Comment of Amadeus Brandes

Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance

To: Commodity Futures Trading Commission (RIN 3038-AF71) and Securities and Exchange Commission (File No. S7-2026-21; Release No. 33-11424; 34-105735; RIN 3235-AN79)

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Re: 91 FR 37873 (June 24, 2026)

This comment draws on my working paper, "Contractibility Regimes: A Structural Theory of Regulatory Architecture for Future-State Markets" (posted May 19, 2026), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6797484 and archived at https://doi.org/10.5281/zenodo.21892788. The comment is self-contained; the paper develops the framework in full.

Executive Summary

The Commissions ask for principled, objective criteria for classifying innovative products, and for approaches to alternative compliance. This comment offers both, organized around one structural observation:

Classification is not neutral with respect to investor and market protection. The swap and security-based swap categories attach different protection bundles, and neither bundle is strictly larger than the other. Classification as a security-based swap takes an instrument outside the public-interest review of CEA section 5c(c)(5)(C), which applies to event contracts listed on designated contract markets and swap execution facilities, while adding the SBS regime's own gates: exchange listing standards, Exchange Act section 19(b) rule filings, Regulation SBSR reporting, and two participation restrictions with practical bite for retail access. Exchange Act section 6(l) makes it unlawful to effect an SBS transaction with a non-eligible contract participant except on a registered national securities exchange, and Securities Act section 5(e) makes it unlawful, notwithstanding the exemptions of sections 3 and 4, to offer or sell an SBS to a non-ECP absent an effective registration statement. Classification as a swap preserves the section 5c(c)(5)(C) screen and the designated-contract-market retail channel of CEA section 2(e), with different reporting. A definitional choice therefore redistributes protection between regimes whether or not anyone intends it, and the useful question for the Commissions is not only "which label fits" but "does the label's protection bundle cover the hazards this instrument actually generates."

The comment accordingly proposes:

1. **Five observable classification criteria** (reference object, payoff mapping, term structure, issuer-consequence channel, and direct-exposure population), each scoreable from the contract's terms and the venue's rulebook alone, with no intent inquiry, at the procedural moment where review already occurs.
2. **Coverage equivalence** as the operational content of "substantially similar" for alternative compliance: for each material hazard an instrument class generates, at the level where it arises, under the conditions actually present, the other Commission's framework must contain a mechanism that

reduces the residual hazard below a tolerance the Commissions set. This operationalizes the outcomes-oriented comparability approach the Commissions already use, including the "scope and objectives" inquiry of Exchange Act Rule 3a71-6.

3. **A decision rule for the existing mixed-swap procedure** of 17 CFR 1.9 and 17 CFR 240.3a68-4, under which alternative treatment is assembled hazard by hazard, illustrated with the cash-settled equity perpetual raised in Question 11; and **a remedy principle** under which coverage gaps are corrected at the venue-rule layer rather than by relabeling.

This comment addresses Questions 1, 3, 5, 7, 8, and 12 through 15. Exhibit A presents the criteria in one page. I have no financial interest in any trading platform or instrument discussed here, no client relationships bearing on these questions, and I received no compensation in connection with this comment.

I. The Framework in Brief

The analysis proceeds from a simple premise: a contract on a future state is governed well when the hazards it generates are each covered by a protection mechanism operating at the level where the hazard arises. Hazards arise at four levels: the contract's terms, the venue's rules, participant conduct, and the public use of the resulting price. Classification questions and compliance questions are different in kind. Classification should turn on observable structural properties of the contract. Compliance should turn on whether hazards are covered.

The criteria below are stated so that a reviewer can score them from the rulebook and term sheet within the existing review process: on the CFTC side, at Part 40 self-certification or approval review; on the SEC side, at listing or registration review.

II. Response to Question 1: Principled, Objective Criteria

Five criteria sort the instruments the Commissions describe. Four are classification criteria; the fifth bridges classification and the statutory "consequence" language.

C1. Settlement reference object. What variable enters the payoff function: (a) the price or value of a security or securities index; (b) an issuer-specific event; or (c) an event exogenous to any security's price and any single issuer. Where the reference is an index, sub-test **C1a** scores narrow-based versus broad-based under CEA section 1a(35) and Exchange Act section 3(a)(55)(B), applying the Commissions' existing tolerance and grace rules for transitions.

C2. Payoff mapping. Whether the payoff is a function of the reference object's price or value, or a function of an event's occurrence independent of any security's price. Threshold functions count as functions of price: a binary option on a security is a threshold function of that security's price, so discreteness of settlement is a descriptor, not the classification line.

C3. Term structure. Whether the instrument has (a) a resolution date fixed by the referenced event, (b) a fixed expiry independent of any event, or (c) no expiry, with a funding-rate mechanism (the perpetual form).

C4. Issuer-consequence channel. Whether the referenced event enters the issuer's own financial statements, financial condition, or contractual obligations through an identifiable channel. This comment

proposes a non-exhaustive channel list: default, covenant breach, indenture triggers, mandated disclosure, and corporate-control and capital-structure events such as merger, acquisition, bankruptcy, delisting, dividend, split, and recapitalization. Effects that run only through market price, sector exposure, or general economic conditions are indirect.

C5. Direct-exposure population. Whether identifiable actors hold pre-existing commercial, contractual, or balance-sheet exposure to the referenced event, evidenced by contract clauses, revenue sensitivity, or regulatory dependency. This criterion gives content to the phrase "potential financial, economic, or commercial consequence" in CEA section 1a(47)(A)(ii). It supports classification; it does not imply that participation should be limited to exposed actors, and this comment does not propose any insurable-interest requirement.

These criteria are principled in that each tracks a statutory line rather than a policy preference; objective in that each is scoreable from documents; and administrable in that scoring occurs at the review moment that already exists. They resolve classification before any public-interest analysis begins, keeping the definitional question separate from the merits question.

III. Response to Question 3: Swaps, Security-Based Swaps, and Mixed Swaps

The statute contains a category for the hardest case, the instrument that genuinely implicates both Commissions' interests: the mixed swap, CEA section 1a(47)(D) and Exchange Act section 3(a)(68)(D). Under the implementing rules, 17 CFR 1.9 and 17 CFR 240.3a68-4, a mixed swap is generally subject to both regimes' requirements for its respective components, and parties may request alternative treatment through the joint procedure those rules establish.

What that procedure currently lacks is a decision rule for what the alternative treatment should be. This comment proposes one: coverage equivalence, developed in Section VIII below. Under it, the Commissions would enumerate the hazards the instrument generates at each level, then draw from each regime the mechanism that covers each hazard, rather than stacking both rulebooks in full or forcing a single label. The result is a protection set assembled by hazard rather than by form, and the mixed-swap route has the additional virtue that it is the one classification under which the protections of both regimes are available to be drawn upon. This is offered as a proposal for how the Commissions might exercise the discretion the joint procedure already gives them, not as a description of the rules' current design.

IV. Response to Question 5: The Narrow-Based Security Index Prong

On the release's specific example, contracts referring to potential changes in the composition of an NBSI as opposed to its price or value: criterion C1a supplies the line. This comment reads "based on" an index, in light of the accompanying phrase "including any interest therein or on the value thereof," as value-referencing; that is an interpretive position, marked as such, but it is the reading that keeps the NBSI Prong coherent with the parallel value language elsewhere in the definitions. On that reading, a composition-change contract does not reference the index's value and should be analyzed under the event-contract rubric rather than the NBSI Prong. For products whose index breadth migrates between narrow and broad, the Commissions' existing tolerance and grace rules remain the right mechanism, applied at the same review moment as the other criteria.

V. Response to Question 7: The Event Contract Prong and "Directly Affects"

The Commissions ask when an event "directly affects the financial statements, financial condition, or financial obligations of the issuer." Criterion C4 supplies an administrable test: directness means an identifiable balance-sheet or contractual channel into the issuer's own accounts or obligations.

The test is continuous with existing law. The credit-event lineage reflected in the Commissions' CDS guidance in the Product Definitions Adopting Release is C4-positive throughout: default, restructuring, and failure to pay all enter the issuer's obligations directly. On the same logic, this comment proposes treating corporate-control and capital-structure events (merger, bankruptcy, delisting, dividend, split, recapitalization) as direct channels, since each enters the issuer's statements or obligations rather than merely its market price. What C4 excludes is correlation: an event that moves the issuer's stock price without entering its statements or obligations, an event affecting the issuer's sector, or a macroeconomic event, is indirect.

Stated this way, the Event Contract Prong becomes reviewable document-by-document: the reviewer asks whether the contract's referenced event, as defined in the contract's own resolution terms, names a channel into an identified issuer's statements or obligations.

VI. Response to Question 8: Event Contracts and the Securities-Option Exclusion

The exclusion in CEA section 1a(47)(B)(iii) reaches "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof," that is subject to the Securities Act and the Exchange Act. The Commissions ask which event contracts referencing securities fall within it.

The criteria give a two-part answer: the exclusion applies when C1 scores the reference object as a security's price or value, and C2 scores the payoff as a function of that price or value. Both parts are necessary. Binariness is not the line; as the release notes, binary options on securities already trade as standardized options on national securities exchanges, and a binary payoff triggered at a price threshold is still a function of the security's price.

Three worked examples show the line:

- *"XYZ common stock closes above $250 on date D."* Reference object: the security's price. Payoff: a threshold function of that price. Within the exclusion; this is an option on the security however the settlement is denominated.
- *"XYZ announces a stock split by date D."* Reference object: an issuer event. Payoff: a function of the event's occurrence, not of the security's price. Not an option on the security; the instrument is analyzed under the Event Contract Prong, where the split is a C4-positive capital-structure channel.
- *"The FOMC lowers the target range at its September meeting."* Reference object: exogenous to any security and any issuer. No securities-law prong is reached; the instrument is analyzed as a CEA event contract.

The distinguishing characteristics the Commissions ask for are therefore the reference object and the payoff mapping, not the settlement's shape.

VII. Response to Question 11: The Cash-Settled Equity Perpetual

Scored on the criteria, the instrument the Commissions describe is: C1, a single security's price; C2, a continuous function of that price; C3, perpetual, with a funding-rate mechanism in place of expiry and delivery.

The definitional label is genuinely contestable. The security-future category assumes a delivery date; the swap and SBS categories assume swap form. Rather than urging one label, this comment offers two observations that do not vary with the label, and a resolution route.

First, the hazard profile is that of the equity-derivatives complex regardless of label: issuer-insider information bears on the reference security; manipulation exposure runs through the reference market; leverage and margin questions are those of continuous price-linked instruments. Whichever category the Commissions select, the protection bundle must cover those hazards, and coverage, not nomenclature, is the substantive stake.

Second, the perpetual form contains a hazard that is distinctive and presently ungoverned in either regime: the funding rate is a venue-administered rate, derived from the venue's own market price, that then determines cash flows in that same market. The venue is, in effect, its own calculation agent for a rate consumed inside the contract. That is a self-referential certification structure with an endogeneity channel: errors or design choices in the funding methodology feed back into the price from which the methodology is computed. The existing frameworks address settlement-price integrity, but none addresses funding-rate methodology, governance, or conflicts as such. If the Commissions provide clarity on the perpetual form, funding-rate governance is the item most in need of it.

On the release's question about liquidity formation, price discovery, and hedging: the candidate marginal contribution of an equity perpetual is continuous single-name exposure without roll. Whether that contribution is real is an empirical question, answerable against the existing substitute set (listed options, single-stock futures, total-return swaps) rather than by presumption in either direction.

Resolution route: the instrument is a strong candidate for the mixed-swap procedure described in Section III, with the protection set assembled by coverage equivalence, so that the insider, manipulation, leverage, and funding-rate hazards are each covered by the mechanism, from either regime, that actually addresses them.

VIII. Response to Questions 12 through 15: Alternative Compliance as Coverage Equivalence

The Commissions ask how "substantially similar" should be viewed. Outcomes-oriented comparability is already the Commissions' approach in adjacent settings: the CFTC through comparability determinations, and the SEC through substituted compliance under Exchange Act Rule 3a71-6, which turns on whether requirements are "comparable to otherwise applicable requirements" in light of factors such as "the scope and objectives of the relevant foreign regulatory requirements." The release's own phrasing of Question 12, asking whether "substantially similar" should contemplate scope, objectives, and outcomes, tracks that inquiry. This comment proposes the operational content for applying the established approach between the two domestic regimes:

Coverage equivalence. Compliance with one Commission's framework should satisfy the other's requirements for an instrument class when, for each material hazard the class generates, at the level where

the hazard arises (contract terms, venue rules, participant conduct, or public use of the price), under the conditions actually present, the first framework contains a mechanism that reduces the residual hazard below tolerance.

Three features of the test respond to the release's sub-questions. "Scope, objectives and/or outcomes" maps to hazard identification: two regimes are comparable for a class when they cover the same hazards, not when their rules share form. "Supervisory compliance programs" and "enforcement authority" map to whether the covering mechanism is real under the conditions present: a rule without examination or enforcement capacity does not cover. And the test is class-specific: two rulebooks with different forms can be substantially similar for one instrument class while failing for another.

Tolerance is for the Commissions to set. The framework's contribution is the hazard enumeration, the level assignment, and the conditions under which a mechanism does or does not cover.

The venue-protection criteria. Three further criteria, presented in Exhibit A alongside the classification criteria, organize the hazard side of the test:

C6. Operator settlement-payoff neutrality. Whether the venue or its affiliates hold economic exposure to contract outcomes, or match customer interest without directional exposure. Venue exposure is an operator-side conflict and a channel for outcome endogeneity; the covering mechanisms are neutrality requirements, disclosure of principal trading, and conflicts rules.

C7. Certifier identity and integration mode. Who certifies the settlement fact (a public authority, a private party, or a mechanism), and how the certifier is integrated: by contract (de jure), by convention without the certifier's participation (de facto), or by economic incentives (cryptoeconomic). The integration mode, not the identity, predicts the failure mode. A central bank whose publication conventions are relied on without its consent, a licensed index provider under contract, and an incentive-secured oracle present three different insider, endogeneity, and dispute surfaces, and the covering mechanisms differ accordingly: stated source hierarchies, restricted-person rules scoped to the certifier's personnel, and dispute procedures.

C8. Public-quote consumption versus quote governance. Whether the instrument's price is consumed outside the transaction, by citation, model use, or institutional decisions, and whether governance of methodology, dissemination, and conflicts scales with that use. The hazard rises with realized use, not with trading volume, and the covering mechanism is benchmark-style governance triggered by realized citation and decisional use.

Questions 13 through 15 follow from the same principle. Surveillance, examination, and information-sharing should be scoped to where hazards sit rather than to agency of registration: personnel of the settlement source for insider risk in event-referenced instruments (C7); the reference market for manipulation in price-referenced instruments; and the citing and deciding institutions' reliance where a price has acquired public use (C8). Cross-market activity is precisely the case in which hazard location and registration diverge, and enhanced data-sharing under the Commissions' March 11, 2026 memorandum of understanding regarding harmonization in areas of common regulatory interest, cited in the release at 91 FR 37874 n.1, is the natural channel for aligning them.

Where coverage fails, the remedy sits at the venue-rule layer, not in relabeling. The mixed-swap procedure reaches only genuinely dual-interest instruments. For the more common case, an instrument

whose single classification is structurally correct but whose label's bundle underfits its hazards, the correction instruments already exist at the level where the hazards arise: on the CFTC side, conditions attached at Part 40 review under the designated-contract-market core principles; on the SEC side, exchange listing standards and Exchange Act section 19(b) rule filings; and, for the residual case, each Commission's exemptive authority (CEA section 4(c); Exchange Act section 36), within the limits Title VII places on that authority, as the release itself notes in Question 13. Classification should follow structure; coverage should be completed by venue rule; relabeling should never be used as a protection instrument.

Finally, the classification non-neutrality described in the Executive Summary is why alternative compliance matters beyond convenience. Because the swap and SBS labels attach different protection bundles, including different public-interest screening and different participation restrictions under CEA section 2(e), Exchange Act section 6(l), and Securities Act section 5(e), a definitional choice redistributes protection whether or not anyone intends it. Coverage equivalence gives the Commissions a way to make that redistribution visible, and the venue-rule remedy gives them a way to correct it without distorting the definitional analysis.

IX. Conclusion

The Commissions' questions divide into two kinds, and the division is the answer. Definitional questions are resolvable by observable structural criteria: reference object, payoff mapping, term structure, issuer-consequence channel, and exposure population. Compliance questions are resolvable by hazard coverage: whether each hazard an instrument class generates is covered at its level, under the conditions present, by a real mechanism. Where an instrument genuinely implicates both Commissions, the mixed-swap category supplies the home and coverage equivalence supplies a decision rule; where a correctly classified instrument's bundle underfits, the venue-rule layer supplies the remedy. I would welcome the opportunity to elaborate on any element of this framework.

Respectfully submitted,

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Exhibit A: Classification and Protection Criteria

Classification criteria (score from contract terms):

#	Criterion	Operative question	Statutory line
C1	Reference object	What variable enters the payoff: security price/value, issuer event, or exogenous event? (C1a: if an index, narrow or broad per CEA 1a(35) / Exch. Act 3(a)(55)(B))	1a(47)(A)(i)-(ii); (B)(iii); 3(a)(68)
C2	Payoff mapping	Is the payoff a function of the reference object's price/value, or of an event's occurrence?	(B)(iii); prong (i) vs (ii)
C3	Term structure	Event-fixed resolution, fixed expiry, or perpetual with funding rate?	(B)(i); Q11
C4	Issuer-consequence channel	Does the event enter the issuer's own statements, condition, or obligations through an identifiable channel?	3(a)(68) Event Contract Prong
C5	Direct-exposure population	Do identifiable actors hold pre-existing exposure to the event?	1a(47)(A)(ii)

Venue-protection criteria (score from venue rulebook):

#	Criterion	Operative question	Hazard governed
C6	Operator neutrality	Does the venue hold exposure to outcomes?	Operator conflict; endogeneity
C7	Certifier identity × integration	Who certifies settlement, and by contract, convention, or incentives?	Insider access; endogeneity; disputes
C8	Quote consumption vs governance	Is the price used outside the transaction, and does governance scale with that use?	Quote authority outrunning governance

Test for alternative compliance (coverage equivalence): for each material hazard, at its level, under conditions present, does the other regime contain a covering mechanism? Tolerance set by the Commissions.

Where no covering mechanism exists: correct at the venue-rule layer, not by relabeling.