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August 24, 2026

VIA https://www.regulations.gov

Robert Sidman
Deputy Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

VIA email to rule-comments@sec.gov

Vanessa A. Countryman
Secretary of the Commission
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, RIN 3038-AF71, File No. S7-2026-21

Dear Mr. Sidman and Ms. Countryman:

Pierson Ferdinand LLP (the "Firm") is pleased to submit this comment letter on behalf of its clients in response to the Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance ("Joint Request") issued on June 24, 2026, by the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") (collectively, the "Commissions").[1] The Joint Request seeks comment on a number of issues, including the exclusion for security forwards from the "swap" and "security-based swap" definitions. The Firm's comments focus on the security forward exclusion and the accompanying request for comment.

The Firm is an international, full-service law firm headquartered in New York with lawyers practicing in more than 25 jurisdictions in the United States and the United Kingdom. Its partners regularly advise clients on regulatory, transactional and compliance matters arising under the Commodity Exchange Act ("CEA") and the federal securities laws. Among its clients are those who provide liquidity to employees of startups through variable pre-paid forward contracts ("VPFCs") involving securities. VPFCs are typically provided by these clients to existing or former employees holding private securities or options of late-stage technology companies in need of liquidity before an initial public offering ("IPO") or corporate acquisition

[1] 91 Fed. Reg. 37873 (June 24, 2026).

involving these securities. VPFCs have been one of the most popular types of pre-IPO liquidity solutions and have substantial benefits for many of these employees. Most significantly, employees rely on VPFCs to provide the liquidity necessary to exercise their stock options while the company is still private. VPFCs also offer employees tax optimization and a source of liquidity against private shares that banks typically will not offer. Numerous registered broker-dealers and online platforms, such as equitybee.com, have facilitated these types of forward contracts in the past.

Regulatory Background

The statutory exclusion for security forwards under the CEA Section 1a(47)(B)(ii)[2] provides that a contract for the purchase or sale of a security for deferred shipment or delivery is excluded from the definitions of the terms "swap" and "security-based swap" so long as the transaction is intended to be physically settled. The Commissions have recognized that no bright-line test exists regarding "intended to be physically settled"[3] and have sought comment on whether further clarity is needed, especially for innovative products and product structures.[4]

Prior to the Joint Request, on June 9, 2022, the staff of the SEC added Question 101.01 to its Compliance and Disclosure Interpretations ("C&DI") addressing forward contracts on restricted securities,[5] which has created some regulatory uncertainty in the VPFC market. The new C&DI provides that forward contracts on restricted securities would not be considered by the staff to be "intended to be physically settled" under certain circumstances. Specifically, while the C&DI recognizes that a determination of whether an instrument qualifies for the security forward exclusion is based on facts and circumstances, it states that the SEC staff would not consider a forward contract as "intended to be physically settled" if, at the time the parties enter into the contract, the underlying securities (i) cannot be legally transferred, or (ii) are subject to contractual restrictions on transfer.

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[2] 7 U.S.C. §1a(47)(B)(ii).

[3] *See* Joint Request at 37,876. *See also Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement;" Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 28107, 245 (Aug. 13, 2012)("Product Definitions"). In the Product Definitions, the Commissions emphasized that "the analysis as to whether any product falls within the exclusion for sales of securities on a deferred settlement basis requires flexibility, including the consideration of applicable facts and circumstances" and declined to adopt a bright-line test. *Id.*

[4] *Id.* (Request for comment #10).

[5] Question 101.01 to the C&DIs is *available at* SEC.gov | Exchange Act Sections. The C&DIs were recently renamed "Corporation Finance Interpretations," but for purposes of this letter, we use the term C&DI.

The C&DI further provides that in order for a contract to be considered "intended to be physically settled," the following conditions must both be met at the time the parties enter into the contract: (i) the offer and sale of the underlying securities must be registered in compliance with Section 5 of the Securities Act of 1933 ("Securities Act") or otherwise exempt from registration; and (ii) any contractual restrictions on the transfer of the underlying securities must be satisfied or otherwise waived.

Transfer Restrictions Alone Should Not Render VPFCs Ineligible for the Security Forward Exclusion

VPFCs are commonly structured to provide for the physical delivery of securities at settlement. In many cases, the underlying securities may be subject to transfer restrictions (such as legends or contractual limitations). These restrictions do not, in themselves, convert a physically settled contract into a cash-settled or synthetic arrangement. The parties' clear intent and contractual obligation to deliver the actual securities—rather than cash or other consideration—should be the determinative factor. So long as the parties intend and are obligated to deliver the securities (subject to compliance with applicable restrictions), the transaction should qualify for the security forward exclusion.

Moreover, VPFCs may be structured in a way that supports the view that they are intended to be physically settled, even with transfer restrictions on the underlying securities. For example, a VPFC requiring physical settlement of securities may include a provision that requires physical delivery of the securities only *after* any period restricting the transfer of securities has elapsed. Under such a contract, the parties intended the contract to be physically settled, notwithstanding the transfer restriction, because physical delivery of the securities was not required until after any applicable restriction period had ended. The staff C&DI, however, could be read to say that the mere presence of transfer restrictions at the time the transaction is entered into, without more, renders a security forward contract not eligible for the security forward exclusion. Providing clarity that qualification for the security forward exclusion is a facts and circumstances inquiry and not a bright-line test, and that transfer restrictions by themselves do not negate the intention of the parties to deliver the underlying securities, would eliminate any regulatory ambiguity.

The staff C&DI provides that if any contractual restrictions on transfers are satisfied or otherwise waived, a security forward may qualify under the security forward exclusion. Such a condition may prevent employees and stockholders of private companies subject to employment or charter restrictions on transfers from using VPFCs in the absence of the company's express cooperation. Although some private companies sponsor liquidity programs for employees and stockholders where any transfer restrictions are specifically waived, typically, the contracts involved are outright sales rather than VPFCs.

If transfer restrictions alone would render a VPFC ineligible for the security forward exclusion, such products would be subject to regulation under Section 5 of the Securities Act[6] and Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[7] regulations for security-based swaps, which, among other things, make it unlawful for any person to offer to sell, offer to buy, or purchase or sell a security-based swap to any person or entity that is not an eligible contract participant ("ECP") without registration with the SEC. As a result, VPFCs would not be practically viable, since many employees, even if they qualify as accredited investors, do not qualify as ECPs.

It is also notable that recent (post-Dodd-Frank Act) case law has not discussed VPFCs as security-based swaps subject to Dodd-Frank Swaps requirements. *See, e.g., Rubenstein v. Knight Swift Transportation Holdings, Inc.*, 664 F.Supp.3d 523 (S.D.N.Y. 2023); *Estate of McKelvey v. CIR*, 906 F.3d 26 (2d Cir. 2018). While these cases focused on tax issues, neither case concluded that the VPFCs violated the federal securities laws because they were not registered with the SEC.

Policy Rationale

Excluding VPFCs from the swap and security-based swap definitions when physical settlement is intended, regardless of transfer restrictions, promotes regulatory clarity and consistency. It also supports lawful innovation and efficient capital markets, as recognized in the Joint Request, by facilitating the development and growth of the market for VPFCs. Imposing additional requirements or uncertainty based solely on the presence of transfer restrictions would create unnecessary barriers and regulatory ambiguity, the ultimate result of which would be the elimination of the VPFC market as a viable alternative for employees seeking liquidity.

While other options for obtaining liquidity may exist, such as traditional securities lending, as a policy matter the Commissions should not be in the position of picking winners and losers, or effectively closing the VPFC market. This is particularly the case where the Commissions can interpret the security forward exclusion to permit the VPFC market to thrive, while remaining subject to appropriate regulation under the federal securities laws as purchases and sales of securities.

Conclusion

The Firm respectfully urges the Commissions to issue an interpretation or take other regulatory action to confirm that VPFCs involving securities qualify for the security forward exclusion, provided the contract is intended to be physically settled, even if the securities are

[6] 15 U.S.C. §77e.

[7] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

subject to transfer restrictions. Further guidance to this effect would provide much-needed certainty for market participants and foster continued innovation in the U.S. financial markets.

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Thank you for the opportunity to submit these comments. Please feel free to contact Julian Hammar at (571) 867-8370 or Julian.Hammar@pierferd.com if there are any questions regarding these comments.

Respectfully submitted,

PIERSON FERDINAND

Pierson Ferdinand LLP