry standard accounting practices. These decisions provide a clear roadmap for defeating omission theories that attempt to convert disagreement with a fund's chosen business practices into Securities Act claims. Specific to fund accounting practices, the decisions underscore that funds are free to select their accounting method of choice, so long as the selection is lawful and GAAP-compliant, and that the frequency of dividends is a matter reserved to a fund's judgment and may differ depending on each fund's investment objectives. See Ropes & Gray Alert: [Delaware and New York State Courts Reject Unusual Theory Under the Securities Act].

## SEC Proposes Rule Changes to Make E-Delivery the Default Option

*July 24, 2026*

On July 16, 2026, the SEC issued a release (the "Release") proposing a comprehensive new framework, designated Regulation E-Delivery ("Reg E-Delivery"), that would permit "covered entities" – including all registered investment companies and BDCs – to satisfy delivery obligations arising under the federal securities laws through electronic means, including by default. If adopted as proposed, Reg E-Delivery would depart from the historical affirmative-consent (opt-in) model by permitting a covered entity to establish electronic delivery as the default means of delivering "covered information," subject to satisfaction of specified conditions, or to continue to operate under an opt-in approach. In addition, the Release would:

- Rescind Rule 30e-3 under the 1940 Act, which currently requires registered open-end funds to transmit streamlined annual and semi-annual reports to shareholders, in favor of reliance on Reg E-Delivery; and
- Make conforming and substantive amendments to the rules governing dissemination of proxy materials and information statements covered by Regulations 14A and 14C under the Exchange Act, respectively. *See* Ropes & Gray Alert: [SEC Proposes Rule Changes to Make E-Delivery the Default Option].

## SEC Clarifies ETF Treatment of Creation Baskets During Passive Concentration Exceedances

*July 29, 2026*

On July 27, 2026, the staff of the SEC's Division of Investment Management issued a no-action letter to the Investment Company Institute confirming that the Staff would not recommend enforcement action under Sections 13(a)(3) or 34(b) of the 1940 Act against an ETF that, during a passive exceedance of its disclosed industry concentration policy:

- Accepts a pro rata creation basket including investments in the over-weighted industry,
- Uses cash received in lieu of a creation basket component to purchase that component security up to an amount consistent with a pro rata basket, or
- Receives a non-pro rata creation basket whose industry weighting is consistent with that of a pro rata basket. *See* Ropes & Gray Alert: [SEC Clarifies ETF Treatment of Creation Baskets During Passive Concentration Exceedances].

The following summarizes additional recent legal developments of note affecting the mutual fund/ investment management industry.

## Federal Reserve Proposes Regulation O Relief for Portfolio Holdings of Qualified Fund Complexes

On August 4, 2026, the Federal Reserve Board (the "FRB") published a [notice] of proposed rulemaking (the "NPR") that would amend Regulation O (12 C.F.R. Part 215), the regulation implementing Sections 22(g) and 22(h) of the Federal Reserve Act governing extensions of credit by member banks to insiders. The amendments would address the treatment of portfolio companies held by fund complexes that have crossed the 10-percent principal shareholder threshold with respect to banks (including their holding companies).

**Background**

With respect to the asset management industry, the NPR seeks to address a known problem. As passive index investing has grown, fund complexes have acquired, or approached acquiring, more than 10 percent of a class of voting securities of banks. When a fund complex crosses the 10-percent threshold with respect to a class of a bank's voting securities, it becomes a "principal shareholder" of that bank under Section 22(h), a statutory designation the NPR does not and cannot alter. Section 22(h) restricts the amount and terms of extensions of credit from a member bank to, among others, its principal shareholders and to any company controlled by a principal shareholder.

Under existing Regulation O, any portfolio company in which a bank's principal shareholder owns more than 10 percent of a class of voting securities and is the largest shareholder is presumed to be controlled by, and a "related interest" of, the principal shareholder. A related interest of a bank's principal shareholder is subject to Regulation O's lending limits and procedural restrictions.

The NPR acknowledges that this result was neither contemplated nor intended by Congress, and that the relationship between a passive fund complex's portfolio companies and a bank that is also in the complex's portfolio does not implicate the conflicts of interest and self-dealing concerns that Regulation O is designed to address.

- Since December 2019, the federal banking agencies have addressed this problem through temporary no-action relief (initially SR 19-16, most recently extended through SR 25-6 in December 2025) permitting banks to continue lending to portfolio companies that would otherwise be presumed controlled by certain fund complexes.
- The NPR would replace this temporary framework with a regulatory exception from the rebuttable presumptions of control for portfolio companies of fund complexes that satisfy specified passivity conditions. Among other things, the NPR would improve the ability of banks to make extensions of credit to certain portfolio companies in which companies that sponsor, advise, and manage "investment funds"[1] (*i.e.*, fund complexes) have accumulated significant holdings.

**The NPR**

If adopted as proposed, Regulation O's presumption of control would not apply to portfolio companies of a fund complex that satisfy on an ongoing basis the following four conditions to qualify as a "qualified fund complex." The following conditions are "designed to ensure that the relationship between the fund complex and the bank is sufficiently passive":

1. The fund complex must not be, and must not be affiliated with, a depository institution or holding company supervised and regulated by the FRB, the FDIC, or the OCC (each, a "regulated company");
2. No individual investment fund within the fund complex may own or control more than 10 percent of any class of voting securities of a regulated company (but investment funds that share the same or substantially the same investment objective and asset composition are treated as a single investment fund);
3. Investment funds within the fund complex that are not index funds must not, in the aggregate, own or control more than 10 percent of any class of voting securities of a regulated company (index fund holdings do not count toward the 10-percent aggregate cap); and
4. The fund complex must not meet any condition that would give rise to a rebuttable presumption of control under the FRB's Regulation Y control rule (12 C.F.R. § 225.32) with respect to a regulated

1 For purposes of the NPR, "investment fund" means a registered investment company as well as collective investment trusts, separately managed institutional accounts, and other pooled investment vehicles.

company (*e.g.*, presumptions based on business relationships, management interlocks, and other indicia of influence).

For a fund complex that satisfies these four conditions, the exemption means that the complex's portfolio companies are no longer captured by the presumption of control (if the fund complex owns more than 10 percent and is the largest shareholder of a portfolio company) and, therefore, are not deemed "related interests" for purposes of Regulation O. Banks may lend to those portfolio companies free from Regulation O's lending limits, prior-approval requirements, and market-terms restrictions. However, the NPR would not override the statutory definition of control in Section 22(h) itself – a portfolio company would still be a related interest of the fund complex if the complex directly, indirectly, or acting in concert owns or controls 25 percent or more of any class of the company's voting securities, controls the election of a majority of its directors, or exercises a controlling influence over its management or policies.

- The NPR also delineates clear consequences for loss of qualifying status. Upon an FRB determination that a fund complex is no longer a qualified fund complex (*e.g.*, a determination that a qualified fund complex attempted to influence the lending decisions of any bank in its portfolio in favor of its other portfolio companies), all portfolio companies would immediately become related interests of each bank for which the fund complex is a principal shareholder. Outstanding extensions of credit would count toward Regulation O lending limits, all future extensions of credit would be subject to Regulation O's full requirements (including prior board approval where applicable), and banks would be required to maintain records demonstrating compliance.
- A loss of qualifying status also means that a fund complex could face liability for knowingly permitting portfolio companies to receive non-compliant extensions of credit.

The NPR poses a number of questions on which the FRB solicits comment, several of which are of direct relevance to the asset management industry. These include whether alternative approaches – such as raising the presumption threshold from 10 percent to 15, 20, or 25 percent, or eliminating the presumption subject to passivity commitments – would better serve the regulation's objectives.

**Comment Deadline**

Comments must be received by the FRB no later than October 5, 2026.

## SEC Allows Blockchain-Based Self-Custody of Affiliated Fund Shares Under Rule 17f-2

On August 12, 2026, the staff of the SEC Division of Investment Management issued a no-action letter to the Franklin Templeton family of registered funds (the "Funds"), permitting the Funds to custody their investments in shares of the Franklin OnChain U.S. Government Money Fund (the "OnChain Fund") with Franklin Templeton Investor Services LLC ("FTIS"), an affiliated registered transfer agent, without complying with paragraphs (b), (e), and (f) of Rule 17f-2 under the 1940 Act.

- The OnChain Fund is a government money market fund operating under Rule 2a-7. Its distinguishing feature is that FTIS maintains the official record of share ownership through a proprietary "Integrated System" that combines a traditional internal book-entry system with one or more public blockchain/distributed ledger technology. The blockchain component records anonymous transactional data, including purchases, redemptions, NAVs, dividend information, and operational history, which FTIS joins in real time with its internal book-entry records to establish the OnChain Fund's master securityholder file.

- Because FTIS is an affiliated person of the Funds, the Funds' proposed custody of shares of the OnChain Fund with FTIS were also self-custody arrangements subject to Rule 17f-2.

**The Funds' Key Representations and Arguments**

The Funds' request built directly on the SEC staff's 1992 no-action letter to *Franklin Investors Securities Trust*,[2] which addressed the same Rule 17f-2 subparagraphs in the context of an affiliated master-feeder arrangement where the master fund's transfer agent held feeder fund shares in traditional book-entry form (the "1992 Letter"). Here, the Funds argued that the same core custody issue persists – the Funds' shares are maintained by an affiliated transfer agent and cannot be held in certificated form in a physical vault, making compliance with Rule 17f-2(b), (e), and (f) operationally impossible or impractical.

The Funds maintained that FTIS performs the identical custodial function that its predecessor, FAS, performed in the 1992 Letter and that the addition of blockchain technology to the recordkeeping architecture does not alter this functional equivalency. The Funds represented:

- FTIS would maintain the official record of share ownership (*i.e.*, the master securityholder file) using a proprietary recordkeeping system that is integrated with blockchain/distributed ledger technology (the "Integrated System"), rather than solely through the traditional book-entry system described in the 1992 Letter. In addition, FTIS maintains and secure the private keys associated with the blockchain wallets holding the investing Funds' shares of the OnChain Fund. Thus, FTIS would maintain the official record of share ownership with unilateral control over that record.
- FTIS would maintain a separate administrative key-control environment (the "Administrative Controls") that employs various security techniques to ensure that instructions for a given transaction are valid. The Administrative Controls would allow FTIS, in its capacity as transfer agent and administrator of the Integrated System, to sign and submit administrative instructions affecting the blockchain records associated with an investor wallet.
- The Funds distinguished the Integrated System from other distributed ledger or blockchain technologies on which permissionless tokens, such as cryptocurrencies, are issued and transferred without comparable access controls. In particular, because FTIS retains unilateral administrative authority to correct, freeze, migrate, or restore the official ownership record, compromise or misuse of a private key would not, by itself, establish a different official ownership record or prevent FTIS from maintaining the correct record.

The Funds argued that FTIS remains the functional analogue of a securities depository, just as FAS was treated in 1992 Letter. Therefore, the relevant custody analysis should continue to turn on FTIS's controlled transfer-agent recordkeeping environment, and the representations described in the Funds' request, rather than on the mere fact that FTIS also maintains the wallet private keys used to sign blockchain transactions. The Funds highlighted that FTIS' private-key custody and administrative authority made the Funds' proposed custody solution closely analogous to the 1992 Letter because the entity serving as transfer agent is the entity that maintains and controls the records through which the OnChain Fund shares are held and transferred.

Based on the foregoing and the conditions with which the Funds offered to comply, the Funds argued that the proposed custody arrangements support the request for a no-action position with respect to Rule 17f-2(b),

2 Franklin Investors Securities Trust, SEC No-Action Letter (pub. avail. Sept. 24, 1992).

(e) and (f), just as the arrangements described in the 1992 Letter were sufficient in the context of affiliated fund shares maintained by an affiliated transfer agent in book-entry form. Specifically, the Funds argued that:

- FTIS's controlled transfer-agent records, segregated accounts, successor-transition obligations and board oversight satisfy the concerns addressed by the physical vault custody requirement in Rule 17f-2(b) for Fund shares recorded in the Integrated System;
- Controls over authorized instructions, passwords or other authentication factors, confirmations sent to persons other than those transmitting instructions, and daily reconciliation against transaction authorizations satisfy the concerns addressed by the deposit and withdrawal notation requirement in Rule 17f-2(e); and
- The concerns addressed by Rule 17f-2(f) were satisfied by three annual independent public accountant verifications that compare FTIS's transfer-agent account records with the book records of the investing Funds and the OnChain Fund, together with reconciliation of any differences.

**The No-Action Letter**

Based upon the facts and representations set forth in the Funds' letter, the staff of the Division of Investment Management stated it would not recommend enforcement action to the SEC under Section 17(f) and Rule 17f-2 if FTIS acts as custodian for the Funds with respect to the Funds' investments in shares of the OnChain Fund, without compliance with paragraphs (b), (e) and (f) of Rule 17f-2.

# REGULATORY PRIORITIES CORNER

The following brief updates exemplify trends and areas of current focus of relevant regulatory authorities.

## Treasury and IRS Signal Scrutiny of Potentially Abusive ETF Tax Strategies

On July 21, 2026, Kevin Salinger (Deputy Assistant Secretary for Tax Policy, U.S. Department of the Treasury, and Principal Deputy Chief Counsel, IRS) and Erika Nijenhuis (Senior Counsel, U.S. Treasury Office of Tax Policy) appeared at a Wall Street Tax Association seminar titled "Developments in Tax Aware Financial Product Strategies." They announced that Treasury and the IRS have become aware of several high-profile ETF transactions that may raise concerns about potentially abusive tax structures.

Mr. Salinger emphasized that the government's concern is *not* with ETF creation and redemption mechanics generally, nor with Internal Revenue Code ("Code") Section 852(b)(6)[3] standing alone. Rather, the concern is with particular transactions that combine Section 852(b)(6) with other Code provisions, or with certain planned transactional steps, that produce a result that appears inconsistent with Congress' intent. Mr. Salinger and Ms. Nijenhuis identified four categories of ETF-related strategies currently under scrutiny, each discussed below.

### 1. Section 351 and ETF Seeding Transactions

Section 351 of the Code facilitates tax-free contributions of property to a corporation in exchange for stock. The provision rests on the theory that the transferor's economic interest has not fundamentally changed. Instead, it has merely been converted from direct ownership of assets into stock of a controlled corporation. Because the transferor retains a continuing interest in the same property (now held by the corporation), Congress determined that no realization event should occur at the time of transfer.

- Conditions apply to transfers to "investment companies" such as ETFs. Among other things, each transferor must contribute a "diversified portfolio of stocks and securities." (*i.e.*, no more than 25% of the portfolio's value is invested in any one issuer and not more than 50% is invested in five or fewer issuers). This test is applied on a transferor-by-transferor basis.
- In-kind ETF seeding transactions that satisfy Section 351 permits investors to contribute appreciated securities to a newly formed ETF without recognizing gain. The tax consequences are symmetrical – the ETF receives the contributed securities with the same tax basis and holding period as the contributing investors, and the investors receive ETF shares with the same aggregate basis and holding period as the contributed securities.

Mr. Salinger noted that the Treasury and IRS are concerned about transfers that purport to rely on Section 351 where the contributed portfolio is not the portfolio the fund intends to hold. The contribution may be a diversified portfolio, but it does not match the ETF's stated investment strategy. As part of the same overall plan, the ETF uses in-kind redemption mechanics under Section 852(b)(6) to dispose of a substantial portion of the contributed securities and replace them with securities that fit the ETF's strategy. He noted that the transactions involved may happen quickly or over a longer period of time and there are variations on the contribution strategy, but the economic result is the same – the contributing

3 Code Section 311(b) provides that a corporation generally recognizes gain, but not loss, when it distributes appreciated property to a shareholder, as if the property were sold at fair market value. However, Section 852(b)(6) provides that Section 311(b) does not apply to a distribution by a RIC in redemption of its stock upon the demand of the shareholder.

investors move from an appreciated securities portfolio into a materially different ETF portfolio without recognizing the built-in gain. Consequently, recognition of the gain is deferred until the taxpayer sells the ETF shares (or may be reduced or eliminated through other planning).

Mr. Salinger noted Treasury's concern is that Sections 351 and 852(b)(6) are being combined to achieve tax-free diversification or portfolio substitution – a result neither provision was designed to produce. A taxpayer uses a series of non-recognition rules and ETF redemption mechanics to get from an appreciated, concentrated, or mismatched position into a diversified investment portfolio without recognizing gains.

Mr. Salinger emphasized that he wanted to be careful about line drawing. He underscored that Treasury understands that Section 351 transactions can be used in ordinary ETF seeding and that there may be real commercial reasons to seed a new ETF with securities rather than cash.

### 2. Dividend Arbitrage Strategy

The second category of ETF transactions that Treasury is scrutinizing involves a dividend arbitrage strategy. Mr. Salinger explained that, in these transactions, an "upper-tier" ETF holds shares of "lower-tier" ETFs to gain exposure to a broad equity strategy (e.g., the S&P 500). When a lower-tier ETF is about to pay a dividend, the upper-tier ETF disposes of its shares of that lower-tier ETF through an in-kind redemption and replaces it with another lower-tier ETF that offers similar market exposure (but is not about to make a distribution). The upper-tier ETF avoids receiving current dividend income. Instead, the return is reflected in appreciation of the upper-tier ETF shares' price, thereby deferring tax and potentially converting dividend income into capital gain. For these transactions, Mr. Salinger said, Treasury's concern is that this dividend arbitrage strategy appears to preserve substantially the same economic exposure while deliberately avoiding current income that would ordinarily flow through a RIC investment.

Additionally, he stated that:

- The dividend arbitrage strategy has been advertised as offering exposure to the same broad market strategy, but with no dividends and no capital gains distributions.
- Some may view the strategy as ordinary tax-efficient portfolio management and noted Treasury's openness to hearing non-tax justifications for employing the strategy (*e.g.*, real economic costs or market constraints). However, if an ETF employs this strategy principally to avoid tax distributions, it raises the concern that the ETF creation-basket and redemption-basket mechanisms are being used to turn the RIC pass-through regime into an indefinite tax-deferral vehicle.

### 3. ETFs Holding Nonqualifying Assets

The third category of ETF transactions that Treasury is scrutinizing involves ETFs that hold assets that produce non-qualifying income (*e.g.*, such as cryptocurrency or commodities) directly, within the limits of the Section 851(b)(3) RIC asset test. Mr. Salinger stated that when this type of ETF disposes of appreciated non-qualifying assets, it does so through in-kind redemptions under Section 852(b)(6) rather than through a taxable sale, thereby avoiding the recognition of gain that would count as non-qualifying income under the Section 851(b)(2) RIC income test. For the ETFs, he said, Treasury's concern is that this undermines the income-test limitations Congress imposed on RICs. He noted that:

- The tax benefit to the ETF is that it receives the economic upside from the appreciation in value of non-qualifying assets but avoids recognizing the gain that would raise issues under the RIC income test.
- Therefore, in substance, the in-kind redemption can operate much like a sale for cash, if the ETF takes the position that the gain is not recognized and, therefore, does not count as non-qualifying for the RIC income test.

- Treasury's concern is that this may be inconsistent with the intent of the RIC income test.

**4. ETF Box-Spread Option Strategies**

The fourth category of ETF transactions Treasury is scrutinizing involves ETFs that use four offsetting options on the same underlying security to construct a box spread of options, which effectively provides synthetic exposure to U.S. Treasury securities, but does not result in the receipt of interest income.[4]

Mr. Salinger noted that the strategy produces a fixed-income-like return, but the ETF distributes appreciated option positions through in-kind redemptions under Section 852(b)(6), avoiding gain recognition. Until the investor sells the ETF shares, there is no interest income or other current income. Treasury's concern is that the ETF redemption mechanism is being used to convert current income or gain recognition, which would ordinarily be expected from integrated, offsetting positions, into NAV appreciation.

**Observations**

Mr. Salinger and Ms. Nijenhuis were very deliberate in what they were – and were not – announcing regarding any planned response from Treasury or the IRS to the ETF transactions they described. They emphasized that Treasury and the IRS are:

- Not issuing guidance from the panel stage. They are not announcing what action will be taken, whether it takes the form of regulations, notices, revenue rulings, reporting guidance (such as transaction of interest or listed transaction designation), or some other tool. All tools are under active consideration.
- Still in the fact-gathering stage and want information from the market, including detailed descriptions of transactions, adjacent transactions with different facts, and any circumstances in which structures may be misunderstood.
- Seeking to narrowly tailor guidance or enforcement, rather than adopting overbroad rules that disrupt the financial markets.

## SEC Amends Fund Governance Rule to Reflect Court's 2006 Vacatur

On August 4, 2026, the SEC issued a release adopting technical amendments to Rule 0-1(a)(7) under the 1940 Act (the "Technical Amendments"), which set forth governance standards that registered funds and BDCs ("regulated funds") must satisfy to rely on various exemptive rules under the 1940 Act.

**Background**

In 2001, the SEC adopted fund governance standards to enhance the effectiveness of disinterested directors of regulated funds that choose to rely on various SEC exemptive rules. Among other things, the standards required that boards have a majority of disinterested directors. In 2004, the SEC amended and renumbered these standards in Rule 0-1(a)(7) resulting in seven requirements, including that at least 75 percent of the directors of the regulated fund must be disinterested (the "75% Requirement") and a disinterested director must serve as chairman of the Board of the regulated fund (the "Chairman Requirement"). The 2004 amendments became effective in September 2004.

4 More specifically, box spread options are an options strategy with offsetting long and short positions. Given the efficient pricing of index options that are commonly used with these strategies, true arbitrage opportunities are uncommon. Instead, in the case of box spreads, an investor is left with a guaranteed return on the spread in strike prices between the synthetic long and short positions. The economic result is like lending (or borrowing) money at, or near to, the Treasury rate of return.

In 2006, a federal circuit court of appeals vacated the 75% Requirement and the Chairman Requirement.[5] The court did not address the other requirements of Rule 0-1(a)(7) as amended in 2004. The court's vacatur of the 75% Requirement and Chairman Requirement went into effect in July 2006, at which time the fund governance standards reverted to those standards that existed as of the September 2004 effective date of the 2004 amendments.

### The Technical Amendments

The Technical Amendments reflect the court's vacatur in the Code of Federal Regulations by removing the 75% Requirement and the Chairman Requirement and thereby reverting to the requirement of a simple majority of directors of the regulated fund be disinterested directors to satisfy the fund governance standards. The remaining provisions of Rule 0-1(a)(7), which were not subject to the court's vacatur, remain unchanged (*e.g.*, disinterested directors nominate any other disinterested director). Thus, the Technical Amendments do not impose any new substantive regulatory requirements. In a statement issued the same day as the SEC release containing the Technical Amendments, Commissioner Mark Uyeda observed: "The court's mandate has been clear since 2006, and updating the Code of Federal Regulations to reflect this outcome is long overdue."

## SEC Settles Matter with ETF Adviser Involving Various 1940 Act Violations

On July 27, 2026, the SEC issued an order settling an administrative proceeding against Simplify Asset Management, Inc. ("Simplify"), investment adviser to a family of ETFs organized as separate series of Simplify Trust. The SEC allegations and conclusions were as follows:

### Seeding Transactions

1. Between 2021 and through 2023, Trust A held an approximately 25% fully diluted equity interest in Simplify through preferred shares. Trust A's preferred shares were voting securities because they gave Trust A the right to select two of the four directors on Simplify's board of directors. Therefore, Trust A was an affiliated person of Simplify and a second-tier affiliate of SURI, one of the Simplify ETFs.
2. In 2022, during a meeting of the Simplify Trust Board, Simplify recommended that the Board vote to approve the formation of SURI as one of the ETFs. Simplify represented to the Board that it would act as the investment adviser to SURI and the Board unanimously approved the formation of SURI at the meeting.
3. In a January 2023 memorandum to the Board, Simplify stated that Trust A was going to be a seed investor in SURI and that Trust A planned to contribute approximately $71.5 million of various securities to subscribe to SURI. This in-kind transaction, according to the memorandum, was a "tax-free exchange" that did not require Trust A to assume any obligation to pay for any accrued investment gains it received as a result of the exchange.
4. In the same memorandum, Simplify also apprised the Board that it had determined that Trust A "is not an affiliate, or affiliate of an affiliate,

5 *See* Chamber of Commerce of the United States v. SEC, 443 F.3d 890 (D.C. Cir. 2006).

of [Simplify] Trust, . . . [Simplify], . . . or [an] underwriter." Simplify did not share with the Board the basis for these conclusions. In a written consent, the Board approved Trust A's proposed in-kind subscription to SURI. The seed transaction occurred on February 7, 2023, and SURI launched on the same day.

5. In June 2023, Simplify provided the Board with another memorandum outlining a second proposed in-kind subscription of SURI shares involving Trust A, which was valued at approximately $35.7 million. The memorandum did not discuss whether Trust A was an affiliated person of either SURI or Simplify, nor did it discuss the tax benefits to Trust A of the proposed transaction. The Board approved this second in-kind subscription. As of that date, Trust A held 97.6% of the outstanding shares of SURI. The transaction occurred on the next day.

The SEC concluded that, because SURI acquired securities from Trust A through the 2023 in-kind subscriptions and did not obtain an exemptive order from the SEC, Trust A violated Section 17(a)(1) of the 1940 Act. In addition, because Simplify recommended the launch of SURI to the Board, recommended the transactions with Trust A to the Board, and represented to the Board that the transactions were not affiliate transactions under Section 17(a)(1), Simplify caused Trust A's violations of Section 17(a)(1).

**Liquidity Risk Management Rule 18f-4 and Rule 30b1-10**

1. Rule 18f-4 exempts registered funds from the requirements of various provisions of Section 18(f)(1) of the 1940 Act for funds that engage in derivative transactions that involve senior securities. Certain conditions apply. Funds relying on the Rule 18f-4 exemption are required to comply with an outer limit on leverage risk based on a relative "value at risk" ("VaR") test that compares the fund's VaR to the VaR of a "designated reference portfolio" (the "VaR test").

2. As an additional condition of relying on the rule, Rule 18f-4(c)(2) contains notification requirements that apply in situations where a fund exceeds its VaR test threshold for five business days or more.

3. FIG is another ETF advised by Simplify. During two episodes in April and May 2024, Simplify caused FIG to exceed the applicable VaR test under Rule 18f-4 through transactions that, without the Rule's exemption, would have been prohibited by Section 18(f)(1)'s limitation on senior securities.

4. Rule 18f-4(c)(7) required Simplify to notify the Board and to provide the Board with a written explanation within 30 days of how FIG intended to come back into compliance with its VaR test. Simplify failed to meet these Rule 18f-4 conditions because it only notified the Board of the VaR test breaches months later, in August 2024.

5. Rule 18f-4(c)(7) also provides that a fund "that experiences an event [described in Form N-RN]," such as exceeding VaR thresholds set out in Rule 18f-4 for a period of five business days or more, "must file with the [SEC] a report on Form N-RN within the period and according to the instructions specified in that form." The instructions for Form N-RN require a fund to report such an event within one business day of its occurrence. In addition, Rule 30b1-10 under the 1940 Act requires an open-end fund that "experiences an event specified on Form N-RN" to file with the SEC "a current report on Form N-RN within the period and according to the instructions specified in that form." Although FIG exceeded its VaR thresholds for a period of five business days or more in April and May, FIG did not file the Forms N-RN with the SEC until August 9, 2024.

The SEC concluded that Simplify caused FIG's failure to satisfy the conditions of Rule 18f-4. Accordingly, the SEC concluded that Simplify caused FIG to violate Section 18(f)(1) and Rule 30b1-10.

**Other Violations**

1. Section 19(a) of the 1940 Act prohibits registered funds from paying distributions from any source other than net income unless the payments are accompanied by contemporaneous written statements to shareholders disclosing the sources of the distributions. Rule 19a-1 specifies that the written statement must be in a separate document and must clearly indicate what portion of the payment is from (i) net income (not including capital gains), (ii) capital gains, and (iii) paid-in surplus or other capital sources.
2. Between July 2021 and June 2024, Simplify caused seven ETFs it advised, including SURI (collectively, the "Simplify ETFs"), to fail to provide contemporaneous notices to fund investors that a portion of the dividends the Simplify ETFs distributed to them was a return of fund capital rather than income, as required by Section 19(a) and Rule 19a-1.

The SEC concluded that Simplify caused the Simplify ETFs to violated Section 19(a) and Rule 19a-1. Additionally, based on the conduct described above, the SEC concluded that SURI, FIG, and the other Simplify ETFs failed to adopt and implement policies and procedures reasonably designed to prevent violations of the federal securities laws. As a result, Simplify caused these ETFs to violate Rule 38a-1 under the 1940 Act.

# ROPES & GRAY ALERTS AND PODCASTS SINCE OUR MAY – JUNE UPDATE

## The Principal View: Trends Shaping Private Markets – August 2026

*August 2026*

Private markets are in the midst of a structural reset. Fee economics are shifting, the competitive landscape is consolidating, and new capital channels are redrawing the boundaries of the industry.

Written for private equity and asset management leaders, from C-suite executives to heads of fundraising, strategy, and business development, our new publication, ***The Principal View: Trends Shaping Private Markets***, brings together proprietary Ropes & Gray data, market intelligence, and practitioner perspective to examine the forces reshaping private equity and asset management, from record-low management fees and the rapid growth of evergreen vehicles, to an unprecedented wave of industry M&A.

## Ropes & Gray Crypto Quarterly: Digital Assets, Blockchain and Related Technologies Update (Q2 2026)

*July 14, 2026*

The landscape of government enforcement, private litigation, and federal and state regulation of digital assets, blockchain and related technologies is constantly evolving. Each quarter, Ropes & Gray attorneys analyze government enforcement and private litigation actions, rulings, settlements, and other key developments in this space. We distill the flood of industry headlines so that you can identify and manage risk more effectively. This newsletter includes takeaways from this quarter's review.

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**If you would like to learn more about the developments in this IM Update, please contact your usual Ropes & Gray attorney contacts.**