SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000
FACSIMILE: 1-212-558-3588
WWW.SULLCROM.COM

125 Broad Street
New York, New York 10004-2498

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August 24, 2026

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance; CFTC RIN 3038-AF71; SEC RIN 3235-AN79; SEC Release Nos. 33-11424 and 34-105735; File No. S7-2026-21

Dear Mr. Kirkpatrick and Ms. Countryman:

On behalf of our client, SOFR Academy, Inc., we appreciate the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC") and Securities and Exchange Commission's ("SEC," and together with the CFTC, the "Commissions") Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance (the "Joint Request").[1]

The classification question addressed in this letter raises a broader market-structure question relevant to market participants evaluating transaction-based credit-spread products. U.S. banking organizations have sought credit-sensitive reference rate elements that can supplement Secured Overnight Financing Rate ("SOFR") for certain lending applications, while the official sector has encouraged continued private-sector innovation in suitable reference rates rather than

[1] Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance, 91 Fed. Reg. 37873 (June 24, 2026) (Vol. 91, No. 120) (SEC Release Nos. 33-11424 and 34-105735; File No. S7-2026-21; CFTC RIN 3038-AF71; SEC RIN 3235-AN79).

the selection or endorsement of a particular commercial benchmark.[2,3] As private sector market participants develop and evaluate the emergence of new transaction-based benchmark credit spread reference rates that can work with SOFR, clear and durable regulatory classification of derivatives referencing such benchmarks becomes an important implementation consideration. Facilitating the use of robust benchmarks in this area would promote responsible innovation and market transparency and enhance the efficiency and stability of the U.S. financial system by mitigating bank funding risks and the potential for adverse effects on credit supply.[4]

This letter addresses a practical classification question that is increasingly important as financial benchmarks become more data-driven: when a derivative references a broad, transaction-based benchmark calculated using prices, yields, or spreads observed in funding markets, should the derivative become a "security-based swap" ("SBS") or "mixed swap" merely because transactions in securities or instruments of indebtedness are among the benchmark's upstream calculation inputs?

We respectfully submit that the answer should be no. Classification should turn on whether the indices or measures referenced by the derivative are designed to track the performance of an overall market segment versus a specific security, issuer, or narrow-based index thereof—not on the provenance of every data observation used by an independent benchmark administrator.

Providing clarity on this question would facilitate consistent analysis by financial institutions, trading venues, intermediaries and benchmark administrators without endorsing any particular benchmark or commercial product.

Accordingly, we request that the Commissions provide a joint interpretation, or a non-exclusive safe harbor, confirming that an agreement, contract, or transaction that otherwise falls within the definition of a "swap" should not be classified as an SBS or mixed swap solely because the broad transaction-based rate, funding-cost measure, or credit-spread benchmark it references is calculated using data relating to securities, loans, or instruments of indebtedness, where the contract does not provide contractual or economic exposure to a single security or loan, a narrow-based security index ("NBSI"), or an issuer-specific event.

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[2] Letter from R. Christopher Marshall et al., representatives of BBVA USA Bancshares, Inc., Capital One Financial Corporation, Citizens Bank, Comerica Incorporated, Fifth Third Bancorp, M&T Bank Corporation, MUFG Americas Holdings Corporation, The PNC Financial Services Group, Inc., Regions Financial Corporation and Zions Bancorporation, National Association, to Randal K. Quarles, Vice Chairman for Supervision, Board of Governors of the Federal Reserve System, Joseph Otting, Comptroller of the Currency, and Jelena McWilliams, Chair, Federal Deposit Insurance Corporation (Sept. 23, 2019).

[3] Letter from Steven T. Mnuchin, Secretary of the Treasury; Jerome H. Powell, Chair, Board of Governors of the Federal Reserve System; Randal K. Quarles, Vice Chair for Supervision, Board of Governors of the Federal Reserve System; John C. Williams, President and Chief Executive Officer, Federal Reserve Bank of New York; Brian P. Brooks, Acting Comptroller of the Currency; Jay Clayton, Chairman, Securities and Exchange Commission; Jelena McWilliams, Chairman, Federal Deposit Insurance Corporation; and Heath P. Tarbert, Chairman and Chief Executive, Commodity Futures Trading Commission, to participants in the Credit Sensitivity Group (Oct. 21, 2020).

[4] *See* Harry Cooperman, Darrell Duffie, Stephan Luck, Zachry Wang & Yilin (David) Yang, Bank Funding Risk, Reference Rates, and Credit Supply, 80 J. Fin. 739 (2025), https://doi.org/10.1111/jofi.13411

Executive Summary

The Commissions can provide meaningful certainty without regulating, approving, or endorsing any particular benchmark or weakening either agency's investor-protection or market-integrity mandate. The requested clarification concerns the classification of derivatives under Title VII, not the selection or approval of the referenced benchmark itself. We recommend that the Commissions:

1. **Adopt an input-output distinction.** The use of security-, loan-, or debt-transaction data as an input to an independently administered benchmark should not, standing alone, make a derivative on the benchmark an SBS or mixed swap. "Based on" and "any interest therein" should require a material contractual or economic nexus to a specific security, loan, NBSI, or issuer event, not a broad-based funding market.
2. **Create a non-exclusive safe harbor for derivatives referencing broad-based funding benchmarks.** The safe harbor should focus on objective product features: the benchmark measures a general rate or funding condition; the contract does not identify a single instrument, NBSI, issuer, or credit event; the methodology applies pre-established criteria to a changing and diversified universe; and settlement depends only on the published benchmark level or change.
3. **Preserve anti-evasion and cross-market authority.** The interpretation should not protect a product designed to replicate a single security, loan, NBSI, or issuer event, and should not disturb the SEC's authority over security-based swap agreements ("SBSAs") or either Commission's anti-fraud, anti-manipulation, or enforcement authority.

Requested interpretive principle

An agreement, contract, or transaction that otherwise falls within the definition of a "swap" should not be classified as an SBS or mixed swap solely because the referenced benchmark is calculated from transaction prices, yields, spreads, or other data relating to securities, loans, or instruments of indebtedness.

The decisive inquiry should be whether the derivative itself transfers exposure to a single security or loan, an NBSI, or an issuer-related event, rather than whether such instruments contribute data to the benchmark calculation.

I. Market Context and Relevant Benchmark Structure

The classification question addressed here arises in the context of longstanding private-sector interest in credit-sensitive supplements to SOFR for certain lending applications. In September 2019, a group of regional banking organizations wrote to federal banking regulators expressing concern that SOFR, on a stand-alone basis, was not well suited to certain lending products and requesting exploration of a SOFR-based lending framework that included a credit-sensitive element. The banks explained that closer alignment between lending rates and bank funding costs could support credit availability through both normal and stressed market conditions.

Following a series of Credit Sensitivity Group workshops, senior officials from the U.S. Department of the Treasury, the Federal Reserve Board, the Federal Reserve Bank of New York,

the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the SEC and the CFTC stated in October 2020 that banks may seek different characteristics when selecting a reference rate based on their particular business needs. The officials further indicated that the official sector was not well positioned to adjudicate the selection of a reference rate between banks and their commercial customers, supported continued innovation in suitable reference rates—including those with credit-sensitive elements—and encouraged private financial market participants to engage with producers and potential producers of alternative reference rates.

This history does not resolve the Title VII classification question presented here. It does, however, demonstrate that the development and evaluation of credit-sensitive supplements has long been understood as a market-led process. Providing clear classification principles for derivatives referencing such benchmarks would support that process without requiring either Commission to select, recommend, or endorse a particular benchmark.

One current example of a transaction-based benchmark architecture that presents this classification question is provided by the iSTOXX SOFR Academy USD AXI and FXI index families. SOFR Academy developed the Across-the-Curve Credit Spread Index ("AXI") and the Financial Conditions Credit Spread Index ("FXI") as transaction-based credit-spread supplements to SOFR for use in loans, derivatives, and other financial contracts. Unlike a standalone unsecured reference rate calibrated to a particular funding tenor, their underlying transaction pools span the maturity curve from overnight through five years.[5]

STOXX is the benchmark administrator for the index families and publishes the governing methodology.[6] Separately, the benchmark framework has been subject to independent review by Promontory Financial Group (IBM Promontory) with respect to relevant IOSCO Principles for Financial Benchmarks.[7]

AXI is designed to measure the recent cost of wholesale unsecured debt funding for U.S. bank holding companies and commercial banks. It combines eligible short-term and long-term funding transactions with maturities from overnight to five years, which provides a rich, varied, and robust range of transactions and transacting parties. FXI uses the same general methodology but expands the issuer universe to include non-bank financial institutions and U.S. corporate

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[5] Antje Berndt, Darrell Duffie & Yichao Zhu, Across-the-Curve Credit Spread Indices, 32 Financial Markets, Institutions & Instruments 115 (2023), https://doi.org/10.1111/fmii.12172 (designing AXI and FXI as a credit-spread add-ons to SOFR based on a broad set of unsecured debt transactions across the maturity curve, with maturities ranging from overnight to five years, rather than a spread tied to a particular short-term funding tenor).

[6] STOXX Ltd., iSTOXX Credit Spread Indices Methodology Guide 4-5, 18-20 (Apr. 2026) (describing STOXX's administrator responsibilities, index rationale, methodology review, and governance).

[7] Promontory Financial Group, a Business Unit of IBM Consulting, AXI and FXI Limited Assurance Review: Principles 6, 7, and 9 of the IOSCO Principles for Financial Benchmarks (Apr. 2024), and AXI/FXI Limited Assurance Follow-up Review: Implementation of Recommendations (June 2024), available at https://stoxx.com/wp-content/uploads/2026/05/AXI-FXI-Limited-Assurance-Review-Report-and-Follow-up-Review-Memo-June-2024-1.pdf. Following its review of actions taken in response to its recommendations, Promontory concluded that the recommendations had been reasonably addressed and that IOSCO Principles 6 (Benchmark Design), 7 (Data Sufficiency), and 9 (Transparency of Benchmark Determinations) appeared to be fully implemented for both AXI and FXI.

issuers. The short-term component is sourced from the Depository Trust & Clearing Corporation ("DTCC")'s Money Market Kinetics data; the long-term component is sourced from transactions reported through the Financial Industry Regulatory Authority ("FINRA")'s Trade Reporting and Compliance Engine ("TRACE"). The methodology excludes private-market, executable quotes, and unregulated proprietary-platform transactions.[8]

Feature comparison: USD-AXI and USD-FXI

Feature	**USD-AXI**	**USD-FXI**
Benchmark form	Credit-spread supplement to SOFR; not a standalone all-in reference rate	Same
Observation structure	Across-the-curve transaction pool; not calibrated solely to a specific short-term tenor	Same
Economic objective	Recent wholesale unsecured funding spread of U.S. bank holding companies and commercial banks	Broader U.S. financial and corporate funding-conditions spread
Eligible observations	USD commercial paper / certificates of deposit and eligible senior unsecured bank bonds	Same categories, with wider issuer coverage
Maturity coverage	Overnight through five years	Overnight through five years
Primary transaction sources	DTCC Money Market Kinetics and FINRA TRACE	DTCC Money Market Kinetics and FINRA TRACE
Transaction window	Prior 21 transaction days	Prior 21 transaction days
Contractual exposure of a benchmark derivative	Published benchmark level or change — not delivery, return, or default performance of any component instrument	Published benchmark level or change — not delivery, return, or default performance of any component instrument

The breadth of the underlying transaction pool is economically significant. A 2025 quantitative study reports that, from June 2016 through March 2025, the daily dollar volume supporting AXI averaged approximately $463.1 billion; the lowest non-holiday observation was approximately $265.4 billion and the maximum was approximately $684.5 billion. The same study reports that FXI's supporting volume averaged approximately $1.558 trillion and remained above $1 trillion throughout the sample. Current benchmark administrator data further illustrates the

[8] FINRA describes TRACE as facilitating mandatory reporting of over-the-counter transactions in eligible fixed-income securities. See FINRA, Trade Reporting and Compliance Engine (TRACE), https://www.finra.org/filing-reporting/trace.

breadth of the underlying data pools. Aggregate reported issuer counts across the DTCC and FINRA components are 1,167 for AXI and 29,596 for FXI. Separately, a recent review of the DTCC and FINRA transaction data, found that an average one-month (21-business-day) observation window contained approximately 594,696 transactions for AXI and 2,892,330 transactions for FXI. These figures illustrate that a broad transaction-based benchmark can be grounded in large, changing pools of market observations without providing exposure to any specific security, loan, or issuer.[9]

The same study reports a full-sample correlation of 0.777 between daily changes in AXI and FXI, increasing to 93.6 percent during the onset of the COVID-19 pandemic and remaining 80.0 percent during the 2023 regional-bank stress episode. These data are relevant to the policy question because they show that the benchmarks measure general funding and financial conditions across large transaction sets. They do not operate as synthetic positions in any identified debt instrument or issuer.[10]

II. Why Additional Definitional Clarity Is Needed

The Joint Request correctly recognizes that increasingly convergent financial markets can blur jurisdictional lines. That uncertainty is not limited to event contracts or digital products. It can also arise when a conventional derivative references a modern benchmark built from regulated transaction data. Market participants evaluating these instruments—including banking organizations, dealers, trading venues and other potential users—may agree that a contract is economically a rate or spread swap, yet remain uncertain whether the benchmark's use of bond, commercial-paper, certificate-of-deposit, or loan data causes an SBS prong to apply.

This is not merely a hypothetical implementation question. In January 2025, Sullivan & Cromwell hosted an industry discussion concerning the implementation of AXI and FXI that included representatives of banking organizations, asset managers, dealers, market infrastructure providers and industry associations. Participants discussed applications of the benchmarks in both cash and derivatives markets, and the meeting minutes record that certain large banking organizations had begun ingesting and using AXI data in Treasury functions. The SEC and FDIC attended the discussion in observer capacity.

The consequences of an incorrect classification are material. Product characterization can affect trading-venue eligibility, dealer registration, business-conduct obligations, reporting, recordkeeping, clearing analysis, documentation, surveillance, and the identity of the primary regulator. A product may fail to develop not because its economic purpose is unclear, but because participants cannot determine with sufficient confidence which regulatory infrastructure applies.

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[9] Viktor Tsyrennikov, A Case for AXI 10, 12 (2025), arXiv:2509.03035.

[10] The reported correlations are for daily changes; the COVID-19 window is March 1-June 30, 2020, and the regional-bank-stress window is March 1-June 30, 2023.

A joint interpretation would reduce this avoidable friction while preserving the statutory allocation of authority.[11]

This is therefore a derivatives-classification question within the Commissions' respective Title VII responsibilities, rather than a request that either Commission regulate, approve, or select the referenced benchmark. Where the official sector has left the development and selection of suitable reference-rate solutions to private-market participants, uncertainty regarding the regulatory classification of derivatives that may reference those solutions can itself become an implementation barrier.

The key ambiguity arises from phrases such as "based on" and "including any interest therein." Those phrases should not be read to collapse the distinction between a benchmark's informational inputs and a derivative's contractual underlier. If upstream use of such data were enough to create SBS status, the classification of rates and indices could turn on remote data lineage rather than the economic risk transferred between counterparties. That result would be difficult to reconcile with Title VII's product-based allocation of jurisdiction, possibly upending the CFTC's traditional oversight of rates-based derivatives.

This letter does not ask the Commissions to approve AXI or FXI, to select or recommend any reference rate, to opine on every possible contract referencing a particular benchmark, or to immunize any product from generally applicable law. Product terms remain controlling. The requested clarification would instead confirm a product-neutral principle for distinguishing (i) an aggregate benchmark that uses debt-market observations to measure a general rate or condition from (ii) a derivative that transfers the price, yield, total-return, default, or event risk of a specific security, loan, NBSI, or issuer.

III. The Statutory Framework Supports an Input-Output Distinction

A. A conventional derivative on a broad funding-cost or credit-spread benchmark can fall naturally within the swap definition

The Commodity Exchange Act's swap definition expressly reaches agreements, contracts, and transactions based on interest or other rates, instruments of indebtedness, indices, quantitative measures, and other financial or economic interests, as well as executory exchanges of payments based on the value or level of such measures. A conventional fixed-versus-floating derivative referencing the level or change in a published funding-cost or credit-spread benchmark fits comfortably within that language.[12]

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[11] *See* Industry Discussion Regarding US-Dollar AXI & FXI: Implementation of IOSCO-Aligned Credit-Spread Reference Benchmarks for SOFR, Minutes for the January 30, 2025 Meeting (Jan. 30, 2025), available at https://sofracademy.com/wp-content/uploads/2025/02/AXI-FXI-January-30-2025-Meeting-Minutes.pdf (meeting hosted by H. Rodgin Cohen, Senior Chair, Sullivan & Cromwell LLP; participants included banking organizations, asset managers, dealers, market infrastructure providers and industry associations; SEC and FDIC participated in observer capacity).

[12] Commodity Exchange Act ("CEA") § 1a(47)(A), 7 U.S.C. § 1a(47)(A).

The statutory question is therefore not whether such a product can be a swap. It is whether one of the more specific SBS prongs also applies. The Exchange Act generally captures a Title VII instrument based on an NBSI, a single security or loan, or an issuer-related event that directly affects the issuer's financial statements, financial condition, or financial obligations. Those prongs identify the security-specific exposures that justify SEC primary jurisdiction. They should not be triggered merely because an aggregate rate is informed by transactions in debt instruments.[13]

B. The SBS prongs require a material nexus to the derivative's own contractual and economic exposure

For the SBS NBSI Prong, the relevant inquiry should be whether the referenced measure is itself a specific NBSI, or is designed to replicate the value or performance of one — not whether some observations used to calculate the measure relate to securities. AXI and FXI do not represent ownership, total return, price performance, or default performance of a fixed basket of debt securities. Their eligible transaction sets change as instruments are issued, mature, and trade; the benchmark output is a broad-based market funding spread, not the value of a index, basket, or portfolio of securities.

For the SBS Single Security Prong, there should be no SBS status unless the price or value of a single security or loan, or a pecuniary interest therein (such as a dividend or coupon) is referenced by the derivative. A transaction in which hundreds of thousands (or more) of observations across thousands (or more) of eligible issuers can influence an aggregate benchmark does not provide a holder with an "interest" in any one observation merely because that observation contributes to the calculation. The derivative counterparty has no right to receive the instrument, no claim on its cash flows, and no component-specific settlement amount.

For the SBS Event Contract Prong, an issuer event should be a contractual trigger or settlement determinant. A benchmark may rise after a bank failure or credit deterioration because market-wide funding spreads change; that statistical response is not the same as a contract that pays upon the occurrence of a named issuer's bankruptcy, failure to pay, restructuring, or other event. The former transfers exposure to the benchmark level. The latter transfers issuer-event risk.

C. The 2012 Product Definitions Adopting Release points in the same direction

The Product Definitions Adopting Release recognized that Title VII instruments based on interest rates or monetary rates are generally swaps, while instruments based on the yield or value of a single security, loan, or NBSI are generally SBSs. Importantly, the Commissions identified money-market rates established from actual lending or money-market transactions, and averages or indices of qualifying rates, as swap underliers, provided the relevant rate is not based on a specific security, loan, or NBSI.[14]

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[13] Securities Exchange Act of 1934 ("Exchange Act") § 3(a)(68)(A)(ii), 15 U.S.C. § 78c(a)(68)(A)(ii). "Narrow-based security index" is defined in CEA § 1a(35), 7 U.S.C. § 1a(35), and Exchange Act § 3(a)(55), 15 U.S.C. § 78c(a)(55).

[14] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, 77 Fed. Reg. 48208, 48262-63 (Aug. 13, 2012)

The Release also distinguished between "yield" used as a proxy for the price or value of a debt security, loan, or NBSI — which can support SBS treatment — and "yield" used as an interest or monetary rate — which supports swap treatment. That distinction is functional. It asks what the reference represents in the contract and what risk the counterparties transfer. The same functional analysis should apply to a transaction-based benchmark credit spread: the use of bond yields or spreads to estimate a general funding rate should not be equated with a derivative on the bonds themselves.[15]

IV. Proposed Joint Interpretation or Non-Exclusive Safe Harbor

What is missing from the Commission's guidance to-date is a clear method for distinguishing swaps on money market rates or general lending rates—which the Commissions have identified as interest rate swaps—from swaps on security indices. Bucketing transaction-based funding rate benchmarks into the latter category due to use of securities, loans, or other debt market transaction data would put a significant burden on market participants due to the need to evaluate whether the number, weighting and characteristics of debt instruments and issuers involved at any time satisfy the complicated test for distinguishing an NBSI from a broad-based security index.

To address this issue, we recommend that the Commissions issue a joint interpretation substantially in the form set out in Appendix A. The interpretation should state that a derivative is not an SBS or mixed swap solely because a referenced benchmark uses transaction data relating to securities, loans, or instruments of indebtedness. It should then identify objective features that support swap classification.

Recommended safe-harbor conditions

1. **General benchmark objective.** The benchmark is designed to measure a broad credit spread, funding spread, liquidity spread, or similar financial-condition spread that may supplement a separately established interest-rate benchmark.
2. **No security-specific contractual reference.** The derivative's terms do not identify a single non-exempt security or loan, an NBSI, a named reference entity, or an issuer event as a payment or settlement determinant. A changing observation set of transaction data, as described below, should not constitute an NBSI for this purpose.
3. **Methodology-based and changing observation set.** The methodology applies pre-established eligibility, weighting, averaging, and fallback criteria to a changing set of observations and is not designed to replicate the price, yield, total return, or default performance of a single security, loan, or a fixed, narrow-based set of eligible issuers or instruments. Where the benchmark is published in multiple settings, those settings should be derived from the broad

("Product Definitions Adopting Release") (discussing interest rates, money-market rates based on actual transactions, general lending rates, and indices or averages of qualifying rates).

[15] *Id.* at 48263-64 (distinguishing yield used as a proxy for the price or value of a debt security, loan, or NBSI from yield used as an interest or monetary rate).

benchmark methodology rather than constructed from observations concentrated around the maturity corresponding to each setting.

4. **Benchmark-level settlement.** Payments depend solely on the published benchmark level, change, average, or spread; the contract does not provide delivery of component instruments or component-specific recovery or value payments.

5. **No counterparty tailoring to obtain targeted security exposure.** The counterparties cannot select or weight benchmark observations to create exposure to a particular security, loan, NBSI, or issuer event.

These conditions should be non-exclusive. A product that falls outside the safe harbor should not automatically be an SBS or mixed swap; it should be analyzed under the statute and existing regulations. Conversely, the safe harbor should include an anti-evasion provision denying protection where the benchmark or contract is structured to replicate or target a single security, loan, NBSI, or issuer event.

The Commissions should also clarify that "any interest therein" denotes a pecuniary interest in the referenced security, loan, or security index, such as dividends or coupon payouts. It should not include a purely informational relationship arising because market data from an instrument contribute to an aggregate benchmark calculation. This interpretation gives the phrase meaningful scope while preventing it from becoming a limitless data-lineage test.

V. Illustrative Application of the Proposed Framework

The classification of any transaction must ultimately depend on its terms. The framework set out above is product-neutral: it applies to any derivative referencing a benchmark that satisfies conditions (i) through (v) of the proposed safe harbor, whatever the benchmark's name or administrator. The table below therefore states the analysis in general terms and then applies it to one concrete illustration — a conventional cash-settled derivative referencing a broad, transaction-based credit-spread benchmark (for which US-dollar AXI or FXI is one example, such as a fixed-versus-floating swap on the compounded daily benchmark or a swap on SOFR plus the benchmark spread). The illustration is included only to make the general principle concrete; it is not a request that the Commissions opine on any particular benchmark.

Classification factor	**Broad transaction-based benchmark derivative (general application)**	**Implication**
Contractual reference	Published benchmark level, average, term, or compounded setting (*e.g.*, AXI or FXI)	Rate/index reference within the swap definition
Named security or loan	None	Single Security Prong not implicated
Narrow-based basket	No fixed NBSI is identified or replicated; observations arise under objective eligibility criteria across a changing	NBSI Prong not implicated

Classification factor	Broad transaction-based benchmark derivative (general application)	Implication
	universe designed to capture a broad-based segment of the funding market	
Issuer event trigger	None; payments do not depend on bankruptcy, failure to pay, restructuring, or another event of a named issuer	Event Contract Prong not implicated
Component delivery or return	None; no component instrument is delivered and no component-specific price, coupon, recovery, or total return is paid	No direct security-specific economic exposure
Settlement	Cash settlement based only on the benchmark level or change	Supports swap, rather than SBS or mixed-swap, treatment
Upstream data	Broad regulated transaction observations (*e.g.*, DTCC and TRACE) used by the administrator	Informational inputs should not, standing alone, alter classification

The result should not change merely because a benchmark combines short-term instruments and bond transactions, or because an administrator uses Treasury rates to calculate credit spreads. Those features affect benchmark methodology, not the derivative counterparty's entitlement. Nor should the result change when a term setting is formulaically derived from the same benchmark, provided the contract continues to settle on the published setting and does not introduce a security-specific component.

This clarification would support consistent legal analysis across benchmark families. It would also encourage administrators to use deep, transparent, regulated transaction sources rather than discouraging such inputs out of concern that better data could unexpectedly change the regulator of a derivative.[16] Because the requested interpretation turns on objective product features rather than on the identity of any benchmark, it neither favors nor disfavors AXI, FXI, or any competing supplement; each would stand or fall on whether a given contract satisfies the stated conditions. That is a desirable policy incentive: robust benchmark design and clear product classification should reinforce, not undermine, one another.

VI. Responses to Selected Questions in the Joint Request

Questions 1 and 3 — innovative products and the lines among swaps, SBSs, and mixed swaps

[16] In this regard, the indices captured by this proposed framework differ from those that have raised regulatory concerns in the past. *See* SEC Chairman Gary Gensler, Prepared Remarks Before the Financial Stability Oversight Council – LIBOR, Jun. 11, 2021, *available at* https://www.sec.gov/newsroom/speeches-statements/gensler-fsoc-libor-2021-06-11.

Yes. Derivatives on data-driven financial benchmarks present a recurring interpretive question even when their economic structure is conventional. The Commissions should clarify that a benchmark's use of security- or loan-related transaction data is not dispositive. The governing criteria should be the contract's reference, settlement, and transferred risk. A product is a mixed swap only if it contains both a swap component and an SBS component; the presence of upstream securities data should not itself constitute an SBS component for this purpose.[17]

Question 4 — "any interest" in a security or group or index of securities

Additional clarity is warranted. "Any interest" should encompass a pecuniary interest, such as dividend or coupon payouts. It should not encompass a remote informational dependency. A benchmark derivative holder does not acquire an interest in every instrument whose transaction data may influence the benchmark any more than a user of a broad economic statistic acquires an interest in each underlying survey observation.

Question 5 — the SBS NBSI Prong

The Commissions should distinguish an "index of securities" from an index or rate derived in part from securities-market data. The NBSI Prong should apply where the contract references a fixed index or basket of securities that is narrow-based. It should only capture a dynamic index where one or the parties or a third party is exercising investment discretion with respect to the composition of the index.[18] It should not apply where objective methodology transforms observations across a changing, broad universe into a general funding-cost or credit-spread measure and the contract does not provide the return or event performance of the components.

Question 6 — the SBS Single Security Prong

A derivative should be "based on" a single security or loan only when the security or loan is expressly referenced in the calculation of the derivative's cash flows or delivery obligations. The possibility that a given security's transaction may be one of many observations in a benchmark calculation is insufficient, particularly where no instrument is guaranteed inclusion and the counterparties cannot control the observation set.

Question 7 — the SBS Event Contract Prong

The relevant issuer event should directly determine a payment, settlement amount, or other contractual obligation. A benchmark's market-driven response to an event is not enough. Otherwise, any broad rate that reacts to issuer stress could become an issuer-event contract after the fact, making classification unstable and path-dependent.

VII. Economic and Market-Structure Benefits of Clear Classification

The principal benefit of the requested clarification is legal certainty: a predictable, product-neutral classification standard that market participants, venues, and administrators can rely on. The market history and empirical literature discussed below explain why that certainty matters, but

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[17] The Product Definitions Adopting Release explains that mixed swaps were intended to be a narrow category and require both swap and SBS elements. 77 Fed. Reg. at 48291, 48294.

[18] *See id.* at 48285.

they do not bear on the legal question the Commissions are asked to resolve, and the requested relief does not depend on them. The market rationale for credit-sensitive supplements is not specific to AXI or FXI. As discussed above, regional banking organizations raised concerns during the LIBOR transition regarding the interaction among risk-free reference rates, bank funding costs, revolving-credit commitments and credit availability, and sought a SOFR-based lending framework incorporating a credit-sensitive element. The subsequent Credit Sensitivity Group process reflected the official sector's view that reference-rate selection should remain market-led and that private financial market participants should continue to develop and evaluate suitable reference-rate solutions.

Transaction-based credit-sensitive benchmarks may be useful in this market-led process because they can preserve SOFR as a robust underlying risk-free rate while supplementing it, where appropriate, with a transparent measure derived from observed funding-market transactions. Whether any particular benchmark is suitable for a particular use should remain a commercial judgment for market participants, subject to applicable regulatory requirements.

That history is relevant to the present request because clear regulatory classification can facilitate private-market evaluation without regulatory selection of a commercial winner. The Commissions need not determine whether any particular credit-sensitive benchmark should succeed. Their role here is narrower: to provide a predictable Title VII framework within which banking organizations, borrowers, dealers, trading venues, benchmark administrators and other market participants can make those commercial judgments.

The requested clarification would therefore have benefits beyond AXI and FXI. It would encourage innovation in transparent benchmarks built from regulated transaction data; reduce legal costs and inconsistent venue decisions; facilitate hedging of funding and credit-spread risk; and give market participants confidence that product classification will remain stable as a benchmark's eligible observations change over time.

The economic literature is cited here only to explain why market participants have sought such tools, not as a basis for the legal classification the Commissions are asked to provide. Peer-reviewed research finds that a transition from credit-sensitive reference rates to risk-free reference rates can exacerbate bank funding risk and reduce credit supply, while a reference rate that covaries with bank funding conditions can offset those effects.[19] A separate model- and assumption-dependent study reports estimates, under its stated scenarios, that a SOFR-plus-supplement approach to revolving-credit pricing can reduce funding-risk mismatches relative to a SOFR-only approach. These estimates are illustrative of the funding-risk mechanism only; the Commissions need not credit, evaluate, or rely on them to resolve the classification question.[20] The point for present purposes is narrow: regulatory uncertainty about classification should not, by itself,

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[19] Cooperman and Duffie, *supra* note 4.

[20] Tsyrennikov, *supra* note 9, at 24-29. The estimates are model- and assumption-dependent; the paper reports potential fixed-spread reductions of up to 65 basis points while maintaining modeled risk-adjusted returns and funding-cost under-recovery of up to 15 basis points over as little as three months under SOFR-only stress scenarios.

prevent market participants from evaluating transparent, broad-based tools for managing funding risk.

When participants can determine with confidence that a benchmark derivative falls within the CFTC swap framework, they can build consistent documentation, reporting, venue, and surveillance arrangements. The SEC can retain its applicable SBSA and anti-fraud authority, and both Commissions can share information. Certainty therefore supports oversight as well as innovation.

Conclusion

For the reasons described above, and against the background of longstanding private-sector interest in credit-sensitive supplements to SOFR, we respectfully request that the Commissions confirm that using securities, loans, or instruments of indebtedness as data inputs to calculate a broad transaction-based benchmark does not, by itself, cause a derivative on that benchmark to be an SBS or mixed swap. Classification should follow the contract's payment terms and economic exposure. A non-exclusive safe harbor based on the objective conditions described above would provide durable guidance while preserving anti-evasion, anti-fraud, anti-manipulation, and cross-market oversight.

Such clarification would not select, recommend, approve, or endorse any particular benchmark. It would instead remove a threshold classification uncertainty and allow private-market participants to evaluate competing reference-rate solutions within a clear and predictable regulatory framework.

We would welcome the opportunity to discuss these issues further or to provide additional legal, market-structure, or technical analysis that may assist the Commissions.

Respectfully submitted,



Colin D. Lloyd

cc: Marcus Burnett
SOFR Academy, Inc.

Appendix A — Proposed Joint Interpretive Text

The following language is offered as a drafting framework. The Commissions could issue it as an interpretation or adapt it into a non-exclusive safe harbor:

Broad Transaction-Based Benchmark Derivatives

For purposes of section 1a(47) of the Commodity Exchange Act and section 3(a)(68) of the Securities Exchange Act of 1934, an agreement, contract, or transaction is not "based on" a single security or loan (including any interest therein or on the value thereof), a narrow-based security index (including any interest therein or on the value thereof), or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, solely because the referenced benchmark is calculated using transaction prices, yields, spreads, volumes, maturities, or other data relating to securities, loans, or instruments of indebtedness comprising a broad-based segment of the funding market.

Absent other security-based terms, an agreement, contract, or transaction referencing such a benchmark that otherwise falls within the definition of a "swap" is not a security-based swap or mixed swap where: (i) the benchmark is designed to measure a broad credit spread, funding spread, liquidity spread, or similar financial-condition spread that may supplement a separately established interest-rate benchmark, rather than to constitute a standalone all-in unsecured reference rate; (ii) the contract does not identify, as a payment or settlement determinant, a single non-exempt security, a single loan, a narrow-based security index, or an event relating to an issuer of a single security or the issuers of securities in a narrow-based security index; (iii) the benchmark applies pre-established, objective criteria to a changing set of eligible observations and is not designed to replicate the price, yield, total return, credit performance, or event risk of a single security or loan or a narrow-based security index; and, where the benchmark is published in multiple settings, such settings are derived from the broad benchmark methodology rather than constructed from observations concentrated around the maturity corresponding to each setting; (iv) settlement depends solely on the published benchmark level, change, average, or spread and does not provide delivery of component instruments or component-specific value or recovery payments; and (v) the counterparties cannot select or weight benchmark observations to obtain targeted exposure to a single security or loan, a narrow-based security index, or an issuer-related event. For this purpose, a "narrow-based security index" is a fixed index of securities that is narrow-based or a dynamic index of securities constituted through the exercise of discretion.

This interpretation is non-exclusive. Failure to satisfy one or more conditions does not create a presumption that a product is a security-based swap or mixed swap. The interpretation does not apply to a benchmark or transaction structured to evade the security-based swap requirements or to replicate, in substance, a security-based swap. It does not alter the treatment of security-based swap agreements or limit either Commission's applicable anti-fraud, anti-manipulation, reporting, examination, or enforcement authority.