Kalshi

August 24, 2026

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

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

Re: Joint Request for Comment on Further Definition of 'Swap' and 'Security-Based Swap' and on Alternative Compliance" (RIN 3038–AF71; S7–2026–21)

Dear Ms. Countryman and Mr. Kirkpatrick:

Kalshi Inc., together with its subsidiaries KalshiEX LLC, a board of trade designated by the Commodity Futures Trading Commission (the "CFTC") as a contract market ("DCM"), and Kalshi Klear LLC, a CFTC-registered derivatives clearing organization (collectively, "Kalshi"), submit these views on the CFTC's and the Securities and Exchange Commission (the "SEC" and, together with the CFTC, the "Commissions")'s Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance.[1]

Kalshi is the leading prediction market in the United States. It has listed event contracts across economic indicators, financial indices, weather, politics, science, sports, and culture; it has submitted a significant majority of all event contracts certified with the CFTC on top of processing tens of billions of dollars in notional volume under the CFTC's oversight. Kalshi was also the first U.S. regulated exchange to offer perpetual contracts on digital commodities for trading in the United States,[2] with trading volumes in Kalshi's Bitcoin perpetual contract exceeding $1 billion within the first week of listing.[3] Derivatives markets globally have experienced transformational product innovation in recent years. Event contracts have been actively regulated by the CFTC for decades,[4] but over the past few years they have exploded in popularity and diversified to cover reference events ranging from political news to company

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1 Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance, 91 Fed. Reg. 37,873 (June 24, 2026) ("2026 Joint Definitional Release").

2 Order Approving KalshiEX LLC BTCPERP Futures Contract, *In re Request for Approval by KalshiEX LLC of the BTCPERP Futures Contract* (CFTC May 29, 2026) ("BTC Perps Order").

3 *See* CNBC, Kalshi trading in "perps" crosses 1 billion in volume within a week of launch (June 9, 2026), https://www.cnbc.com/2026/06/09/kalshi-perpetual-futures-trading-perps-crosses-1-billion-in-volume-within-a-week-of-launch.html.aa.

4 *See* CFTC Division of Trading and Markets, No-Action Letter (Feb. 5, 1992); CFTC Division of Trading and Markets, No-Action 93-66, 1993 WL 595741 (June 18, 1993).

events and financial metrics related to equity and commodity prices. Meanwhile, perpetual contracts have become the most widely traded derivative instrument in digital commodity markets.[5] And, beyond digital commodities, perpetual contracts have emerged as a core instrument for hedging risk and obtaining synthetic economic exposure across a wide range of traditional asset classes, such as securities and tangible commodities, but – to date – this innovation has taken place only offshore.

These developments have significant benefits for markets and investors. Event contracts provide financial exposure to real-world events far beyond traditional asset prices in a more straightforward and customizable manner than previously possible. As a result, investors can now execute more precise and diverse hedging and investment strategies, which promote price discovery and capital formation. Event contracts also provide novel forms of market-driven information sharing, crowdsourcing beliefs in real-time without added biases and fragmentation of traditional news reporting such as, for political events, traditional polling. Perpetual contracts, in turn, offer market participants a complement to traditional, dated futures contracts that eliminates the trading costs and frictions associated with periodic rolls and concentrates liquidity in a single contract.

To-date, U.S. markets and investors have not been able to unlock these benefits fully due to questions regarding the regulatory categorization of these products and the overlapping and duplicative compliance burdens faced by venues and intermediaries seeking to offer them in the United States. Although the CFTC has taken actions to confirm the regulatory treatment of perpetual contracts on certain digital commodities and event contracts as futures or swaps,[6] questions remain regarding the regulatory treatment of these contracts when they relate to securities or issuers thereof.[7] As a result, much of this innovation has taken place offshore, instead of the United States, often in markets lacking robust regulatory safeguards.

To solve this problem, we recommend that the Commissions:

(i) **Adopt Guiding Principles for Novel Product Regulation**: deliver both definitional clarity and alternative compliance frameworks oriented around four guiding principles: fair competition, customer choice, coordinated market oversight, and right-sized compliance obligations; and

(ii) **Apply Listed Derivatives Rules to Listed Products:** regulate all types of listed derivatives products in a manner consistent with traditional regulation of listed commodity futures and commodity options (or security futures and securities options,

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[5] Blackrock iShares, *What are perpetual futures? Crypto derivatives explained* (August 6, 2026), https://www.ishares.com/us/insights/portfolio-insights/what-are-perpetual-futures.

[6] *See, e.g.*, BTC Perps Order; *Policy Statement Concerning the Listing of Perpetual Contracts*, 91 Fed. Reg. 33160 (June 3, 2026); *Prediction Markets*, 91 Fed. Reg. 12516, 12517 (providing that DCMs can list event contracts as swaps or futures).

[7] *See, e.g.*, *Prediction Markets*, 91 Fed. Reg. 12516, 12517 ("Although the event contracts listed on CFTC-registered DCMs and [swap execution facilities] are swaps or futures contracts subject to the jurisdiction of the CFTC, other event contracts referencing events associated with potential financial, economic or commercial consequences may be security-based swaps or other instruments subject to the jurisdiction of the SEC.").

as applicable), rather than the Dodd-Frank swaps and security-based swaps ("SBS") regime designed for bilaterally-negotiated, off-exchange derivatives.

Consistent with these overarching recommendations, we encourage the Commissions to take the following actions with respect to specific product categories:

(iii) **Confirm Equity Perpetuals Are Security Futures:** treat standardized, exchange-traded and centrally-cleared perpetual contracts on single NMS securities and narrow-based security indexes ("equity perpetuals") as security futures;

(iv) **Permit Options on Security Futures:** exercise their statutory authority under Section 6(h)(6) of the Securities Exchange Act of 1934 (the "Exchange Act") to lift the moratorium on options on security futures; and

(v) **Allow Venue Choice for Securities-Related Event Contracts:** give exchanges the choice to list binary event contracts related to securities or issuers thereof ("securities-related event contracts") under the primary jurisdiction of either Commission, subject to notice registration and concurrent jurisdiction by the other Commission, by allowing exchanges to list securities-related event contracts as either security futures products ("SFPs"), securities options or commodity options, in each case subject to an alternative compliance framework involving shared market conduct oversight.

I. Adopt Guiding Principles for Novel Product Regulation

Historically, highly technical definitional distinctions between futures versus options or commodities versus securities, combined with incompatible regulatory regimes administered by the CFTC and SEC, have conclusively determined which exchanges and brokers can offer a given product. That framework has led regulatory status—not better technology, product-market fit, lower fees, or better customer service—to determine "winners" and "losers" among products and market participants. It has fragmented both market liquidity and regulatory oversight, with particular harms at times of stress. It is not a framework fit for the 21st century where capital and liquidity can move freely on electronic rails to offshore markets, none of which apply a similarly formalistic and inconsistent approach to determining regulatory treatment of products with similar economic characteristics.

Markets experienced firsthand the consequences of such an approach in the aftermath of the Commissions' 2012 joint rulemaking to implement the Dodd-Frank Act.[8] The 2012 Joint Definitional Release was predicated on the creation and definition of jurisdictional dividing lines, using overly technical definitions and complex line-drawing exercises in an attempt to create clean, non-overlapping buckets in which to categorize the diverse, ever-evolving universe of derivatives products. This approach left market participants unequipped to deal with the eventual certainty that a novel derivative product would either fail to fall within any of these buckets or reasonably fall within multiple buckets. As acknowledged by CFTC Chairman

[8] 2026 Joint Definitional Release at 7; *see Further Definition of "Swap," "Security- Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping,* 77 FR 48208, 48267 (Aug. 12, 2012) ("2012 Joint Definitional Release").

Michael Selig in the announcement for the 2026 Joint Definitional Release, "longstanding ambiguities within Title VII of Dodd-Frank … have stifled fair competition and responsible innovation."[9] In the same announcement, SEC Chairman Paul Atkins likewise noted that "[c]larification is long overdue on Title VII definitional issues, including event-based products."[10] We agree.

In a time of innovation, delineating a comprehensive taxonomy of mutually exclusive regulatory categories is a fool's errand. A better approach is to remove CFTC versus SEC regulatory categorization as the only driver for regulatory treatment of listed products. Instead, the Commissions should create alternative compliance frameworks guided by the following principles:

- **Fair competition**. Exchanges and brokers should compete on the basis of the merits of their offerings – *e.g.*, execution quality, liquidity, fees, technology, customer service – rather than the particulars of the regulatory regime to which they are subject. Achieving this goal requires the Commissions to adopt consistent rules in those regulatory areas that have an outsized impact on competition, such as margin requirements and listing standards. Providing consistency in these areas lowers the stakes of regulatory categorization and facilitates jurisdiction sharing between the Commissions. Congress and the Commissions recognized this when enacting and implementing the notice-registration regime for SFPs established by the Commodity Futures Modernization Act of 2000 (the "CFMA").[11] That regime permits a registrant of one agency to list SFPs subject to that agency's primary jurisdiction, while also being subject to supplemental jurisdiction of the other agency and harmonized rules in these competitively sensitive areas.

- **Customer choice**. Relatedly, the Commissions should empower customers to choose where and how they trade based on the commercial merits of an exchange's or broker's business, rather than their regulatory status. It is a feature of today's vibrant, diverse financial and commercial markets that different investors have different

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[9] SEC Press Release, *SEC, CFTC Seek Public Comment to Further Clarify and Harmonize Derivatives Product Definitions* (June 18, 2026), https://www.sec.gov/newsroom/press-releases/2026-57-sec-cftc-seek-public-comment-further-clarify-harmonize-derivatives-product-definitions. More than ten years following the 2012 Joint Definitional Release, the Commissions were still litigating over jurisdictional fault-lines. In the CFTC's enforcement action against Archegos, the SEC filed an amicus brief against the CFTC arguing that the relevant ETF and custom-basket total return swaps were SBS subject to the SEC's jurisdiction, rather than swaps subject to the CFTC's jurisdiction. *Brief of Amicus Curiae Securities and Exchange Commission on Defendants' Motions to Dismiss the Commodity Futures Trading Commission's Amended Complaint* at 1–3, 11–24, *Archegos*, No. 22-CV-3401 (JPO), ECF No. 75-1 (S.D.N.Y. Apr. 14, 2023). The court ultimately agreed with the SEC's position and dismissed the CFTC's complaint. *See Commodity Futures Trading Commission* v. *Archegos Capital Management LP*, No. 22-CV-3401 (JPO), slip op. at 4, 6–13 (S.D.N.Y. Sept. 19, 2023).

[10] SEC Press Release, *SEC, CFTC Seek Public Comment to Further Clarify and Harmonize Derivatives Product Definitions* (June 18, 2026), https://www.sec.gov/newsroom/press-releases/2026-57-sec-cftc-seek-public-comment-further-clarify-harmonize-derivatives-product-definitions.

[11] Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

preferences regarding how they construct their portfolios. For example, some investors may want to trade equity perpetuals and securities-related event contracts alongside non-securities futures and event contracts, while others may want to trade them alongside cash equities and conventional listed equity options. In each case, an investor should be able to choose the venue and intermediaries through which they trade based on these preferences, as well as speed, cost and other commercial factors, without having to tradeoff against materially different customer or market protections.

- **Coordinated market oversight**. Both Commissions should have visibility, without frictions, into the activity that occurs in markets that implicate both of their regulatory interests. The Commissions' memorandum of understanding regarding Harmonization in Areas of Common Regulatory Interest, announced earlier this year, acknowledged the reality that "[i]n an increasingly convergent financial ecosystem, the [Commissions] share significant areas of common regulatory interest, including oversight of trading venues, clearinghouses, data repositories, pooled investment vehicles, dealers and other intermediaries."[12] And such coordinated oversight is not new. For example, the regulatory regime for SFPs under the CFMA defines SFPs as "securities" under the federal securities laws *and* as contracts of sale of a commodity for future delivery under the CEA, thereby providing the SEC and the CFTC with joint jurisdiction. Joint Commission regulations require all exchanges that offer SFPs to be members of the Intermarket Surveillance Group and participate in marketwide trading halts.[13] The Commissions' 2004 memorandum of understanding regarding the oversight of SFP trading and the sharing of SFP information also requires the Commissions to share SFP examination-related information, SFP trading data and related information with respect to trading activity in SFPs in connection with surveillance and enforcement activities.[14]

- **Right-Sized Compliance**. The CEA and Exchange Act, and Commission rules thereunder, cover much of the same territory: fair and impartial access, governance and mitigation of conflicts of interest, promoting competition and transparency, preventing fraud and manipulation, ensuring financial and operational integrity, protecting customer funds, and oversight of disclosure and sales practices.[15] But the

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[12] Memorandum of Understanding between the SEC and the CFTC regarding Harmonization in Areas of Common Regulatory Interest (March 11, 2026), https://www.sec.gov/files/mou-sec-cftc-2026.pdf; *see also* Memorandum of Understanding between the SEC and the CFTC regarding Coordination in Areas of Common Regulatory Interest (March 11, 2008) ("The SEC and the CFTC recognize that enhanced coordination and cooperation concerning issues of common regulatory interest is necessary in order to foster market innovation and fair competition and to promote efficiency in regulatory oversight.").

[13] *See* 17 C.F.R. §§ 41.25(b)(2); 240.6h-1(c).

[14] Memorandum of Understanding between the SEC and the CFTC regarding the Oversight of Security Futures Product Trading and the Sharing of Security Futures Product Information (March 17, 2004), https://www.cftc.gov/sites/default/files/files/opa/press04/opamoubetweencftcandsec031704.pdf.

[15] To mitigate the impact to registrants of conflicting state laws, the CEA provides broad federal preemption of swaps (including commodity options), commodity futures and SFPs. *See* 7 U.S.C. § 2(a)(1)(A). Securities

particular rules and practices in these areas differ. For example, despite similarly principles-based statutory mandates, the Commissions' rules around systems security and integrity are sufficiently different that a CFTC-registered clearing organization recently needed to request relief from the SEC in order to register as a clearing agency.[16] Market participants should not have to seek such accommodations to offer new products; regulation in these areas should not be a vector for competition. Instead, the Commissions should afford each other mutual recognition in these areas of common regulatory goals, for example by expanding the notice-registration framework for SFPs to a broader range of products.

II. Apply Listed Derivatives Rules to Listed Products

The Commissions should recognize that the legal analysis and regulatory framework for listed contracts necessarily differs from that which applies to over-the-counter, bilaterally-negotiated contracts.

The Dodd-Frank Act was enacted on July 21, 2010, largely in response to the financial traumas engendered by the 2008 global financial crisis.[17] Title VII of the Dodd-Frank Act established a comprehensive regulatory framework for swaps and SBS which, prior to enactment of the Dodd-Frank Act had been unregulated products, traded over-the-counter by and between sophisticated market participants.[18] For example, the CFMA expressly excluded financial over-the-counter ("OTC") swaps from regulation under the CEA and the Exchange Act, provided that trading occurred only among institutional parties (*i.e.*, eligible contract participants).[19] Title VII was largely a response to the systemic and procyclical risks created by OTC swaps in the early 2000s and the role such risks played in the global financial crisis.[20] As reported by the National Commission on the Causes of the Financial and Economic Crisis in the United States, "[OTC] derivatives contributed significantly" to the financial crisis, with the CFMA's ban on federal or state regulation of OTC derivatives constituting "a key turning point in the march toward the financial crisis."[21]

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options and SBSs are also subject to preemption with respect to state gaming and bucket shop laws. 15 U.S.C. § 78bb(a)(3).

16 *Cboe Clear U.S., LLC; Notice of Filing of an Application, as Amended, for Temporary Registration as a Clearing Agency Under Section 17A of the Securities Exchange Act of 1934*, 91 Fed. Reg. 46817 (July 24, 2026).

17 Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act").

18 *See* Joint 2012 Definitional Release at 48307.

19 *See* 7 U.S.C. 1a(12) (2006).

20 Title VII was described on the Senate floor during the legislative discussions preceding its enactment as creating "a new regulatory framework for the over-the-counter derivatives market." 156 Cong. Rec. S5907 (daily ed. July 15, 2010) (colloquy between Sen. Chambliss and Sen. Lincoln).

21 Financial Crisis Inquiry Commission, ''The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States,'' at xxiv (Jan. 2011); *see also id.* at 352 ("AIG's failure was possible because of the sweeping deregulation of [OTC] derivatives, including credit default swaps, which effectively eliminated federal and state regulation of these products, including capital and margin requirements that would have lessened the likelihood of AIG's failure.").

Prior to adoption of the Dodd-Frank Act, the CEA and the Exchange Act established an extensive and fully-regulated taxonomy of exchange-listed products, including:

- futures, options and options on futures on non-security commodities, subject to exclusive jurisdiction of the CFTC;
- security futures, subject to joint jurisdiction of the Commissions under the CFMA as mentioned above; and
- options "on any security … or group or index of securities (including any interest therein or based on the value thereof)" ("securities options"), subject to SEC jurisdiction as "securities" under the Exchange Act.[22]

The Dodd-Frank Act intentionally preserved this taxonomy by creating exclusions in the statutory swap and SBS definition for each of these products,[23] except commodity options. Notably the Dodd-Frank Act did not alter the CFTC's grant of plenary exemptive authority over commodity options transactions in Section 4c(b) of the CEA,[24] and no analogous broad exemptive authority exists for other swaps. In adopting regulations to implement the Dodd-Frank Act, the CFTC has treated commodity options as swaps, but has taken actions to address the pre-existing regulatory framework that existed for exchange-traded commodity options.[25] We urge the CFTC to further harmonize its rules for DCM-listed commodity options with its rules for listed futures, such as by confirming one-day margin period of risk treatment for commodity options listed by a DCM under CFTC Regulation 39.13(g)(2)(ii), eliminating the counting of transactions in DCM-listed commodity options towards the swap dealer *de minimis* threshold and harmonizing trade reporting for listed commodity options with the reporting regime for listed commodity futures.[26]

The historical context in which the Dodd-Frank Act's swap regime was enacted, alongside the exclusion of all but one category of pre-existing listed derivative products, makes clear that Congress intended for the swaps and SBS regime to apply to institutional OTC contracts, the products that motivated enactment of Title VII in the first place. Although the Dodd-Frank Act added provisions to the Securities Act of 1933 (the "Securities Act"), the Exchange Act and the CEA contemplating retail and exchange-trading of swaps and SBS,[27] these provisions are largely enforcement tools – akin to Section 2(c)(2)(D) of the CEA applicable to leveraged, margined or financed retail commodity transactions[28] – designed to prevent the offering of off-exchange derivatives to retail (*i.e.*, non-eligible contract participant) market participants.. These provisions do not undermine the exclusions of exchange-traded products from the swap and SBS definitions.

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22 15 U.S.C. 78c(a)(10).

23 *See* 7 U.S.C. §§ 1a(47)(B)(i), (iii), (x) (excluding futures, SFP, securities options, SBS and options on futures from the CEA's swap definition); *and see* 15 U.S.C. 78c(a)(68) (defining SBS to include any instrument that is a swap, notwithstanding the CEA's exclusion of SBS from the swap definition).

24 7 U.S.C. § 6c(b).

25 *See, e.g.*, *Commodity Options*, 77 Fed. Reg. 25320 (Apr. 27, 2012).

26 *See* Kalshi, Inc., *Comment Letter on Data Reporting Requirements for Certain Event Contracts*, *RIN 3038-AF73* (July 31, 2026), *available at* https://www.regulations.gov/comment/CFTC-2026-1453-0034.

27 15 U.S.C. § 77e(e); 15 U.S.C. § 78f(l); 7 U.S.C. § 2(e).

28 7 U.S.C. § 2(c)(2)(D).

In other words, Title VII of the Dodd-Frank Act was not enacted to upend the pre-existing regulatory taxonomy between listed derivatives. For example, we find no clear Congressional intent to undermine pre-Dodd-Frank treatment of binary listed credit derivatives (*i.e.*, credit event futures or credit default options).[29] While such intent may be present with respect to purchases and sales of securities contingent on the occurrence of credit events,[30] such contracts are distinct from contracts providing binary payouts based on the occurrence or nonoccurrence of credit events.

Accordingly, regardless of whether a listed contract may be captured by the affirmative criteria of the swap or SBS definition (with respect to swaps, subparagraph (A) of CEA Section 1a(47); and, with respect to SBS, subparagraph (A) of Exchange Act Section 3(a)(68)), if the product is listed by a regulated exchange as a commodity or security future or security option (in each case, excluded from the swap or SBS definition), it should be regulated as such. For the reasons discussed below, the Commissions should permit exchange-traded perpetual contracts and event contracts to be listed in these product categories.

III. Equity Perpetual Contracts

Consistent with the principles laid out above, the Commissions should treat equity perpetuals listed by DCMs and national securities exchanges ("NSEs") as SFPs, subject to the CFMA's notice-registration framework.

a. *Categorization of Equity Perpetuals as Security Futures Products is Consistent with the Regulatory Treatment of Economically Similar Products.*

Perpetual contracts are indefinite-term contracts that provide their holders with either long or short, as applicable, economic exposure to the price of an underlying asset (*e.g.*, the spot price of Bitcoin or an equity security) through "funding" payments that vary based on the price of the underlying relative to the price of the perpetual contract. When the price of a perpetual contract exceeds the price of the underlying, payment will be due from long-side holders to short-side holders, and vice versa if the price of the underlying exceeds the price of the perpetual contract. This funding mechanism is designed to incentivize market participants to take on positions in a perpetual contract (long or short) that align the price of the contract with the price of the underlying. Because perpetual contracts generally have no expiration date (unless the perpetual contract is delisted from its listing exchange, *e.g.*, if the equity security underlying an equity perpetual fails to meet the exchange's listing criteria), holders of perpetual contracts exit their positions by offset. The perpetual nature of these contracts enables market participants to obtain exposure to an asset without actually holding the asset and without the need to incur the transaction fees and other frictions associated with rolling over futures positions.

The CFTC has already approved the listing of perpetual contracts referencing certain digital commodities as futures contracts.[31] In the BTC Perps Order, the CFTC concluded that listing

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[29] *See* Section V(a), *infra*.

[30] 7 U.S.C. § 1a(47)(B)(vi) (excluding from the swap definition contingent purchases and sales of securities, *except* those contingent on the occurrence of "bona fide contingenc[ies] that might reasonably be expected to affect or be affected by the creditworthiness of" a third party.).

[31] Policy Statement Concerning the Listing of Perpetual Contracts, 91 Fed. Reg. 33,160, 33,161 n.5 (June 3, 2026), https://www.govinfo.gov/content/pkg/FR-2026-06-03/pdf/2026-11020.pdf; BTC Perps Order.

Kalshi's Bitcoin perpetuals (the "BTCPERP Contract") as a futures contract would not violate the CEA or the CFTC's regulations thereunder on the basis that:

(i) the BTCPERP Contract exhibited all of the key features of futures contracts identified in relevant judicial precedent and CFTC guidance, including the contract's trading at a fixed, standardized unit quantity, each party's obligations being guaranteed via novation to a central clearing house that sets margin requirements, the ability of a holder to exit their position via offset, availability to the general public, risk transference and trading on the centralized market of a DCM;[32] and

(ii) certain characteristics of the spot market of the underlying commodity (*i.e.*, bitcoin) supported the effective functioning of the funding rate mechanism employed by the BTCPERP Contract, including continuous and broadly distributed trading in and depth and liquidity of the underlying spot market.[33]

Equity perpetuals that are standardized, exchange-traded and centrally cleared bear all the same "key features of futures contracts" possessed by the BTCPERP Contracts relevant to their futures classification. And, like the bitcoin spot market, markets in U.S.-listed equity securities have deep, active and continuous trading that supports "effective functioning of the funding rate mechanism employed by [a perpetual contract], helping to ensure the accuracy of the periodic funding payments, promoting convergence, and reducing the susceptibility of the contract to manipulation."[34]

Although equity perpetuals obviously differ from the BTCPERP Contracts in that they are derivatives on securities, not commodities, the defining characteristics of commodity futures are – if not directly applicable – instructive to the question of whether equity perpetuals constitute SFPs. The CEA classifies securities as a type of excluded commodity,[35] meaning that security futures are also a type of commodity future (which is a reason why SFPs are also regulated by the CFTC, in addition to the SEC). Further, the phrase "contract of sale for future delivery" used in the security future definition is the same as what the CEA uses to reference commodity futures contracts, which it consistently describes as "contracts of sale of a commodity for future

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[32] *See* BTC Perps Order at 2-5; *see also CFTC* v. *Co Petro Marketing Group, Inc.,* 680 F.2d 573, 579-580 (9th Cir. 1982) ("Except for price, all the futures contracts for a specified commodity are identical in quantity and other terms. The fungible nature of these contracts facilitates offsetting transactions by which purchasers or sellers can liquidate their positions by forming opposite contracts."); *see In re Stovall, et. al.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) 20,941, p. 6 (CFTC Dec. 6, 1979) (describing futures contracts as "standardized contracts for the purchase or sale of commodities which provide for future, as opposed to immediate, delivery, and which are directly or indirectly offered to the general public and generally secured by earnest money, or 'margin' . . . [and that] are entered into primarily for the purpose of assuming or shifting the risk of change in value of commodities, rather than for transferring ownership of the actual commodities."); *Salomon Forex, Inc.* v. *Tauber,* 8 F.3d 966, 971 (4th Cir. 1993) ("*Tauber*") ("To facilitate the development of a liquid market for these transactions, these contracts are standardized and transferrable. Trading in futures seldom results in physical livery of the subject commodity, since the obligations are often extinguished by offsetting transactions that product a net profit or loss.").

[33] BTCPERPs Order at 7.

[34] *Id.* at 7.

[35] 7 U.S.C. § 1a(19).

delivery."[36] There is no case law or regulatory guidance or interpretation attributing a different meaning to the phrase "contract of sale for future delivery" as used in the security future definition relative to that attributed the term used to reference commodity futures contracts elsewhere in the CEA, and courts often interpret the meaning of words used in a particular provision by looking to similar phrases used in different provisions within the same statute.[37]

Additionally, equity perpetuals bear significant economic relationships with and similarities to listed equities, fixed-expiry futures and options on listed equities and single stock exchange-traded funds, such that they should be subject to a coordinated and generally consistent regulatory framework with these instruments. The regulatory regime for SFPs is built specifically to address the regulation of exchange-traded securities derivatives and to ensure equitable treatment with exchange-listed securities options when it comes to margin,[38] listing standards[39] and tax,[40] and provides for coordinated trading halts and market surveillance with the cash equities markets.[41] SFPs are also subject to the notice registration regime implemented by the Commissions under the CFMA, which was purpose-built to address exchange-listed contracts accessible by retail investors in a manner coordinated with cash equity markets. Categorization of equity perpetuals as SFPs is therefore necessary to ensure their consistent regulatory treatment with economically similar instruments.[42]

By contrast, categorization of equity perpetuals as SBSs would create a regulatory mismatch by subjecting standardized, listed and fungible derivative contracts to a regulatory regime designed for institutional, over-the-counter swaps markets. Notably, unlike for SFPs or listed securities options, there is currently no tailored pathway for SBSs to comply with the Securities Act, meaning that an equity perpetual subject to regulatory treatment as an SBS could not readily be accessible to retail investors on an NSE, notwithstanding Section 6(l) of the Exchange Act (which requires that retail investors only have access to SBS on a national securities exchange).[43] SBS categorization of equity perpetuals would also create regulatory arbitrage opportunities as

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36 *See, e.g.*, 7 U.S.C. § 2(a)(1)(A).

37 *See, e.g.*, *Unicolors, Inc.* v. *H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 947 (2022) ("nearby statutory provisions help confirm that here "knowledge" refers to knowledge of the law as well as the facts."); *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear.").

38 15 U.S.C. § 78g(c)(2)(B)(iii) (providing that customer margin requirements for security futures must, among other things, be consistent with the margin requirements for comparable exchange-traded options and must not be lower than the lowest level of margin, exclusive of premium, required for any comparable exchange-traded options.).

39 15 U.S.C. § 78f(h)(3)(C) (requiring that listing standards for security futures products "shall … be no less restrictive than comparable listing standards for" options listed on securities exchanges).

40 *See* Staff of the Joint Comm. on Tax'n, 106th Cong., *Technical Explanation of the Tax Provisions of H.R. 4541, the "Commodity Futures Modernization Act of 2000"* (Oct. 19, 2000) (noting that the tax provisions of the Commodity Futures Modernization Act "provide[] for the tax treatment of [security futures] in a manner generally consistent with the present-law treatment of transactions in stock and stock options.").

41 *See* 17 C.F.R. §§ 41.25; 240.6h-1.

42 *See* Commissioners Allison Herren Lee and Caroline A. Crenshaw, *Statement on Complex Exchange-Traded Products* (Oct. 4, 2021) ("The [SEC] should endeavor to adopt a consistent approach to exchange-traded products with similar features (and in many cases, similar names).").

43 Also, unlike for SFPs or listed security options, a clearing agency issuing exchange-traded SBSs would be subject to ill-fitting audit committee and compensation committee requirements intended for public companies, not market infrastructures.

similar products (*e.g.*, long-dated security futures) could be designed to mimic the economics of equity perpetuals in order to fit within an appropriate regulatory framework for exchange-traded security derivatives.

b. *Indefinite Duration Does Not Disqualify Equity Perpetuals from Categorization as Security Futures.*

Equity perpetuals differ from traditional cash-settled SFPs in that they do not provide for final cash settlement on a pre-defined expiry date. But nothing in the text of the "security future" definition requires a SFP to provide for final settlement on a single, specified future date. To qualify as an SFP, an equity perpetual merely must involve "future delivery" of a cash payment based on a single, non-exempt security or a narrow-based security index (or any interest therein or based on the value thereof). In the context of commodity derivatives, courts have affirmatively held that contracts of indefinite duration involve "futures delivery" where the defining characteristics of a futures contract are present. For example, the Seventh Circuit in *CME* v. *SEC* concluded that contracts of "indefinite duration" can possess the attribute of "futurity," because futurity means "value that is set in the future" and exists where a contract provides for future executory payment obligations, not only where a contract has a final-settlement date.[44] Like the "index participations" at issue in *CME* v. *SEC*, equity perpetuals provide for future executory payment obligations in the form of funding payments, which constitute "future delivery" within the meaning of the SFP definition. There is no case law or regulatory guidance defining "future delivery" in a different manner for commodity futures contracts versus SFPs.

c. *The Commissions Should Disregard CME's Challenge to the BTC Perps Order when Determining the Regulatory Treatment of Equity Perpetuals.*

The recent litigation brought against the CFTC's categorization of BTCPERP Contracts by the Chicago Mercantile Exchange Inc. ("CME"), one of the largest incumbent marketplaces for traditional dated futures,[45] should not affect the Commissions' regulatory treatment of equity perpetuals as SFPs. CME's arguments lack any merit to give the Commissions pause on this topic.

In its complaint, CME argues that perpetual contracts are swaps under the CEA because, by virtue of the funding payment mechanism, perpetual contracts "provide[] on an executory basis for the exchange … of 1 or more payments based on the value or level of … commodities."[46] This argument fallaciously ignores the rest of the "swap" definition. Regardless of whether a

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[44] *See Chicago Mercantile Exchange* v. *SEC*, 883 F.2d 537, 541 (7th Cir. 1989) ("CME v. SEC"). *See also Standard Forex II*, 1996 WL 435440, at *10, 1996 U.S. Dist. LEXIS 14778, at *29. *See also CFTC* v. *Intern. Fin. Servs.*, 323 F. Supp. 2d 482, 498 (S.D.N.Y. 2004) ("As a matter of law, defendants wrongly characterize certain indicia of futures contract as essential features of such contracts. Principally, they argue at length that without a fixed date for future delivery, a transaction cannot be a futures contract within the CFTC's jurisdiction. They cite no authority for this proposition, however.") and *CFTC* v. *International Foreign Curren.*, 334 F. Supp. 2d 305, 312 (E.D.N.Y. 2004) ("[T]he fact that Defendants' contracts failed to have a specified future delivery date is not determinative").

[45] *See Chicago Mercantile Exchange Inc.* v. *Selig, and Commodity Futures Trading Commission*, Case No. 26-cv-02157 (D.D.C. June 18, 2026) ("CME v. Selig").

[46] 7 U.S.C. § 1a(47)(A)(iii).

contract falls within any clause in subparagraph (A) of the CEA's swap definition, it is *per se excluded* from the definition if it falls within any of the exclusions in subparagraph (B) of the definition, including the exclusion for futures contracts.[47]

CME also argues that perpetual contracts are not futures contracts because they lack a final expiration date.[48] This argument conflicts with the position taken by CME in a comment letter it filed just last year, where it stated that "certain perpetual-style derivative contracts may accurately be classified as futures."[49] It also is predicated on a red herring – as discussed above, no court has held that future delivery on a specified future date is a necessary condition for a contract to be a futures contract. To the contrary, courts have repeatedly explained that, "[w]hile futures contracts generally have a specified future delivery date, or settlement date, that date is not always specified thus allowing some futures contracts to be of 'indefinite duration.'"[50]

CME attempts to support its misguided argument that perpetual contracts must be swaps, and not futures, by noting that "[t]he swap-future distinction does not turn on whether a product is standardized, exchange-traded, or centrally cleared" because "[a]lthough swaps historically were traded over-the-counter, many swaps are now standardized, DCM-traded, and centrally cleared."[51] Once again, here CME contradicts itself. As CME itself has explained in a prior comment letter to the CFTC, although it is true that, following enactment of the Dodd-Frank Act, several of the "significant distinctions between futures and swaps [were] eliminated", the Dodd-Frank Act "preserves 'customer choice.' That is, under [the Dodd-Frank Act] market participants retain the option to trade products as either 'futures' or 'swaps.'"[52]

The changes brought about by Dodd-Frank led CME and other market participants to request that the CFTC clarify that a DCM can "list for trading a futures contract regardless of whether it could be viewed as a swap if traded over-the-counter or on a [swap execution facility ("SEF")], since futures and swaps are indistinguishable in material economic effects."[53] The CFTC declined to provide that clarification, underscoring the continued relevance of standardization and exchange-trading in the product categorization analysis.[54] Although the CFTC noted that "the presence or absence of clearing… may no longer be relevant" to distinguish futures from swaps in light of the Dodd-Frank Act's grant of authority to the CFTC to mandate swaps for central clearing,[55] the CFTC did not address the other relevant factors, such as standardization, exchange trading, and retail participation. Those factors continue to be relevant to distinguish futures contracts from centrally cleared swaps, such as interest-rate swaps and credit default swaps, which in many cases are not standardized as to tenor or size (among other terms) and trade on SEFs, which may employ request-for-quote and other bilateral execution methods without interaction with a central limit order book in the manner typical of a DCM, and lack

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47 7 U.S.C. § 1a(47)(B)(i).

48 CME v. Selig at 35, 36.

49 Letter from Jonathan Marcus, Senior Managing Dir. & Gen. Couns., CME Grp. Inc., to Christopher J. Kirkpatrick, Sec'y of the Comm'n, 2 (May 21, 2025).

50 *See* notes 23 and 24, *supra.*

51 CME v. Selig at 18.

52 Letter from Craig S. Donohue, Chief Exec. Officer, CME Grp. Inc., to David A. Stawick, Sec'y of the Comm'n, 4 (July 22, 2011).

53 2012 Joint Definitional Release at 48303.

54 *Id.*

55 *See id.*; 7 U.S.C. 2(h)(1).

retail participation. The CFTC went on to say that "[i]f a DCM has a view that a particular product is a futures contract, it may self-certify the contract consistent with that view."[56]

CME also argues that the CFTC's approval of the BTCPERP Contract for listing as a futures contract is inconsistent with the CFTC's prior position taken in certain enforcement actions that perpetual-duration digital-asset derivative products constitute swaps.[57] However, in all but one of these cases, the CFTC looked only to features of the products at issue relevant to whether they fell within the scope of CEA Section 1a(47)(A)(iii). The CFTC did not address whether such products were futures contracts, which would be excluded from the swap definition. As discussed above, the fact that a contract falls within the scope of CEA Section 1a(47)(A)(iii) because it "transfers, as between the parties to the transaction … the financial risk associated with a future change" in the price of the underlying asset is not determinative of its regulatory categorization if the product qualifies as a futures contract.

The only instance in which the CFTC has addressed the possibility that perpetual-duration digital-asset derivative products could be excluded from the "swap" definition as futures contracts is in a single footnote in the CFTC's response to Binance's Motion to Dismiss.[58] In that case, Binance failed to meaningfully address why the perpetual contracts at issue were futures contracts under applicable case law and CFTC precedent; in particular, Binance relied on the sole point that positions in their contracts could be closed by offset, and they failed to reference any particular facts indicating the other key characteristics of futures contracts identified in the BTC Perps Order.[59] So that precedent does not bind the Commissions today.

IV. Options on Security Futures Products

Section 6(h)(6) of the Exchange Act, enacted as part of the CFMA, grants the Commissions authority, by joint order, to determine to permit the trading of options on any SFP authorized to be traded under the Exchange Act and the CEA.[60] The Commissions should exercise this authority, which they have had but left unused for over two decades, to permit the trading of options on SFPs authorized to be traded under the Exchange Act and the CEA. In connection with definitional guidance to clarify the regulatory treatment of equity perpetuals as SFPs and approval of such contracts for trading, this would enable the trading of options on equity perpetuals in the United States and accelerate innovation in U.S. derivatives markets.

The CFMA lifted the nearly two decades old ban on single-stock and narrow-based stock index futures contracts that had existed under the Shad-Johnson Accord by establishing the Commissions' joint regulatory framework for such contracts.[61] When adopting the CFMA, Congress "deferred"[62] options on SFPs for a period of three years. This deferral reflected the

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56 2012 Joint Definitional Release at 48303.

57 *See* Complaint, *CFTC* v. *Changpeng Zhao, et al.*, No. 23-cv-01887 (March 27, 2023) ("*Binance*"); Complaint, *CFTC* v. *MEK Global Limited, et al.,* No. 24-cv-2255 (March 26, 2024); Complaint, *CFTC* v. *Eisenberg*, No. 23-cv-00173 (Jan. 9, 2023); Complaint, *CFTC* v. *HDR Global Trading Limited, et al.*, No. 20-cv-8132 (Oct. 1, 2020); *In the Matter of Deridex, Inc.*, CFTC No. 23-42 (Sept. 7, 2023).

58 Plaintiff Response to Defendants' Motion to Dismiss, Binance at note 14 (Sept. 22, 2023).

59 Brief in Support of Defendants' Motion to Dismiss, Binance at note 19 (July 27, 2023).

60 15 U.S.C. § 78f(h)(6).

61 Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

62 15 U.S.C. § 78f(h)(6) (titled "Deferral of options on security futures trading.").

circumstances and reality prevailing at the time, as the CFMA reflected a substantial expansion of and change in equity derivatives markets – novel, untested SFPs were being re-introduced to the market after decades of their exclusion. Congress, understandably, sought to *defer* – rather than prohibit outright – the introduction of additional, novel and potentially more volatile products until markets and the Commissions became comfortable and experienced with SFPs.

More than 25 years later, these concerns are resolved. The regulatory framework for SFPs is established and steady, and the Commissions have gained over two decades of experience with their joint regulatory architecture these products, including margin requirements, listing standards, and coordinated trading halts and surveillance.[63] Further, as SFPs have traded alongside cash equities and equity options since enactment of the CFMA, the market effects of these products and their relationships with other markets have become well understood. The Commissions have had the authority to authorize trading of options on security futures for 22 years. The prudential, transitional concerns associated with the Section 6(h)(6) deferral have long since dissipated, and so the Commissions should wait no longer to exercise their authority.

Policy considerations also support the Commissions' exercise of their authority to permit the trading of options on SFPs. First, options on commodity futures – including options on perpetual contracts on commodities – are already permitted to trade on CFTC-regulated exchanges alongside options on commodities and commodity futures, and there is no principled basis for prohibiting analogous products in equity derivatives markets. The continued prohibition of options on SFPs exacerbates the asymmetry between the CFTC's and the SEC's regulatory frameworks in a manner that serves no functional purposes and suppresses innovation in equity derivatives markets. Second, options on SFPs, including but not limited to equity perpetuals once approved for listing as SFPs, would provide market participants with important tools to express their investment and hedging strategies. Options provide unique, asymmetric payoff structures that cannot be replicated through futures alone, enabling investors to hedge specific downside risks and express nuanced directional or volatility views with precision. Finally, permitting options on SFPs would support the growth and deepening of U.S. markets in equity perpetual markets, once they are authorized for listing as SFPs. If the Commissions fail to act and act quickly – either to clarify the regulatory treatment and approve the listing of equity perpetuals as SFPs or to permit options thereon – trading volumes and innovation will quickly move offshore, and the United States will have missed its opportunity to lead the next wave of derivatives markets innovation.

V. Securities-Related Event Contracts

There is considerable uncertainty surrounding the regulatory categorization of binary event contracts relating to an issuer of securities, security prices or security indexes ("securities-related event contracts").[64] For example, the 2026 Joint Definitional Release asks, among other things, whether event contracts settling by reference to a security or index should be treated as a "put, call, straddle, option, or privilege on" a security for purposes of the CEA section 1a(47)(B)(iii) exclusion of securities option from the swap definition, and "how such contracts differ from binary options that already trade as standardized options on national securities exchanges,"[65] and,

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63 15 U.S.C. §§ 78g(c)(2)(B)(iii), 78f(h)(3)(C); 17 C.F.R. Part 41.

64 *See, e.g.*, 2026 Joint Definitional Release, Questions 1-4.

65 2026 Joint Definitional Release at 8.

separately, whether additional clarity is necessary regarding when an event "directly affects" the financial statements, financial condition, or financial obligations of an issuer, including how any clarification should relate to the Commissions' previous guidance regarding credit default swaps.[66]

At the same time, there is increasing investor interest in securities-related event contracts, such as (i) those that reference "key performance indicators" ("KPIs") ranging from metrics relating to a company's official financial statements to purely operational metrics, and (ii) those that pay out based on whether or not the price of a particular security increased or decreased by a certain date (*i.e.*, up/down contracts). These contracts enable investors to narrowly tailor their investments to a precise thesis or specific hedging outcome, for example by isolating their financial exposure to a particular company metric, or expressing a view about the direction of security prices but not the magnitude of price changes.

Notwithstanding increasing investor interest and demand, the growth of these markets in the United States is currently stifled by a lack of coordinated regulatory clarity from the Commissions. To allow the United States to become and remain a leader in these markets, Commissions must clarify the regulatory treatment of these products in a manner that (i) promotes fair competition, customer choice, coordinated market oversight and right-sized compliance and (ii) applies listed derivatives rules to listed securities-related event contracts. To this end, we urge the Commissions to grant registrants flexibility to choose whether to (i) list event contracts as options or futures and (ii) list securities-related event contracts under the primary regulatory authority of the SEC or the CFTC, pursuant to a notice-registration regime equivalent to the CFMA's framework for SFPs. Relatedly, the Commissions should recognize that only a very narrow subset of listed event contracts are captured by the Exchange Act's SBS definition.

a. *There are Unresolved Questions Relating to the Regulatory Categorization of Event Contracts.*

Congress recognized in Section 718 of the Dodd-Frank Act that novel derivative contracts may combine elements of futures and options and securities and commodities, necessitating tailored definitional clarity.[67] Section 717 of the Dodd-Frank Act further granted the Commissions the tools to ensure coordinated, comprehensive jurisdiction over such products.[68] As novel derivative products that combine all of these elements, securities-related event contracts are a prime candidate for the Commissions to exercise these tools.

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[66] 2026 Joint Definitional Release at 7; *see Further Definition of "Swap," "Security- Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR 48208, 48267 (Aug. 12, 2012) ("2012 Joint Definitional Release").

[67] Dodd-Frank Act at Section 718(a)(1) ("Any person filing a proposal to list or trade a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities) may concurrently provide notice and furnish a copy of such filing with the Securities and Exchange Commission and the Commodity Futures Trading Commission.").

[68] Dodd-Frank Act at Section 717 (granting the CFTC jurisdiction over securities options exempted by the SEC where such exemptions are contingent upon the CFTC's concurrent jurisdiction over such instruments and providing that any instrument exempted by the CFTC under Section 4(c)(1) of the CEA, with the condition of concurrent SEC jurisdiction, shall be deemed a security for purposes of the securities laws.").

Prior to enactment of the Dodd-Frank Act, two exchanges – the Chicago Board Options Exchange ("Cboe") and the CME – listed two competing, nearly identical binary derivative products under different product categories. Both contracts had binary payout structures triggered by bankruptcy or other credit events of reference entities, but CME listed their version of the contract as *credit event futures* (commodity futures subject to exclusive CFTC jurisdiction), while Cboe listed their version of the contract as *credit default options* (securities options subject to SEC jurisdiction as "securities" under the Exchange Act).[69] During the CFTC's evaluation of CME's credit event futures, Cboe and CME each filed a series of comment letters reflecting a back and forth over the appropriateness of categorization of the products as futures or securities options.[70] Their spirited debate is not only instructive as to the core challenges in categorizing cash-settled, binary contracts, such as event contracts, but provides a roadmap to their resolution.

The disagreement between CME and Cboe regarding the categorization of CME's credit event futures proceeded across two axes: (i) whether the binary contracts at issue were futures or options and (ii) whether the contract was "based on" the value of a security or securities. We address each in turn. This same debate applies to most securities-related event contracts.

(i) Futures v. Options Categorization of Event Contracts.

Although event contracts are often described as binary options, they "can be designed to exhibit the attributes of either options or futures contracts."[71] The CFTC has expressly provided that "[p]rediction markets can … list event contracts for trading as futures contracts," and several DCMs have listed event contracts for trading as commodity futures contracts.[72]

Three characteristics that distinguish options from futures contracts:

(i) an options purchaser pays the seller a non-refundable premium, while the purchaser of a futures contract pays a "down payment" applied against the ultimate sale price;

(ii) an options contract gives the purchaser the right to take physical possession of the commodity, but does not obligate them to do so, unlike a futures contract where the purchaser is required to accept delivery; and

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69 *See* CFTC Press Release, *CFTC Approves CME Credit Derivative Product, Also Approves OCC Clearing of Proposed CBOE Products* (June 5, 2007), https://www.cftc.gov/PressRoom/PressReleases/5345-07; *Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Amendment No. 5 to a Proposed Rule Change to List and Trade Credit Default Options; and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment Nos. 3, 4, and 5, and Designating Credit Default Options as Standardized Options under Rule 9b-1 of the Securities Exchange Act of 1934,* Exchange Act Release No., 34-55871 (June 6, 2007).

70 CFTC Industry Filings, Designated Contract Market Products: 13288 (CME Credit Event Futures: Tribune Corporation), https://www.cftc.gov/IndustryOversight/IndustryFilings/TradingOrganizationProducts/13288.

71 *Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25669, 25670 (May 7, 2008).

72 A list of event contracts certified for listing as futures contracts is available on the CFTC's website. *See* https://www.cftc.gov/IndustryOversight/ IndustryFilings/TradingOrganizationProducts?Type=Future&Category=Event.

(iii) an options purchaser profits if the price of the commodity rises enough to cover the premium paid, while the purchaser of a futures contract profits if the price of the commodity at expiry exceeds the purchase price paid.[73]

Applying these characteristics to exchange-traded binary event contracts, there is ample room to argue for futures categorization.

First, purchase of an event contract involves no payment of a non-refundable premium – rather, if a person receives the payout of an event contract (because they correctly predicted the outcome of the underlying event), the purchaser will win back their purchase price *plus* the delta between that purchase price and $1. In that way, the purchase price of an event contract is akin to "down payment" on a futures contract, in that the purchaser's profit (if they receive payout) is not exclusive of their purchase price. Although the purchaser of an event contract who incorrectly predicts the outcome of the underlying event loses their purchase price paid, this fact does not weigh in favor of either options or futures categorization. Potential loss of the initial monetary commitment (*i.e.*, the premium for an option, or the down payment on a traditional futures contract) is a characteristic of both traditional options and futures contracts.

Second, a binary event contract does not involve any affirmative option to "exercise" or not by the purchaser upon (or before) the exercise date.[74] Similarly to both a traditional option and traditional futures contracts, the purchaser of an event contract can close their position prior to expiry by placing an offsetting order.

Third, unlike a conventional options contract, where only the seller bears risk of loss, both the seller and the purchaser of a binary event contract risk the loss of their purchase price – *i.e.*, there is symmetric risk exposure between the buyer and the seller of an event contract. As CME noted at the time, "[t]he risk structure of CME Credit Event Futures, however, implies bounded risk and bounded profit potential on the part of both the long and short. Indeed, if bounded risk on the part of the long were the distinguishing feature of an option, then all futures contracts might be regarded as options to the extent that the logical lower bound of most futures contracts is zero, conceding the low probability of achieving such extreme result."[75]

Moreover, exchange-traded binary event contracts traded today exhibit all of the fundamental characteristics of futures contracts: standardization, central clearing, the ability of holders to exit their positions via offset, availability to the general public, risk transference and centralized

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[73] *United States* v. *Bein*, 728 F.2d 107, 112 (2d Cir. 1984). *See*, *also*, Letter from Joanne Moffic-Silver, Exec. Vice President, Gen. Counsel & Corp. Sec'y, Chi. Bd. Options Exch., to Eileen Donovan, Acting Sec'y, Commodity Futures Trading Comm'n (Nov. 3, 2006), *available at* https://www.cftc.gov/files/submissions/filings/CBOEComment1.pdf.

[74] Notwithstanding this point, in the SEC's 2007 approval of Cboe's credit default basket options contract, the SEC squarely addressed the eligibility of a binary, cash-settled derivative product with "automatic" exercise for listing as a securities option and decided in the affirmative. *Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 3 Thereto, to List and Trade Credit Default Basket Options*, Exchange Act Release No. 56275, 14 (Aug. 17, 2007) ("Credit Default Basket Options Approval").

[75] Letter from John W. Labuszewski, Managing Director, Research and Product Development, Chi. Mercantile Exch. To Eileen Donovan, Acting Sec'y, Commodity Futures Trading Comm'n at 8 (Nov. 9, 2006), *available at* https://www.cftc.gov/sites/default/files/files/submissions/filings/CMEComment1.pdf.

exchange-trading.[76] That event contracts do not involve physical delivery, but rather are cash-settled based on the occurrence or nonoccurrence of an event, does not disqualify them from categorization as futures or security futures – with respect to commodity futures, it is well-recognized that cash-settlement qualifies as a form of future delivery,[77] and any conclusion to the contrary would disrupt markets in widely traded products such as cash-settled S&P 500 futures; with respect to SFPs, not only does the text of the statutory definition itself contemplate "future delivery" of narrow-based security indices, which generally necessitates cash settlement, but the SEC has adopted regulations expressly contemplating and regulating cash-settled SFPs and several such contracts have been and are currently listed.[78]

Of course, all exchange-traded options also exhibit these characteristics of standardization, central clearing, offset, public availability, etc. And binary event contracts, unlike conventional futures, provide for bounded, non-linear exposure. For these reasons, options categorization is also reasonable, as evidenced by the significant body of CFTC and judicial precedent categorizing binary option contracts as options contracts.[79]

Accordingly, the Commissions should acknowledge that event contracts possess attributes of both futures and options contracts and grant exchanges flexibility to list them in either category.

(ii) Event Contracts "Based on" the Value of Securities (or Any Interest Therein).

In addition to arguing that CME's products were options (not futures), Cboe challenged CME's credit event futures on the basis that the options "on one or more securities… including any group or index of such securities, or any interest therein or based on the value thereof," such that they were securities subject to SEC jurisdiction.[80] Specifically, Cboe argued that CME's products were "based on" securities because they were "either based directly on one or more securities of the Reference Entity or on a swap that is not excluded from the definition of a security under the

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[76] *See* note 11, *supra*.

[77] *CFTC* v. *Erskine*, 512 F.3d 309, 320 (6th Cir. 2008) (citing *Chi. Mercantile Exch.* v. *SEC*, 883 F.2d 537, 542 (7th Cir. 1989)).

[78] *See* 17 C.F.R. §§ 41.25(c); 240.6h-1(b) (the "SFP Final Settlement Rules"); CBOE Futures Exchange, LLC, *Rule Certification and Listing of Security Futures Products*, Submission No. CFE-2011-28 (Dec. 22, 2011) (submitting pursuant to CEA Section 5c(c)(1) and Commission Regulations 40.2 and 41.23 thereunder new rules and terms and conditions for certain cash-settled security futures on "certain Individual Stock Based Volatility Indexes and Exchange-Traded Fund ("ETF") Based Volatility Indexes"); OneChicago, LLC, *Listing of Security Futures Products* (Dec. 3, 2008) (submitting pursuant to CEA Section 5c(c)(1) and Commission Regulation 41.23 thereunder specifications for certain cash-settled security futures on certain narrow-based security indexes). We note that, because event contracts have binary payout values ($1 or $0) based on the occurrence or nonoccurrence of an event that are *not* indexed to the price of any security, any securities-related event contract listed as a SFP would not be subject to the SFP Final Settlement Rules.

[79] *See, e.g.*, *Concept Release on Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25669, 25670 (May 7, 2008) ("A significant number of event contracts are structured as all-or-nothing binary transactions commonly described as binary options"); *In re Blockratize (d/b/a Polymarket.com)*, CFTC No. 22-09 (Jan. 3, 2022) ("Polymarket is an online trading platform that offers binary options in the form of winner-take-all 'event contracts' … Binary options are swaps as defined under Section 1(a)(47) of the Act."); *In re Trade Exchange Network*, CFTC No. 05-14 (Sept. 29, 2005); CFTC Complaint in *CFTC v. Yukom Communciations Ltd.*, *et. al.*, Case No. 1:19-cv-05416 (N.D. Ill. Aug. 12, 2019). *See also, CFTC* v. *TEN*, 117 F. Supp. 3d 29 (D.D.C. 2015).

[80] Letter from Joanne Moffic-Silver, Exec. Vice President, Gen. Counsel & Corp. Sec'y, Chi. Bd. Options Exch., to Eileen Donovan, Acting Sec'y, Commodity Futures Trading Comm'n at 4 (Nov. 3, 2006), *available at* https://www.cftc.gov/files/submissions/filings/CBOEComment1.pdf.

securities laws and is therefore a security."[81] In effect, Cboe took the position that an event is "based on" a security because the occurrence, nonoccurrence or extent of the occurrence of the event is somehow correlated with or "material" to the price of the security.[82]

Cboe took a similar position more recently, in a proposed rule change to permit the listing of binary options overlying KPIs (*i.e.*, KPI event contracts), such as those relating to "Total Net sales", "Daily Active Users" and "YouTube ads Revenues," reported by certain issuers of stock ("binary KPI options").[83] There, Cboe similarly took the position that binary KPI options are "based on" the value of a security (or securities) or any interest thereon because the proposed KPIs were "among the most significant inputs into the valuation of an issuer's stock."[84] In other words, Cboe again argued that event contracts are securities options if the value of a security can be based in part on the underlying event, *not* because the underlying event is based on the value of a security.

Cboe's position is predicated on the assumption that "materiality" is a sufficient condition for an event to be "based on" a security or group of securities. That is not an obvious conclusion.[85] A KPI is a piece of information released by an issuer of a security, not a pecuniary interest in a security. And, although the value of an issuer's stock may move as the indirect result of a KPI (*i.e.*, security prices may be *correlated to* KPIs), KPI metrics do not move based on the value of a security or securities. For example, although the price of Tesla stock may rise or fall in a manner correlated to the number of Tesla vehicles sold, the number of Tesla vehicles sold will not necessarily rise or fall based on the value of Tesla stock – accordingly, a binary option that pays out based on the number of Tesla vehicles sold is not "based on the value" of Tesla stock.

Further, Cboe's theory that an event's materiality to the value of a security is sufficient to result in binary options thereon being categorized as securities options would be so broad as to capture a wide range of contracts that have long been regulated by the CFTC, such as options on the price of oil (material to the price of, *e.g.*, ExxonMobil shares) or weather contracts (the weather on a particular date could be material to stock price of an agriculture company), as securities options. Such an approach would also be impossible to administer as it would require, for every event contract, an analysis of the extent to which the underlying event correlates to the price of a security. Product categorization cannot turn on a constantly changing correlation analysis.

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81 *Id.*

82 *Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend its Rules to Permit the Listing of Binary Options Overlying Key Performance Indicators ("KPIs") Reported by Certain Issuers of Stock ("Binary KPI Options")*, Exchange Act Release No. 34-105877 at 7 (July 10, 2026) (the "Binary KPI Options Proposal").

83 Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend its Rules to Permit the Listing of Binary Options Overlying Key Performance Indicators ("KPIs") Reported by Certain Issuers of Stock ("Binary KPI Options"), Exchange Act Release No. 34-105877 at 7 (July 10, 2026) (the "Binary KPI Options Proposal").

84 *Id.*

85 We also view Cboe's Binary KPI Options Proposal as deficient on process-related grounds, as detailed in our comment on the Binary KPI Options Proposal. *See* Kalshi Inc., *Comment Letter on Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend its Rules to Permit the Listing of Binary Options Overlying Key Performance Indicators (SR-CBOE-2026-061)* (Aug. 5, 2026), *available at* https://www.sec.gov/comments/SR-CBOE-2026-061/srcboe2026061-993079-3105906.pdf ("Kalshi Binary KPI Options Comment").

Whether an instrument is "based on" an underlier depends on whether the payment or delivery terms of the instrument are based on future events with respect to the underlier such that the instrument shifts the risk of the underlier as between the parties. For example, the Commissions explained in the 2012 Joint Definitional Guidance that a Title VII instrument is "based on" a debt security where the instrument's payoffs are determined by reference to the yield on the debt security "where the term 'yield' is used as a proxy for the price or value of the debt security, loan, or narrow-based security index."[86] Unlike the yield on a debt security, which is based on the value of the debt security, KPIs are not "used as a proxy for the price or value" of the relevant security but rather are units of information provided by an issuer relating to aspects of their business that may influence the price of the security. Of course, the frailties of Cboe's KPI contract analysis do not undercut the fact that the SEC has a regulatory interest in derivatives that pertain to public companies. And there are other types of securities-related event contracts, such as contracts based on the price direction of a security, that more clearly fall within SEC jurisdiction as either securities options or SFPs. While splitting hair based on these distinctions is fine work for lawyers, it provides no benefits for investors.

b. *An Alternative Compliance Framework for Securities-Based Event Contracts.*

Given the recent rise in listings of and trading volumes in securities-based event contracts, jurisdictional line-drawing questions and regulatory uncertainty have already materialized under the current regime, as reflected in Cboe's Binary KPI Options Proposal and the CME-Cboe parlay. Such jurisdictional debates and shifting faultlines will only magnify in scale and severity as event contract markets continue to evolve, as customer and market demand will always exist for unified trading of all event contracts on a single trading platform. Moreover, as products increasingly straddle the often blurry line between these regulatory categorizations, onshore innovation will be stifled by the liquidity fragmentation, regulatory arbitrage and poor investor experience that result from economically similar products being subject to different jurisdictional and regulatory regimes and trading on different exchanges, through different intermediaries.

To address these issues, the Commissions should create safe harbors recognizing a trading venue or intermediary registered with one agency but offering products implicating the other agency's regulatory interests as compliant with both of the Commissions' statutory and regulatory obligations without full dual-registration. Rather, such an intermediary should be mutually recognized as a registrant by the second agency through notice-registration that preserves oversight and market integrity roles for the second agency while allowing the registrant to offer innovative products without facing an excessive, duplicative regulatory overhead.

The mutual-recognition structure envisioned here is far from unprecedented – this alternative compliance framework would simply allow securities-related event contracts to fall under the

[86] 2012 Joint Definitional Release at 48264 ("In cases when a ''yield'' is calculated based on the price or changes in price of a debt security, loan, or narrow-based security index, it is another way of expressing the price or value of a debt security, loan, or narrow-based security index. For example, debt securities often are quoted and traded on a yield basis rather than on a dollar price, where the yield relates to a specific date, such as the date of maturity of the debt security (i.e., yield to maturity) or the date upon which the debt security may be redeemed or called by the issuer (e.g., yield to first whole issue call). … when one of the underlying references of the Title VII instrument is the "yield" of a debt security, loan, or narrow-based security index in the sense where the term "yield" is used as a proxy for the price or value of the debt security loan, or narrow-based security index, the Title VII instrument would be a security-based swap.").

notice-registration framework for SFPs while also extending that framework to exchanges, clearing organizations and brokers offering securities-related event contracts as options, using the Commissions' exemptive authorities (including under Section 717 of the Dodd-Frank Act). Notably, permitting notice-registration for DCOs clearing securities options would have the added benefit of mitigating the derivatives industry's reliance on the Options Clearing Corporation as the sole central counterparty permitted to clear securities options in the United States.

c. *The Exchange Act's SBS Definition Captures Very Few Listed Event Contracts.*

As discussed in Section II above, the regulatory regime for swaps and SBS created by Title VII of the Dodd-Frank Act was intended for OTC derivatives, formerly unregulated prior to enactment of the Dodd-Frank Act. The SBS definition, in particular, is extremely narrow and excludes both securities options and SFPs, such that very few, if any, listed derivative products should fall within its scope.

The Exchange Act's SBS definition has three prongs, providing that an instrument is an SBS if it is an "agreement, contract, or transaction that is a swap [under the CEA] … and is based on:

(ii) "an index that is a narrow-based security index, including any interest therein or on the value thereof [the "SBS NBSI Prong"];

(iii) "a single security or loan, including any interest therein or on the value thereof [the "SBS Single Security Prong"]; or

(iv) "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, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer" (the "SBS Event Contract Prong").[87]

The 2026 Joint Definitional Release expressly requests public comment regarding the categorization of event contracts on changes to the composition of securities indices.[88] In our view, the event of a change in index composition is "based on" the index itself, rather than any component security within it. Accordingly, if the index at issue is a broad-based securities index, an event contract that pays out depending on whether or not a change in the composition of such index occurs should be a swap subject to exclusive CFTC jurisdiction; on the other hand, an event contract overlying whether or not a change in composition of a narrow-based security index occurs may be an SBS under the SBS NBSI Prong.[89]

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87 15 U.S.C. 78c(a)(68).

88 2026 Joint Definitional Release at Question 5.

89 To the extent the Commissions view an exchange-traded event contract on the change in composition of a broad-based security index as a mixed swap, the Commissions should exercise their authority under 17 C.F.R. § 1.9(c) and 17 C.F.R. § 240.3a68-4(c) to issue a joint order permitting an exchange seeking to list such an event contract to comply with specified parallel provisions of the Exchange Act or the CEA.

The 2026 Joint Definitional Release also asks "when an event 'directly affects' the financial statements, financial condition, or financial obligations of an issuer'" for purposes of the SBS Event Contract Prong.[90] In considering whether a contract is an SBS under the SBS Event Contract Prong, each of the following three elements of the definition must be met: (i) the contract must be "based … on the occurrence, nonoccurrence, or extent of the occurrence of an event (*i.e.*, it is an event contract); (ii) that event "relat[es] to a single issuer of a security or the issuers of securities in a narrow-based security index" *and* (iii) that event must "directly affect the financial statements, financial condition, or financial obligations of" such issuer.[91]

The plain language of the words used in this prong of the Exchange Act's SBS definition convey a narrow scope. Although the phrase "directly affects" is not defined in the Exchange Act or any SEC regulations or guidance issued thereunder, the plain meaning of "directly affects" suggests a requirement for there to be a proximate effect on the issuer without intervening events or actions.[92] Further, read against the broad, relational language in the corresponding event-based prong of the CEA's swap definition ("*associated with ... a potential ... consequence*"[93]), it is clear that Congress intended for this language in the SBS Event Contract Prong to capture only events with an effect not only proximately causing a change in an issuer's financial statements, financial condition or financial obligations, but only those which *certainly* (not "potentially") result in such a change.

Similarly, while the event-based prong of the CEA's swap definition applies to event contracts on any event with a potential "*financial, economic, or commercial*"[94] consequence, the SBS Event Contract Prong is on its face limited to events that directly affect an issuer's *financial statements, financial condition or financial obligations*. Although the phrase "financial condition" could be read narrowly, Congress placed it in a list alongside technical, specific terms, indicating that it should be interpreted in a similar, narrow manner (*i.e.*, as referring to an issuer's state of solvency).[95]

Accordingly, we believe that the SBS Event Contract Prong should capture only those few event contracts that pay out based on the occurrence of an event that certainly, proximately causes a change to an issuer's financial statements, condition (*i.e.*, solvency) or obligations. Event contracts on an issuer's default on a debt obligation, for example, may fall within the SBS Event Contract Prong because, like credit default swaps, they pay out based on the occurrence or nonoccurrence of credit events that, by operation of law, cause a change in an issuer's financial obligations without reliance on intervening events.[96]

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90 2026 Joint Definitional Release, Question 7.

91 *Id.*

92 Black's Law Dictionary (2024), "directly," "affect."

93 7 U.S.C. § 1a(47)(A)(ii) (emphasis added).

94 *Id.*

95 *See, e.g.*, *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis,* that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.").

96 *See* 2012 Joint Definitional Release at 48267 ("the third prong of the security-based swap definition includes a swap that is based on the occurrence of an event relating to a ''single issuer of a security,'' provided that such event ''directly affects the financial statements, financial condition, or financial obligations of the issuer.'' This provision applies generally to event-triggered swap contracts. With respect to a CDS, such events could include,

However, as discussed in Section II of this letter, *even if* an event contract falls within the affirmative criteria of the SBS definition, if the contract is listed by an exchange as an SFP or a securities option, it should be regulated as such and not as an SBS.

VI. Conclusion

We thank the Commissions for the opportunity to comment on the 2026 Joint Definitional Release and for coordinating on jurisdictional and alternative-compliance issues. A coherent, fit-for-purpose framework that promotes fair competition, consumer choice, coordinated market oversight and right-sized compliance obligations for registrants is essential to the vibrancy and competitiveness of U.S. derivatives markets. We welcome further engagement with the Commissions on the topics addressed in this letter.

Respectfully submitted,

Sudhir Jain
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for example, the bankruptcy of an issuer, a default on one of an issuer's debt securities, or the default on a non-security loan of an issuer.").