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BY ELECTRONIC SUBMISSION

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

ForecastEx LLC ("ForecastEx") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC") and the Securities and Exchange Commission ("SEC") (collectively, the "Commissions") joint request for comment on further definition of "Swap" and "Security-Based Swap". ForecastEx is a Designated Contract Market ("DCM") and a Derivatives Clearing Organization ("DCO") that lists Forecast Contracts, which are a subset of event contracts.

ForecastEx supports the Commissions' effort to provide greater clarity at the boundary between swaps and security-based swaps. Currently, the jurisdictional boundaries between swaps and security-based swaps are unclear, leading to confusion among trading venues as to which contracts are on which side of the jurisdictional boundary, and cooling innovation in an emerging product category. As discussed below, the Commissions should define the term "directly affects" in the event contract prong, establish workable rules for applying the narrow-based security index framework to multi-issuer quantitative measures, and clarify that a binary or threshold-based payoff does not, standing alone, transform an event contract into an excluded securities option. These clarifications would permit ordinary operating and commercial events to remain within the CFTC swap framework where appropriate, while preserving SBS treatment for contracts that are genuinely based on single-security or narrow-based securities exposure or on events having the direct financial incidence contemplated by the statute.

At the same time, the jurisdictional line should not determine more of the regulatory infrastructure than necessary. Where a standardized, fungible, fully collateralized SBS is traded on a CFTC-registered DCM, centrally cleared through a CFTC-registered DCO, and subject to comparable market-integrity, financial, customer-protection, and surveillance requirements, the Commissions should permit alternative compliance rather than require duplicative SEC and CFTC regimes. Existing statutory authorities, together with targeted exemptive and rulemaking authority where necessary, provide a path for trading venues registered with one agency to list products that fall on the other side of the jurisdictional line without full registration with the other regulator. This approach would preserve each Commission's substantive regulatory interests while reducing the consequences of difficult jurisdictional classifications

and allowing economically similar exchange-traded products to operate within a coherent federal framework.

I. The Commissions Should Clarify the Event Contract Prong

The statutory definition of "security-based swap" creates substantial uncertainty when applied to event contracts concerning the business activities of a securities issuer. Section 3(a)(68)(A)(ii)(III) of the Exchange Act provides that a swap is a security-based swap if it is based on "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."[1]

The first portion of that standard is relatively straightforward. A contract concerning the number of iPhones sold by Apple, vehicles delivered by Tesla, or subscribers added by an issuer plainly may be an event "relating to" that issuer. The more difficult—and increasingly important—question is whether such an event "directly affects" the issuer's financial statements, financial condition, or financial obligations.

The Commissions have never provided meaningful guidance concerning that limitation. In the 2012 Product Definitions Release, the Commissions stated that the Event Contract Prong applies generally to event-triggered swaps and identified bankruptcy, default on an issuer's debt securities, and default on a non-security loan as examples.[2] But the Commissions did not explain what distinguishes a "direct" effect from an indirect one or how the standard applies to ordinary commercial and operating events. The development of exchange-traded event markets now makes that previously unresolved question consequential to product classification and market structure.

I.A. "Directly Affects" Must Perform Independent Limiting Work

The statutory text indicates that an event's relationship to a single issuer is necessary but not sufficient for the Event Contract Prong to apply. Congress did not define a security-based swap to include any swap based on an event relating to a single issuer. Instead, Congress expressly conditioned that category on the additional requirement that "such event directly affects" one of three specified financial attributes of the issuer.

That limitation should be given independent meaning. A rule under which substantially every economically meaningful event concerning a single issuer is presumed to satisfy the Event Contract Prong would risk collapsing the statutory inquiry into the simpler question of whether the event relates to one issuer. Congress knew how to establish such a single-name rule. Indeed, the immediately preceding prong of the SBS definition expressly covers swaps based on a "single security or loan."[3] The Event Contract Prong uses materially different language and imposes an additional financial nexus.

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[1] 15 USC § 78c(a)(68)(A)(ii)(III)

[2] Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208, 48267. "This provision applies generally to event-triggered swap contracts. With respect to a CDS, such events could include, 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."

[3] 15 USC § 78c(a)(68)(A)(ii)(II)

At the same time, the meaning of "directly affects" cannot reasonably turn on whether an event has any causal effect on the issuer's accounts or economic position. Virtually every transaction undertaken by an operating company ultimately has an accounting or financial consequence. The sale of a product may affect revenue, cash or receivables, inventory, and cost of goods sold. The purchase of equipment may affect cash and property, plant and equipment. Hiring an employee may result in compensation expense and a cash obligation. Entering into a lease may create an asset and a liability. If an event "directly affects" financial statements whenever the underlying business activity ultimately produces an accounting consequence, the Event Contract Prong could encompass an extraordinarily broad range of ordinary commercial activity undertaken by any issuer of securities.

Nothing in the statute suggests that Congress intended every event forming an input into an issuer's accounting system to constitute an SBS event. To the contrary, the use of the modifier "directly" indicates that some events affecting an issuer's financial statements or condition are too attenuated to fall within the provision. The difficulty is determining where that line should be drawn.

I.B Financial Attributes should be Distinguished from Operating Metrics

The specific objects Congress selected are also significant. The Event Contract Prong refers to an issuer's financial statements, financial condition, and financial obligations. It does not refer generally to an issuer's business, commercial activities, operational performance, results, prospects, or enterprise value.

Those omitted concepts were hardly unknown when Dodd-Frank was enacted. The SEC's disclosure framework has long distinguished an issuer's financial condition from its results of operations, and SEC guidance separately recognizes operating and statistical measures used to evaluate the performance of an issuer's business. Regulation S-K Item 303, for example, has long required management to discuss both "financial condition" and "results of operations" as distinct subjects.[4]

This distinction does not mean that operating events are financially irrelevant. Quite the opposite. The number of products an issuer sells, vehicles it delivers, subscribers it adds, or units it produces may be highly material to investors and may have substantial consequences for its reported results. But the fact that an operating event contributes to or affects an issuer's financial results does not resolve whether Congress intended that event to "directly affect" the particular financial objects identified in the SBS definition.

The statutory distinction therefore warrants clarification. An interpretation under which every issuer operating metric falls within the Event Contract Prong merely because operating activity eventually affects the issuer's accounts would substantially reduce the work performed by the word "directly" and would render meaningless Congress' decision to limit the scope of relevant events to financial statements, financial condition, and financial obligations. It would also make classification depend on difficult factual inquiries into an issuer's business model, revenue-recognition practices, cost structure, and accounting treatment rather than the objectively ascertainable characteristics of the event on which the contract is based.

[4] 17 C.F.R. § 229.303

I.C Direct Financial Events Should be Distinguished from Ordinary Operating Events

The examples provided by the Commissions in 2012 illustrate a category of events that comfortably satisfies the statutory standard.[5] Bankruptcy directly changes or establishes the issuer's financial and legal condition. A default directly changes the status of a financial obligation. Similar events—such as acceleration, restructuring, extinguishment, or impairment of a financial obligation—have an immediate and formal financial incidence on one of the subjects specifically identified in the statute.

Likewise, certain events concerning an issuer's financial statements fit naturally within the provision. A contract concerning whether an issuer restates previously issued financial statements, reports a specified amount of revenue or net income, or records a specified asset or liability directly references the financial statements themselves or a financial measure reported in them.

Ordinary operating events present a materially different case. A contract based on the number of iPhones sold by Apple, vehicles delivered by Tesla, subscribers added by a communications company, barrels produced by an energy company, or stores opened by a retailer is based on the issuer's underlying commercial activity. Those events may materially affect the issuer and may contribute to amounts ultimately reflected in its financial statements. But treating that relationship alone as sufficient would effectively make ordinary-course operating activity an SBS reference merely because the operating company has issued a security.

The Commissions should therefore clarify that an event does not directly affect an issuer's financial statements, financial condition, or financial obligations solely because the event constitutes or measures ordinary commercial or operating activity that ultimately contributes to, is recognized in, or has consequences for the issuer's financial results or financial position.

I.D Proposed Safe Harbor for Issuer-Related Nonfinancial Events

The Commissions should adopt an objective safe harbor clarifying that an event does not satisfy the Event Contract Prong solely because it concerns a single issuer and may have material economic, accounting, or securities-market consequences for that issuer.

The safe harbor should reflect the statutory distinction between an event that directly affects an issuer's financial statements, financial condition, or financial obligations and an event that instead concerns the issuer's underlying business, operations, governance, scientific or technological developments, regulatory milestones, physical assets, resources, or other nonfinancial facts.

Accordingly, an event should not be deemed to "directly affect" an issuer's financial statements, financial condition, or financial obligations solely because:

1. The event concerns or measures the issuer's ordinary commercial or operating activity;
2. The event concerns a governance, personnel, scientific, technological, regulatory, production, resource, or business-development matter;
3. The event may be material to investors or may materially affect the value of the issuer's securities;
4. Information concerning the event may constitute material nonpublic information;

[5] Ibid, 77 FR 48208, 48267

5. the event may influence the issuer's future revenues, expenses, cash flows, liquidity, financing needs, or other financial results; or
6. activities underlying the event may ultimately be recognized, reflected, aggregated, or disclosed in the issuer's financial statements.

The relevant distinction should be whether the event itself has direct financial incidence on one of the statutory objects identified by Congress, rather than whether the event has downstream economic consequences for the issuer. Events involving the status, validity, amount, or reporting of an issuer's financial statements, financial condition, or financial obligations would remain outside the safe harbor where the statutory requirements are otherwise satisfied.

This approach would preserve the limiting role of the phrase "directly affects" while giving market participants an administrable standard that can be applied from the terms and economic substance of the contract. It would also avoid making SBS classification turn on open-ended judgments about materiality, expected stock-price impact, or whether the issuer possesses material nonpublic information concerning the event. Those considerations may be highly relevant to antifraud, surveillance, and market-integrity regulation, but they are not themselves the jurisdictional test Congress enacted.

I.E Application of the Safe Harbor to Common Issuer-Related Event Contracts

The value of the proposed safe harbor is not merely that it provides a categorical answer for particular products. It also helps align regulatory treatment with the economic character of the event being traded.

Many issuer-related event contracts concern facts about a company's business, operations, governance, scientific development, or physical activity rather than the issuer's financial statements, financial condition, or financial obligations. A safe harbor for these events would provide several benefits. It would create a more objective and predictable jurisdictional boundary, avoid making SBS status depend on potentially limitless chains of accounting or economic causation, and permit economically similar real-world event contracts to receive similar regulatory treatment.

The following examples illustrate both the proposed line and the policy reasons for drawing it.

I.E.1 Executive Appointments and Departures

A contract based on whether a company appoints or replaces a chief executive officer should generally fall outside the Event Contract Prong because the appointment itself does not directly alter the issuer's financial statements, financial condition, or financial obligations. Any financial effect depends on subsequent decisions, changes in strategy, operating performance, or market expectations. That is materially different from a default or bankruptcy, where the occurrence of the event itself changes the status of a financial obligation or the issuer's financial condition.

Treating executive appointments as SBS events would also create an unstable jurisdictional rule because classification would depend on judgments about how financially consequential a particular appointment is expected to be. By contrast, a contract asking whether the board will approve a CEO compensation package of at least $X presents a materially stronger case for SBS treatment.

I.E.2 Developmental Product Results

A contract based on whether a drug candidate meets a specified clinical endpoint or whether a given drug will receive regulatory approval should generally fall outside the Event Contract Prong. Any trial result is a scientific outcome, and regulatory approval is not a financial event. The result may have enormous consequences for the issuer, but those consequences arise through subsequent regulatory, commercial, financing, or accounting developments. The trial outcome does not itself establish a revenue amount, alter a financial obligation, or determine the issuer's financial condition.

Placing such contracts within the safe harbor would also avoid making regulatory classification depend on the issuer's particular circumstances. The same clinical-trial outcome remains the same underlying scientific event whether the sponsor is a large diversified pharmaceutical company or a development-stage biotechnology company whose value depends substantially on a single product. A jurisdictional rule that turns on how economically consequential the trial happens to be for a particular issuer would make product classification less predictable and less tied to the character of the event being traded.

I.E.3 Product Launches and Operational Milestones

A contract based on whether a company launches a product, opens a facility, or begins commercial operations should generally fall outside the Event Contract Prong even where the event may materially affect the value of the issuer's securities. A successful product launch may cause the issuer's stock price to rise and thereby improve its access to capital or otherwise benefit its financial position. But that effect is neither necessary nor reliably predictable from the occurrence of the launch itself. The same launch may cause the stock price to rise, fall, or remain unchanged depending on whether it was expected, how the product is received, its anticipated profitability, broader market conditions, and numerous other factors.

That uncertainty is important to the meaning of "directly affects." A jurisdictional test should not require the Commissions or market participants to predict the securities-market reaction to an event and then determine whether that reaction will be sufficiently favorable or adverse to affect the issuer's financial condition. An effect that depends on an intervening and inherently uncertain market response is better understood as indirect rather than direct. By contrast, a contract asking whether the issuer will recognize at least $X of revenue from the product, incur a specified liability, or record a specified financial-statement charge turns on an identified financial consequence and therefore presents a substantially stronger case for SBS treatment.

I.E.4 Resource Discoveries

A contract based on whether a company discovers commercially recoverable oil, gas, minerals, or another natural resource in a specified region should generally fall outside the Event Contract Prong. The discovery may materially increase the value of the issuer's assets, improve its growth prospects, or affect the market price of its securities, but those effects depend on subsequent questions such as recoverability, development costs, reserve classification, permitting, commodity prices, financing, and commercialization. The discovery itself therefore does not necessarily produce a determinate change in the issuer's financial statements, financial condition, or financial obligations.

Treating such discoveries as SBS events would also make classification depend on forecasting the financial significance of a physical or geological fact. That would be difficult to administer because the

same discovery could have very different financial consequences depending on the issuer and market conditions.

I.E.5 Sales, Deliveries, Production, and Subscriber Metrics

Contracts based on unit sales, vehicle deliveries, production volumes, subscriber counts, or similar operating metrics should generally fall outside the Event Contract Prong. In these cases the relationship to the issuer's financial results may be close: additional sales may increase revenue, deliveries may affect revenue recognition, production may affect inventory and costs, and subscriber growth may affect future revenue. But that relationship should not be enough, standing alone, to make the operating metric a security-based swap reference.

The key distinction is that the contract is based on the issuer's underlying business activity, not on the resulting financial measure. "Will Apple sell more than 50 million iPhones?" asks about units sold; "Will Tesla deliver more than 500,000 vehicles?" asks about deliveries. Neither contract specifies the revenue, earnings, assets, liabilities, liquidity, or other financial consequence that will result. Translating the operating metric into a financial effect requires additional facts—such as price, product mix, returns, recognition timing, margins, costs, collectability, and accounting treatment. The same operating result can therefore produce materially different financial consequences. That dependence on additional variables provides a principled basis for treating the financial effect as indirect rather than direct.

A broader interpretation would also be difficult to contain. If an operating metric "directly affects" financial statements whenever it contributes to an accounting result, the same reasoning could extend to units purchased from suppliers, employees hired, customer returns, stores opened, advertising expenditures, electricity consumed, or countless other components of an issuer's ordinary business. Because the statute contains no materiality threshold, there would be no obvious basis for including quarterly vehicle deliveries while excluding smaller-scale operating facts that also have immediate accounting consequences. The Event Contract Prong would risk becoming a general rule for contracts on the operations of any company that happens to be a securities issuer.

The safer and more administrable interpretation is therefore to distinguish the operating input from the financial output. A contract on unit sales, deliveries, production, or subscribers should fall within the safe harbor unless the contract itself is based on an identified financial result. Thus, a contract on whether Apple sells more than 50 million iPhones would generally fall within the safe harbor, while a contract on whether Apple reports more than $X of revenue would present a substantially stronger case for SBS treatment. That distinction gives "directly affects" meaningful limiting effect and allows classification to turn on the event actually being traded rather than an open-ended inquiry into every accounting and financial consequence that may flow from it.

I.E.6 Events not Covered by the Safe Harbor

By contrast, contracts based on events such as:

- Will Company X report revenue above $10 billion?
- Will Company X report EPS above $2.00?
- Will Company X default on its bonds?
- Will Company X enter bankruptcy or insolvency proceedings?

fit much more naturally within the Event Contract Prong.

The distinction is not that these events are necessarily more consequential to the issuer than a clinical-trial result, product launch, executive appointment, or production milestone. Rather, these contracts are based directly on the financial objects Congress identified. Revenue, earnings, and restatements concern the issuer's financial statements. Default concerns the status of a financial obligation. Bankruptcy or insolvency directly concerns the issuer's financial condition.

This distinction gives substantive meaning both to Congress's decision to identify "financial statements, financial condition, or financial obligations" rather than more generally covering every significant event relating to an issuer and to Congress's decision to require that those metrics be "directly affect[ed]". It also provides a more objective jurisdictional rule: contracts based on the issuer's financial state remain within the SBS framework, while contracts based on underlying business, scientific, governance, operational, or physical facts can fall within the safe harbor.

I.F The Proposed Safe Harbor Would Not Create a Gap in Market-Integrity Protections

Clarifying that certain issuer-related event contracts are swaps rather than security-based swaps would not leave trading in those products outside the federal antifraud framework. The CFTC has long interpreted CEA Section 6(c)(1) and Rule 180.1 to reach trading on material nonpublic information obtained through fraud or deception or used in breach of a pre-existing duty. In February 2026, the CFTC Division of Enforcement expressly confirmed the application of that principle to event contracts, including trading based on confidential information misappropriated in breach of a duty of trust or confidence.[6] Thus, for example, an employee who trades an issuer-related event contract using confidential information concerning an upcoming product release, sales figures, or similar corporate developments may be subject to CFTC enforcement even where the contract is properly classified as a swap.

At the same time, classifying the contract as a swap should preserve the statutory division of regulatory responsibility. The CFTC and the relevant DCM would remain primarily responsible for regulating trading in the swap, including surveillance for fraudulent or abusive trading and enforcement of applicable exchange rules. The SEC would retain its existing authority over related conduct in the securities markets, including trading or other misconduct involving the issuer's securities. Where suspicious activity spans both markets, the Commissions can use existing information-sharing and enforcement-coordination mechanisms to identify and address misconduct within their respective jurisdictions.

This approach recognizes the SEC's legitimate interest in issuer-related event contracts without using the SBS definition as a substitute for targeted market-integrity protections. Congress has already recognized, in the security-based swap agreement framework, that a product may remain subject to primary CFTC regulation while securities-related concerns justify a continuing SEC interest. The same principle supports a narrow construction of the Event Contract Prong: product classification should follow the statutory definition, while antifraud surveillance and enforcement should address the particular misconduct presented by trading in the product.

[6] CFTC Division of Enforcement, *Advisory on Enforcement Authority over Event Contracts*, Release No. 9185-26 (Feb. 25, 2026)

II. Multi-Issuer Quantitative Measures and the Narrow-Based Security Index Test

The current statutory framework creates substantial uncertainty for contracts based on quantitative measures derived from multiple securities issuers. Consider, for example, a contract based on the aggregate annual revenue of twenty companies. The contract is not naturally understood as an index of securities because the constituent inputs are revenues rather than securities or security values. At the same time, the Event Contract Prong applies to events relating to "the issuers of securities in a narrow-based security index."[7] The statute therefore appears to preserve the traditional narrow-based/broad-based distinction for multi-issuer event contracts, but does not explain how that distinction should be applied where the underlying measure is revenue, EPS, profit, or another issuer metric rather than an index composed of traded securities.

The Commissions should clarify that multi-issuer quantitative measures are subject to the same basic jurisdictional principle reflected in the narrow-based security index framework. A contract based on a sufficiently concentrated group of issuers should remain within the SBS regime where the other elements of the Event Contract Prong are satisfied, while a contract based on a sufficiently diversified group should remain a CFTC-regulated swap. Thus, a revenue measure composed of five issuers would necessarily be narrow-based under the numerical component test. A measure composed of twenty issuers, however, should be evaluated for concentration before determining whether it is narrow- or broad-based. This approach preserves the longstanding distinction between concentrated single-name or small-basket exposure and genuinely diversified economic exposure.

To make that framework workable for multi-issuer quantitative measures, the Commissions should adopt three clarifications to the existing NBSI methodology to help trading venues evaluate whether these types of products fall within the SBS definition.

II.A Determine Component Weighting Based on Each Issuer's Share of the Reference Measure

For an unnormalized aggregate measure, each issuer's weight should be determined by its proportionate contribution to the value of the aggregate measure at the applicable determination date. For example, if one issuer accounts for 32 percent of the aggregate revenue of twenty issuers, that issuer should be treated as having a 32 percent weight for purposes of the 30 percent concentration test. Similarly, the five issuers contributing the largest shares of the aggregate should be used for purposes of the 60 percent top-five test. Conversely, for a genuinely normalized or fixed-weight measure in which each issuer is assigned an equal formula weight, the issuers should be treated as equally weighted.

II.B Replace ADTV With a Public-Information-Availability Test

The statutory Average Daily Trading Volume ("ADTV") requirement does not translate naturally to multi-issuer quantitative measures because the trading volume of an issuer's securities bears little relationship to the availability or reliability of information concerning the revenue, production, deliveries, subscribers, or other metric that actually comprises the reference measure. The Commissions should instead adopt an objective public-information-availability test modeled on the index-CDS rules.[8] In adopting those rules, the Commissions recognized that ADTV was not meaningful where the relevant reference entities or

[7] Ibid
[8] 17 C.F.R. § 240.3a68-1b

instruments did not themselves trade actively and substituted a test intended to preserve the underlying objectives of public information availability and market following.[9]

For multi-issuer quantitative measures, an issuer should satisfy the public-information test where:

(i) the issuer is subject to periodic reporting under Sections 13 or 15(d) of the Exchange Act, or is a foreign issuer subject to an equivalent recognized public-reporting regime, and

(ii) the particular metric included in the measure is publicly available pursuant to an established and recurring disclosure process, such as a regulatory filing, regularly issued financial statement or earnings release, or another predetermined public source identified in the contract terms.

Consistent with the index-CDS framework, the test should be satisfied where qualifying issuers comprise at least 80 percent of the measure's weighting, provided that no issuer failing the test represents 5 percent or more of the measure.[10] The existing index-CDS rules use the same 80-percent and 5-percent thresholds to permit limited inclusion of issuers that do not independently satisfy the public-information requirement.

This standard would more directly serve the purpose of the ADTV requirement than applying the trading volume of securities that are not themselves the reference components. It would also provide an objective test that can be determined in advance: the exchange must identify the source and recurring availability of the constituent information when establishing the measure, rather than attempting to infer information availability from trading in an economically distinct security.

II.C Adapt the NBSI Migration Rules to Periodically Reported Metrics

The existing migration framework assumes an index whose component weights can be measured on a continuing basis. That assumption does not hold for revenues and many other issuer metrics, which may be reported only quarterly. Applying a daily or continuous migration standard to such measures would either require reliance on stale information or cause jurisdictional status to change abruptly whenever new quarterly information becomes available.

For periodically reported metrics, each completed reporting period should instead constitute a separate determination date. The measure should migrate between narrow-based and broad-based status only

[9] Ibid, 77 FR 48208, 48278. "An ADTV test is designed to take into account the trading of individual stocks and, because Exchange Act registration of the security being traded is a listing standard for equity securities, the issuer of the security being traded must be subject to the reporting requirements under the Exchange Act. Based on the provisions of the statutory ADTV test, the Commissions have determined that the ADTV test is not useful for purposes of determining the status of the index on which the index CDS is based because index CDS most commonly reference entities, which do not ''trade,'' or debt instruments, which commonly are not listed, and, therefore, do not have a significant trading volume. However, the underlying rationale of such provision, that there is sufficient trading in the securities and therefore public information and market following of the issuer of the securities, applies to index CDS."

[10] Ibid, 77 FR 48208, 48278. "However, so long as the effective notional amounts allocated to reference entities or securities included in the index that satisfy the public information availability test comprise at least 80 percent of the index's weighting, failure by a reference entity or security included in the index to satisfy the public information availability test will be disregarded if the effective notional amounts allocated to that reference entity or security comprise less than five percent of the index's weighting.818 In this situation, the public information availability test for purposes of the index would be satisfied."

where the applicable classification is supported by a majority of the three most recent reporting periods. Thus, a measure that satisfies the NBSI concentration tests in only one of the three most recent quarters would not migrate, while satisfaction of the tests in two of the three quarters would establish persistent concentration sufficient to warrant a change in classification. This approach closely follows the policy of the existing migration rules by distinguishing temporary fluctuations from sustained changes in concentration, while adapting the observation period to the frequency at which the relevant information actually becomes available.

Further, changes in composition should apply prospectively. Where an issuer is newly added to the measure, prior determination periods should not be recalculated based on information or constituents that were not part of the measure at that time; the new component would effectively have no weighting for those historical determinations. A similar principle should apply to removals and substitutions. This would permit the classification of the measure to be determined objectively at each reporting date without retroactively changing prior jurisdictional determinations.

Together, these modifications would preserve the substantive narrow-based/broad-based distinction established by Congress while adapting the NBSI framework to products whose components are periodically reported issuer metrics rather than continuously traded securities.

III. Event Contracts Referencing Securities should not be Considered Securities Options

The Commissions request comment on when an event contract should be considered subject to the security option exclusion to the swap definition.[11] The Commissions should clarify that an event contract does not become an excluded securities option merely because its payout depends on whether the price or value of a security or securities index is above or below a specified level. Such an interpretation would place excessive weight on the economic shape of the contract's payout and would substantially erode the distinction between securities options and the numerous contingent, asymmetric, and option-like instruments that Congress expressly included within the swap and security-based swap definitions.

As a threshold matter, a binary event contract referencing the future value of a security or securities index can independently satisfy the affirmative definition of a swap. The CEA defines "swap" to include agreements providing for payments dependent on the occurrence, nonoccurrence, or extent of occurrence of an event having potential financial, economic, or commercial consequences, as well as agreements providing for contingent payments based on the value or level of securities, indices, quantitative measures, and other financial interests. A contract providing that a fixed amount will be paid if the S&P 500 exceeds a specified level on a specified date fits naturally within those provisions: it transfers between the parties the financial risk associated with a future contingency determined by the value of an index.

The fact that the same agreement may also have option-like economics does not end the analysis. The affirmative definition and the exclusion should be read together. Congress plainly contemplated that contingent payments and securities-related economic exposures could constitute swaps. The securities-option exclusion should therefore apply where the agreement itself is properly characterized as a put, call, or other option on the security or index—not whenever a swap happens to generate a payoff that can be represented using the same payoff diagram as an option.

[11] 7 U.S.C. § 1a(47)(B)(iii) "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof…"

III.A Option-Like Economics Cannot Provide the Jurisdictional Test

A contrary interpretation would create substantial difficulty distinguishing securities options from products that the statute and the Commissions already recognize as swaps or security-based swaps. Optionality, asymmetry, threshold conditions, and contingent payment obligations are pervasive throughout the Title VII framework. The swap definition expressly includes caps, floors, collars, credit default swaps, total return swaps, equity-index swaps, and options on swaps.[12] The 2012 Product Definitions Release confirms that explicit optionality is not inherently inconsistent with classification as a swap or SBS. The Commissions explained that "an option on a swap or security-based swap (commonly known as a 'swaption') would itself be a swap or security-based swap, respectively."[13]

Credit default swaps provide the clearest example. A CDS transfers risk through a payment that becomes due only upon occurrence of a specified credit event. The resulting exposure is contingent and asymmetric and may economically resemble a digital put or other option on the financial condition of the reference entity. Nevertheless, Congress and the Commissions plainly treat single-name CDS as security-based swaps and broad-based index CDS as CFTC-regulated swaps. The 2012 Product Definitions Release specifically identifies bankruptcy and defaults as examples of events falling within the SBS Event Contract Prong[14] and separately confirms the swap treatment of broad-based index CDS. The treatment of options on CDS demonstrates the point even more directly. The Commissions concluded that an option to enter into a single-name CDS or a CDS referencing a narrow-based security index is itself a security-based swap, while an option to enter into a CDS referencing a broad-based security index is a swap.[15] Thus, even an instrument containing an express contractual option does not necessarily become an excluded securities option. Its classification depends on the nature of the agreement and the statutory treatment of the underlying Title VII instrument.

Caps and floors present a similar limiting-principle problem. An interest-rate cap may require payment only if a reference rate exceeds a specified threshold. That is plainly option-like and can be described using familiar strike and payoff concepts. Yet Congress expressly included caps and floors within the swap definition.[16] A rule under which the presence of a reference value, threshold, and contingent payment is sufficient to establish option status would therefore reach instruments that Congress itself expressly characterized as swaps.

Nor can the exclusion turn on whether the economic exposure can be replicated through options. Many conventional swaps contain embedded optionality or can be economically reproduced using combinations of options. A total return swap on a broad-based securities index, for example, remains a CFTC swap even though substantially similar exposure can be constructed through other SEC regulated derivatives. The 2012 Product Definitions Release similarly addresses total return swaps containing embedded caps,

[12] 7 U.S.C. § 1a(47)(A)(iii)
[13] Ibid, 77 FR 48208, 48259
[14] Ibid
[15] Ibid, 77 FR 48208, 48273 FN752 "Similarly, an option to enter into a singlename CDS or a CDS referencing a narrow-based security index as described above would be a security-based swap, while an option to enter into a CDS on a broad-based security index or the issuers of securities in a broad-based security index would be a swap."
[16] Ibid

collars, puts, or calls without suggesting that such optionality automatically transforms the entire instrument into an excluded securities option.[17]

The relevant distinction therefore cannot be simply whether a contract is contingent, asymmetric, bounded, threshold-based, or economically replicable through an option. If those characteristics were sufficient, the securities-option exclusion would have no coherent stopping point and could sweep into the exclusion substantial categories of instruments that Title VII expressly treats as swaps or SBSs.

III.B The Securities Option Exclusion Should Turn on the Character of the Agreement

The better interpretation is to distinguish an instrument that is of the character of a put, call, straddle, option, or privilege on a security or securities index from an event-contingent risk-transfer agreement that happens to possess option-like economics.

Relevant characteristics of a securities option may include whether the instrument establishes an option holder and writer; is structured as a put or call; has a buyer and a seller; provides for exercise or automatic exercise; creates an exercise settlement amount; provides the seller of the option with a premium; and is entered into, cleared, and administered as an option on the referenced security or index.

A DCM event contract may have a materially different contractual structure. Both sides become bound when the transaction is executed. Both parties take complementary positions rather than occupying a traditional option-holder/option-writer relationship. The contract does not provide for a separately designated option premium paid by a holder to a writer. The positions represent complementary exposure to the occurrence and nonoccurrence of a stated contingency. Neither party subsequently exercises a privilege against the other. Settlement instead occurs automatically according to an objective resolution criterion established in the contract terms. No single characteristic should be dispositive. Automatic exercise, for example, is also used in conventional securities options, and an exchange should not be able to transform an otherwise conventional option into a swap merely by describing its "strike" as a "threshold." The classification should instead reflect the agreement as a whole and the substantive contractual rights and obligations created by the transaction.

This approach also permits economically similar exposures to exist in different legal forms without collapsing their statutory classifications. A national securities exchange might list a binary call created and administered as an option on the S&P 500. A DCM could separately list an event-contingent agreement transferring the risk that the S&P 500 exceeds a specified value. The fact that the two contracts may produce the same terminal payment in particular circumstances does not itself make them the same legal instrument. Futures, swaps, options, forwards, and combinations of derivatives routinely can be structured to produce similar economic exposures without becoming legally interchangeable.

III.C Existing CFTC Practice Is Consistent With This Distinction

Existing CFTC practice provides additional support for distinguishing the legal character of an event contract from the shape of its payout. The CFTC has long used "Swap (Binary Option)" as a product classification for exchange-traded event contracts. That terminology itself recognizes that "binary" or

[17] Ibid, 77 FR 48208, 48265 "For example, where the counterparties embed interest-rate optionality (e.g., a cap, collar, call, or put) into the terms of a security-based swap in a manner designed to shift or limit interest rate exposure, the inclusion of these terms would cause the TRS to be both a swap and a security-based swap (i.e., a mixed swap)."

"option-like" economics and statutory treatment as a swap are not mutually exclusive concepts within the CEA framework.

DCMs have also listed contracts referencing securities-related quantitative measures and securities indexes as swaps. Those product filings do not constitute a binding joint SEC-CFTC determination concerning the scope of the securities-option exclusion, and the jurisdictional treatment of a self-certified product should not by itself resolve the statutory question. They are nevertheless relevant evidence that, within the CFTC framework, the existence of a fixed binary payout or a securities-related reference has not historically been treated as sufficient to remove an agreement from the swap definition.

The Commissions should preserve that distinction when providing prospective guidance. The appropriate question should be whether the contract, considered as a whole, is an agreement of the character of a securities option—not whether a binary payoff can colloquially or economically be described as "option-like."

III.D Recommended Standard

The Commissions should clarify that contingent, asymmetric, bounded, threshold-based, or economically option-like payoffs are not, standing alone, sufficient to make an agreement an excluded securities option. The securities-option exclusion should apply where the agreement, considered in its entirety, creates the rights and obligations characteristic of a put, call, straddle, option, or privilege on a security or securities index.

Conversely, an agreement under which both parties become bound at execution to transfer the financial risk associated with the occurrence, nonoccurrence, or extent of a specified event or contingency should remain within the Title VII framework where it otherwise satisfies the statutory swap definition, notwithstanding that its terminal payout may resemble or be replicable by a securities option.

Under this interpretation, a standardized DCM event contract based on whether a broad-based securities index such as the S&P 500 exceeds a specified level at a specified time may appropriately be treated as a CFTC-regulated swap where the contract is substantively structured as an event-contingent risk-transfer agreement. A contract based on a single security or narrow-based security index would instead proceed to the applicable SBS analysis rather than automatically being removed from Title VII solely because its payoff resembles that of a binary option.

This interpretation gives meaningful effect to both the affirmative swap definition and the securities-option exclusion, preserves the existing treatment of CDS, broad-based index CDS, swaptions, caps, floors, total return swaps, and other contingent or option-like Title VII instruments, and avoids making federal jurisdiction turn solely on the geometry of a derivative's payoff.

IV. Alternative Compliance for Fully Collateralized, Exchange-Traded Security-Based Swaps

The Commissions' questions concerning alternative compliance provide an opportunity to address products that fall within the statutory definition of a security-based swap but are functionally much closer to standardized, fully collateralized exchange-traded derivatives than to the bilateral security-based swap market for which much of Title VII's SBS framework was designed. This issue may arise, for example, with event contracts based on an issuer's reported revenue or earnings and, depending on the resolution of

the definitional questions discussed elsewhere in this letter, certain other standardized contracts referencing individual securities or issuers.

The classification of such a product as an SBS should not necessarily require the creation of a second trading, clearing, surveillance, reporting, and compliance infrastructure where the product is already traded and cleared through entities subject to comprehensive CFTC regulation. The Commissions should instead establish an alternative-compliance framework under which qualifying SBS may be listed on a CFTC-registered designated contract market ("DCM") and cleared through a CFTC-registered derivatives clearing organization ("DCO"), with the CFTC remaining the primary regulator of the trading and clearing infrastructure and the SEC retaining those requirements and oversight functions necessary to address genuinely distinct securities-law interests.

This approach would not alter the statutory classification of the product. A contract satisfying the SBS definition would remain an SBS. Rather, the framework would recognize that Title VII's regulatory objectives may often be achieved without requiring substantially the same regulatory functions to be performed twice by the same venue, clearing organization, and intermediaries.[18]

IV.A Statutory Basis and Substantial Comparability

Exchange Act Section 3D(e) provides a direct statutory basis for the SEC to permit a CFTC-regulated trading venue to operate without separately maintaining the full SBSEF regulatory structure. Section 3D(e) authorizes the SEC to exempt, conditionally or unconditionally, a security-based swap execution facility from registration where the facility is subject to "comparable, comprehensive supervision and regulation on a consolidated basis" by the CFTC.[19] Exchange Act Section 3C(h) correspondingly recognizes an SBSEF exempt under Section 3D(e) as a permissible execution venue for SBS subject to the trade-execution requirement.

Title VII provides an analogous mechanism for clearing. Exchange Act Section 17A(k) permits the SEC to exempt, conditionally or unconditionally, a clearing agency from SEC registration for clearing SBS where the clearing agency is subject to comparable, comprehensive supervision and regulation by the CFTC.[20] The statute expressly contemplates that such relief may be conditioned on SEC inspection rights

[18] ForecastEx recognizes that the alternative-compliance principles discussed herein need not operate only in one direction. The CEA similarly authorizes the CFTC to exempt a swap execution facility from registration where the facility is subject to "comparable, comprehensive supervision and regulation on a consolidated basis" by the SEC, and authorizes the CFTC to exempt a derivatives clearing organization from registration for the clearing of swaps where the organization is subject to "comparable, comprehensive supervision and regulation" by the SEC. See CEA §§ 5h(g), 5b(h), 7 U.S.C. §§ 7b-3(g), 7a-1(h). Accordingly, an SEC-regulated national securities exchange and securities clearing agency seeking to offer and clear qualifying swaps could potentially pursue a reciprocal alternative-compliance structure. Because ForecastEx is a CFTC-registered DCM and DCO, however, this letter focuses on the alternative-compliance framework applicable in that direction and does not address the mechanics of reciprocal relief in detail.

[19] 15 U.S.C. § 78c-4(e) "The Commission may exempt, conditionally or unconditionally, a security-based swap execution facility from registration under this section if the Commission finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the Commodity Futures Trading Commission."

[20] 15 U.S.C. § 78q-1(k) "The Commission may exempt, conditionally or unconditionally, a clearing agency from registration under this section for the clearing of security-based swaps if the Commission determines that the clearing agency is subject to comparable, comprehensive supervision and regulation by the Commodity Futures Trading Commission or the appropriate government authorities in the home country of the agency. Such conditions

and access to information.[21] Sections 3D(e) and 17A(k) therefore provide a particularly strong statutory foundation for a CFTC-primary alternative-compliance framework: Congress itself contemplated circumstances in which comprehensive CFTC supervision could substitute for otherwise applicable SEC venue and clearing registration.

A CFTC-registered DCM should be a strong candidate for a Section 3D(e) determination. In adopting Regulation SE, the SEC deliberately modeled much of the SBSEF regulatory framework on the CFTC's existing regulation of swap execution facilities.[22] The Commission explained that its general approach was to harmonize closely with analogous CFTC requirements except where differences in statutory authority, differences between the SBS and swap markets, or identifiable regulatory benefits justified imposing a different or additional requirement.[23] The SEC also recognized that harmonization would permit regulated venues to rely on existing systems, policies, and procedures rather than construct duplicative infrastructure.[24]

Although the DCM and SBSEF regimes are not identical, the regulatory functions relevant to the proposed framework are substantially aligned. Both require venues to enforce their rules;[25] prevent manipulation and abusive trading;[26] list products that are not readily susceptible to manipulation;[27] conduct real-time market surveillance and reconstruct trading activity;[28] obtain information concerning participants' positions and relevant underlying-market activity;[29] maintain the financial integrity of transactions;[30] possess emergency authority;[31] publish market information;[32] maintain comprehensive books and records;[33] address conflicts of interest and anticompetitive conduct;[34] maintain adequate financial resources;[35] and operate resilient and secure trading systems.[36] In several areas—including manipulation susceptibility, cross-market surveillance, emergency authority, antitrust considerations, and system safeguards—the requirements are exceptionally close. The DCM framework also contains

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may include, but are not limited to, requiring that the clearing agency be available for inspection by the Commission and make available all information requested by the Commission."

[21] Ibid.

[22] 88 FR 87156, 87158 "Thus, in proposing Regulation SE, the Commission took the general approach of harmonizing closely with analogous CFTC SEF rules, except where differences in the SEC's statutory authority relative to the CFTC's statutory authority, or differences in the SBS market relative to the swaps market, necessitated differences between the Commission's rules and the CFTC's."

[23] Ibid 88 FR 87156, 87158

[24] Ibid 88 FR 87156, 87158 "VII below. Given the relative size of the SBS market as compared to the swaps market, the fact that the CFTC's SEF regulation has been in place for many years now, and the cost efficiencies and reduced burdens that would result from harmonized rules for dually registered SEFs/SBSEFs, it is appropriate to generally harmonize the Commission's SBSEF regulatory framework with the CFTC's SEF regulatory framework."

[25] 17 CFR 38.150; 17 CFR 242.819

[26] 17 CFR 38.156; 17 CFR 242.819(d)

[27] 17 CFR 38.200; 17 CFR 242.820

[28] 17 CFR 38.157; 17 CFR 242.821

[29] 17 CFR 38.254; 17 CFR 242.821(e)

[30] 17 CFR 38.600; CFR 242.823

[31] 17 CFR 38.350; 17 CFR 242.824

[32] 17 CFR 38.450; 17 CFR 242.825

[33] 17 CFR 38.950; 17 CFR 242.826

[34] 17 CFR 38.850; 17 CFR 242.828

[35] 17 CFR 38.1100; 17 CFR 242.829

[36] 17 CFR 38.1050; 17 CFR 242.830

additional exchange-level protections concerning centralized clearing, financial surveillance of members and intermediaries, customer funds, disciplinary proceedings, and regulatory oversight.

Section 3D(e) does not require those regimes to be identical. Congress chose the terms "comparable" and "comprehensive," rather than requiring a CFTC-regulated facility to demonstrate compliance with every provision otherwise applicable to a registered SBSEF. A CFTC requirement should therefore be considered substitutable where it addresses substantially the same regulatory risk, produces a comparable regulatory outcome, and is supported by meaningful supervisory, examination, information-gathering, and enforcement authority. Differences in regulatory terminology, organizational structure, filing mechanics, or the particular layer of the regulatory framework at which a requirement is imposed should not independently require duplicative SEC regulation.

That standard is consistent with the SEC's own approach in adopting Regulation SE. Where the CFTC framework already achieved the relevant regulatory objective, the SEC generally sought harmonization rather than divergence for its own sake. The same principle should govern alternative compliance. Most of the substantive DCM and SBSEF requirements can therefore be treated as substitutable, while the comparatively limited areas of genuine difference can be addressed through targeted conditions or coordinated rules.

IV.B Eligibility for Alternative Compliance

The alternative-compliance framework should apply to a defined class of standardized, exchange-traded SBS whose structure permits the DCM and DCO regulatory regimes to provide protections comparable to the ordinary SEC framework. Eligibility should turn principally on the structure of the product and market rather than on the particular statutory prong under which the contract is classified as an SBS.

At a minimum, a qualifying SBS should:

1. be listed and traded on a CFTC-registered DCM pursuant to standardized, publicly available terms;
2. be fungible and centrally cleared through a CFTC-registered DCO eligible for the corresponding Section 17A(k) relief;
3. be fully collateralized throughout the life of the contract;
4. have a fixed or otherwise objectively determinable maximum payout and maximum loss;
5. settle in cash pursuant to objective, predetermined terms and an identified, independently verifiable settlement source;
6. be subject to the DCM's market-surveillance, manipulation-prevention, and information-access requirements, including surveillance of relevant underlying or reference markets where appropriate; and
7. be subject to the public-transparency and regulatory-reporting requirements established under the alternative-compliance framework.

In addition, direct participation in qualifying SBS should remain institutional. A DCM relying on the framework should limit membership and direct trading privileges in qualifying SBS to ECPs and regulated intermediaries such as FCMs. Non-ECP customers could participate through an appropriately regulated FCM, but should not obtain direct DCM membership or direct market access under the exemption. This limitation substantially narrows the difference between the DCM and SBSEF participation structures: both would retain an institutional direct-participant base, while the separate retail

provisions discussed below would govern whether and under what conditions non-ECP customers may obtain intermediated access.

This distinction is important to the Section 3D(e) comparability analysis. The absence of an ECP restriction at the ultimate customer level should not make the DCM financial-integrity or market-regulation framework non-comparable where the DCM's direct participants remain ECPs and regulated intermediaries. A direct-access retail DCM would present a materially different regulatory structure and need not be included within the initial alternative-compliance framework.

These eligibility criteria would naturally encompass standardized event contracts based on issuer financial measures such as revenue or earnings if the Commissions determine that those products fall within the SBS definition. They could also encompass certain cash-settled binaries referencing individual securities where the same structural conditions are satisfied. A stronger securities nexus may warrant additional surveillance, disclosure, or information-sharing conditions, but it should not automatically render an otherwise qualifying product ineligible.

The initial framework should exclude bespoke or non-standardized SBS, including transactions whose material economic terms are individually negotiated rather than established by the standardized terms of the listed contract, as well as uncleared products, contracts creating material unsecured future exposure, nonfungible transactions, and physically settled products requiring delivery of securities. This limitation should not exclude block trades or other permitted off-order-book transactions in otherwise standardized, fungible, centrally cleared contracts merely because price or quantity is negotiated bilaterally. The excluded products raise credit, custody, lifecycle, and operational issues materially different from the standardized, bounded-payout contracts contemplated here.

IV.C Limited Areas Requiring Tailored Treatment

IV.C.1 Transaction Reporting and Public Transparency

The principal reporting difference arises not from the ordinary venue-level market-transparency requirements, but from Regulation SBSR's separate requirement that SBS transaction data be reported through a registered security-based swap data repository.

At the venue level, the two regimes are already substantially aligned. SBSEF Core Principle 8 requires publication of daily information concerning prices, volume, trading activity, and settlement information.[37] In adopting Regulation SE, the SEC expressly sought to harmonize those requirements with corresponding CFTC requirements and concluded that its Daily Market Data Report did not differ materially from the CFTC framework.[38]

The more significant issue is Rule 825's incorporation of Regulation SBSR and the statutory reporting of SBS transactions to an SBSDR. For standardized, fully collateralized contracts traded exclusively on a DCM, however, the CFTC has already developed an alternative model that provides a useful template.

[37] 17 C.F.R. § 242.825

[38] Ibid 88 FR 87156, 87207 "the proposed Daily Market Data Report for SBSEFs is consistent with the required daily disclosures for SEFs."

CFTC Staff Letter No. 26-14 provides uniform no-action relief from Parts 43 and 45 and related swap-reporting requirements for qualifying fully collateralized binary and variable-payout event contracts.[39] In place of the SDR reporting structure, the DCM promptly publishes transaction-level information, including price, quantity, contract, and execution time while providing transaction and related regulatory information directly to the CFTC. The result preserves both public transaction transparency and regulatory access without requiring the exchange transaction to pass through an SDR intermediary.

The SEC should adopt the same functional approach for qualifying SBS. Compliance with the DCM's market-data publication requirements should satisfy corresponding venue-level requirements under Rule 825. The DCM should additionally be permitted to disseminate required SBS transaction information directly to the public and provide the SEC with transaction-level and order-level regulatory information. To the extent necessary, the SEC should provide appropriate relief from duplicative SBSDR reporting. That approach is consistent with the "comparable, comprehensive" standard because it preserves the same substantive regulatory outcomes, including public transparency and regulator access, even though the reporting mechanism is not identical. Alternative compliance should not require replication of a particular SEC process where the CFTC framework delivers substantially equivalent information and oversight through a different channel.

The objective should be preservation of the information, not preservation of a particular reporting intermediary. Where the public receives prompt transaction-level information and the SEC receives the data necessary for surveillance and enforcement, requiring the same information additionally to pass through an SBSDR would provide little incremental regulatory benefit.

IV.C.2 Conflicts of Interest and the Member Ownership Limitation

The core conflicts-of-interest requirements applicable to DCMs and SBSEFs are substantially comparable. Both regimes require venues to identify, minimize, and resolve conflicts in their decision-making. More detailed SEC requirements concerning board representation, disciplinary processes, conflicts involving decision-makers, and recusals also have close counterparts in existing CFTC requirements, including 17 C.F.R. §§ 1.64 and 1.69[40] and the DCM governance and conflicts framework.

The principal substantive difference is Rule 834's member ownership and voting limitation. Rule 834 generally prohibits an SBSEF member, together with specified affiliated persons, from owning or exercising 20 percent or more of the voting power of the facility.[41] There is no corresponding mandatory ownership limit applicable generally to DCMs.

This difference illustrates why alternative compliance should focus on regulatory outcomes rather than identical mechanisms. The purpose of Rule 834's ownership limitation is to reduce the risk that a substantial member-owner could improperly influence surveillance, disciplinary decisions, access policies, or other regulatory functions. The CFTC framework addresses the same risk through a combination of conflicts requirements, independent regulatory oversight, board and disciplinary-panel

[39] CFTC Letter No. 26-14. No-Action. May 13, 2026
[40] 17 CFR § 1.64 - Composition of various self-regulatory organization governing boards and major disciplinary committees and 17 CFR § 1.69 - Voting by interested members of self-regulatory organization governing boards and various committees.
[41] 17 CFR § 242.834(b)

composition, mandatory recusals, governance fitness standards, and separation of regulatory functions from commercial interests.

Rule 834 itself recognizes that the ownership limitation is not indispensable in every regulatory structure. Rule 834(b)(3) does not apply the limitation where specified surveillance and investigative functions are performed by a registered futures association or national securities association.[42] The SEC has therefore already recognized that sufficiently independent regulatory arrangements can address the underlying conflict through mechanisms other than an ownership cap.

Under alternative compliance, the SEC should similarly determine whether a DCM's regulatory-independence arrangements adequately address the risks targeted by Rule 834. Where surveillance, investigations, discipline, and other regulatory functions are appropriately insulated from member influence, the DCM framework should be deemed substantially similar. If additional protection is necessary in a particular organizational structure, it can be imposed as a targeted condition rather than through wholesale application of the SBSEF governance regime.

IV.C.3 Financial Resources

The financial-resource requirements provide another example of why the CFTC framework should be evaluated as a whole rather than through a provision-by-provision comparison. SBSEF Core Principle 12 requires an SBSEF both to maintain sufficient resources to cover its operating costs and to meet its financial obligations notwithstanding the default of the member creating the largest financial exposure to the facility under extreme but plausible market conditions.[43] DCM Core Principle 21 contains the corresponding operating-resource requirement.[44] The member-default requirement, however, is principally addressed through the CFTC's clearing framework.

Section 39.11(a)(1) requires a DCO to maintain sufficient financial resources to meet its financial obligations to clearing members notwithstanding the default of the clearing member creating its largest financial exposure under extreme but plausible market conditions.[45] The CFTC thus applies substantially the same default-resource requirement at the clearing level, where exposure arising from cleared transactions resides.

The relationship is especially clear where the DCM and DCO are the same legal entity. Section 38.1101(a)(3) expressly requires an entity registered as both a DCM and DCO to comply with Section 39.11 and demonstrate sufficient resources to operate the "single, combined entity" as both a DCM and DCO.[46] The CFTC therefore already evaluates the financial resources of the combined entity on the consolidated basis contemplated by Section 3D(e).

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[42] Ibid 17 CFR § 242.834(b)(3) "The ownership and voting limitations in paragraphs (b)(1) and (2) of this section shall not apply to an SBSEF that has, pursuant to § 242.819(e), entered into an agreement with a registered futures association or a national securities association for the provision of regulatory services that encompass, at a minimum, real-time market monitoring under § 242.819(d)(5) and investigations and investigation reports under § 242.819(d)(6)."
[43] 17 C.F.R. § 242.829(a)(2)
[44] 17 C.F.R. § 38.1100
[45] 17 C.F.R § 39.11(a)
[46] 17 C.F.R. § 38.1100(a)(3)

Where qualifying SBS are centrally cleared through a DCO subject to Section 39.11, compliance with the DCO financial-resource requirements should satisfy the member-default component of the SBSEF requirement to the extent that exposure resides at the clearing level. Where the DCM and DCO are the same entity, no duplicative SEC financial-resource showing should be necessary. If a DCM separately retained material member-default exposure not borne by the DCO, the SEC could address that residual exposure as a condition of relief.

IV.C.4 SEC Access to Books and Records

The DCM and SBSEF regimes already provide the trading venue with comparable authority to obtain information necessary to perform their respective regulatory functions. Accordingly, SBSEF Core Principle 5 should not independently require an additional SEC condition.

A distinct question is the SEC's access to records concerning SBS traded under the alternative-compliance framework. DCM Core Principle 23 provides a useful model. Section 38.1200 currently requires a DCM to keep records relating to specified security-based swap agreements open to SEC inspection and examination.[47] Although that provision does not itself extend to actual SBS, it demonstrates that Congress already contemplated a CFTC-primary regulatory structure under which the SEC receives direct record access because of a product's securities nexus.

The Section 3D(e) exemption should extend the same approach to qualifying SBS. A DCM should maintain relevant SBS records through its existing books-and-records systems and make those records directly available to the SEC for inspection and examination. The condition should not require duplicative books, separate SEC recordkeeping infrastructure, or duplicative routine examinations.

IV.C.5 Product and Rule Filings

Product and rule filings are another natural area for alternative compliance. The SEC modeled substantial portions of Regulation SE's filing procedures on existing CFTC procedures. Requiring a DCM to prepare separate filings addressing substantially the same product or rule would therefore create administrative cost without necessarily providing the SEC materially different information.

For qualifying SBS, the Part 40 filing should remain the principal substantive regulatory filing. The DCM should transmit that filing to the SEC together with a short supplement containing only information uniquely relevant to the SEC's responsibilities, such as the basis for SBS classification, the relevant issuer or security, and any genuinely securities-specific settlement or surveillance consideration.

Submission of the Part 40 filing and supplemental notice should be deemed to satisfy corresponding SEC venue-level product or rule filing requirements. The SEC could retain authority to request additional securities-specific information or impose a condition where warranted, but the DCM should not be required to reproduce an independent filing addressing issues already considered through the CFTC process.

This venue-level deemed-filing mechanism is distinct from the Securities Act registration requirement applicable where qualifying SBS are offered to non-ECPs, discussed below.

[47] 17 C.F.R. § 38.1200

IV.D FCM Intermediation

A workable alternative-compliance framework must extend beyond the venue and clearing organization to the regulated intermediaries through which customers obtain access. Requiring an FCM that already intermediates fully collateralized contracts on the DCM to establish a separate securities-broker infrastructure solely because particular contracts are classified as SBS would substantially diminish the practical value of alternative compliance.

Exchange Act Section 15(a)(2) gives the SEC authority, by rule or order, to exempt a broker or dealer or class of brokers or dealers from registration where consistent with the public interest and investor protection.[48] The SEC should use that authority, as necessary, to permit CFTC-registered FCMs to intermediate qualifying SBS in an agency capacity under their existing CFTC/NFA framework, subject to appropriate conditions and SEC information access.

Such relief should distinguish ordinary customer intermediation from SBS dealing. Alternative compliance should not depend on disregarding genuine SBS dealer activity or requirements that Congress made independently applicable to SBS dealers. The objective is instead to prevent ordinary FCM access to a DCM from triggering duplicative broker-dealer infrastructure where the CFTC framework already regulates customer onboarding, financial responsibility, supervision, recordkeeping, and related intermediary functions.

IV.E Customer Account Treatment

Qualifying SBS should likewise be permitted to be carried in the same Part 22 cleared-swaps customer accounts used for other CFTC-regulated swaps. Requiring otherwise identical, fully collateralized exchange-traded contracts to move between separate securities and cleared-swaps account structures depending solely on where the swap/SBS jurisdictional line is ultimately drawn would fragment collateral, complicate operations, and undermine a principal purpose of alternative compliance.

Part 22 already provides a comprehensive customer-protection regime for cleared swaps, including segregation of customer property, restrictions on the use of one customer's collateral to support another customer's obligations, daily segregation calculations, and protections applicable in an FCM default.[49] The SEC has previously recognized that compliance with CFTC requirements may substitute for parallel SEC requirements where the CFTC framework provides an appropriate regulatory alternative. Rule 18a-10, for example, permits certain SBSDs that are also swap dealers to comply with applicable CEA and CFTC capital, margin, and segregation requirements in lieu of corresponding SEC requirements and to treat SBS and related collateral as swaps and swap collateral for purposes of those CFTC requirements.[50] More directly, the Commission has permitted cleared SBS and swaps to be commingled and portfolio-

[48] 15 U.S.C. § 78o(a)(2)

[49] See CEA § 4d(f)(2), (6), 7 U.S.C. § 6d(f)(2), (6); 17 C.F.R. §§ 22.2(a)–(d), (f), (g), 22.3(a)–(c), 22.14, 22.15. Section 22.2 requires an FCM to treat cleared-swaps customer collateral as customer property, segregate it from the FCM's own property, and prohibits use of one customer's collateral to margin, secure, or extend credit for another person's obligations; § 22.2(g) requires a daily segregation computation and reporting; §§ 22.3 and 22.15 impose corresponding protections at the DCO/collecting-FCM level; and § 22.14 addresses treatment of customer collateral when an FCM fails to meet a cleared-swaps customer margin call.

[50] 17 C.F.R. § 240.18a-10 "A security-based swap dealer may comply with capital, margin, segregation, recordkeeping, and reporting requirements of the Commodity Exchange Act and chapter I of this title applicable to swap dealers in lieu of complying with §§ 240.18a-1 and 240.18a-3 through 240.18a-9

margined in a CFTC cleared-swaps customer account maintained pursuant to CEA Section 4d(f), subject to specified conditions.[51]

The Commissions should apply the same functional principle here and permit FCMs carrying qualifying SBS to treat those positions and associated collateral as cleared swaps for operational and segregation purposes under Part 22, subject to any limited SEC conditions necessary to maintain equivalent customer protection. The resulting account framework should be stable across the jurisdictional boundary rather than requiring DCMs, FCMs, and customers to continually restructure accounts based on difficult product-classification questions.

IV.F Retail Participation

Non-ECP participation raises two separate statutory issues. Exchange Act Section 6(l) governs the venue on which an SBS transaction involving a non-ECP may occur. Securities Act Section 5(e) separately governs whether an SBS may be offered or sold to a non-ECP without an effective registration statement. The two requirements should be addressed separately but as coordinated components of the retail alternative-compliance framework.

IV.F.1 Exchange Act Section 6(l)

Exchange Act Section 6(l) generally prohibits a person from effecting an SBS transaction with or for a non-ECP unless the transaction is effected on a national securities exchange registered under Section 6(b).[52] A DCM operating pursuant to a Section 3D(e) exemption would not, merely by virtue of that exemption, become a national securities exchange. Separate relief is therefore necessary before non-ECP customers may participate.

The SEC has authority to provide such relief under Exchange Act Section 36. Section 36 generally permits the SEC to exempt conditionally or unconditionally a person, security, transaction, or class from provisions of the Exchange Act where appropriate in the public interest and consistent with investor protection.[53] Although Section 36(c) restricts the Commission's exemptive authority with respect to a number of Title VII provisions, Section 6(l) is not among the provisions subject to that limitation.[54] The SEC has also previously exercised Section 36 authority to provide relief from Section 6(l).[55]

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[51] Exchange Act Release No. 93501 (Nov. 1, 2021). https://www.sec.gov/rules-regulations/2021/11/order-granting-conditional-exemptions-under-securities-exchange-act-1934-connection-portfolio

[52] 15 U.S. Code § 78f(I)) "It shall be unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange registered pursuant to subsection (b).

[53] 15 U.S. Code § 78mm

[54] Ibid, 15 U.S. Code § 78mm "Unless the Commission is expressly authorized by any provision described in this subsection to grant exemptions, the Commission shall not grant exemptions, with respect to amendments made by subtitle B of the Wall Street Transparency and Accountability Act of 2010, with respect to paragraphs (65), (66), (68), (69), (70), (71), (72), (73), (74), (75), (76), and (79) of section 78c(a) of this title, and sections 78j–2(a), 78j–2(b), 78j–2(c), 78m–1, 78o–10, 78q–1(g), 78q–1(h), 78q–1(i), 78q–1(j), 78q–1(k), and 78q–1(l) of this title; provided that the Commission shall have exemptive authority under this chapter with respect to security-based swaps as to the same matters that the Commodity Futures Trading Commission has under the Wall Street Transparency and Accountability Act of 2010 with respect to swaps, including under section 6(c) of title 7."

[55] 76 FR 36287, 36304–05 "The Commission finds that temporary exemption from section 6(l) of the Exchange Act 268 for persons that meet the definition of eligible contract participant as set forth in section 1a(12) of the

The Commission should use that authority for the limited class of transactions contemplated here. Such relief would not move retail SBS trading into an unregulated or bilateral market. Non-ECP customers would obtain access through regulated FCMs to a CFTC-regulated DCM whose direct participant base remains limited to ECPs and regulated intermediaries. Transactions would be centrally cleared, fully collateralized, subject to bounded maximum loss, publicly transparent, and subject to real-time surveillance, rule enforcement, disciplinary authority, and SEC information access.

The proposal therefore substitutes one comprehensively regulated federal exchange structure for another rather than eliminating exchange regulation. It also retains the separate Securities Act protections discussed below. These conditions provide a sound basis for the SEC to determine under Section 36 that relief from the NSE requirement is consistent with investor protection for this narrowly defined product class.

IV.F.2 Securities Act Section 5(e)

Relief from Section 6(l) would not eliminate the separate registration requirement imposed by Securities Act Section 5(e). Section 5(e) provides that, notwithstanding the ordinary exemptions in Securities Act Sections 3 and 4, an SBS generally may not be offered, purchased, or sold to a non-ECP unless an effective registration statement meeting the requirements of Section 10(a) is in place for the SBS.[56]

The appropriate approach is not necessarily to exempt qualifying retail SBS from that requirement. Section 5(e) reflects an express congressional determination that SBS sold to non-ECPs should receive the protections of Securities Act registration. The SEC should instead create a streamlined registration and disclosure regime appropriate to standardized, centrally cleared, fully collateralized SBS.

The existing treatment of cleared SBS under Securities Act Rule 239 provides useful precedent. Rule 239 substantially exempts qualifying cleared SBS from Securities Act requirements where the products are sold only to ECPs, subject to specified disclosures.[57] When adopting that rule, the SEC expressly preserved registration for transactions with non-ECPs but also stated that it could later evaluate the need for a simplified disclosure and registration scheme for SBS offered to persons who are not ECPs.[58] The alternative-compliance initiative provides an appropriate opportunity to establish such a regime.

The Securities Act gives the SEC substantial flexibility to tailor registration and prospectus requirements to particular classes of securities. Sections 7, 10, and 19 give the Commission substantial flexibility to

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Commodity Exchange Act (as in effect on July 20, 2010) 269 is necessary or appropriate in the public interest, and is consistent with the protection of investors."

[56] 15 U.S. Code § 77e(c) Notwithstanding the provisions of section 77c or 77d of this title, unless a registration statement meeting the requirements of section 77j(a) of this title is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of title 7.

[57] 17 CFR § 230.239

[58] 77 FR 20536, 20568-69. "One commentator suggested that the Commission adopt a simplified disclosure and registration scheme for those security-based swaps transactions that may involve persons who are not eligible contract participants.95 E. Expiration of Temporary Exemptions for Eligible CDS As the commentator's suggestions are outside the scope of the proposed rules, we are not considering the suggestions as part of this rulemaking. In the future, we may evaluate the need for a simplified disclosure and registration scheme for security-based swaps that may be offered and sold to persons who are not eligible contract participants."

prescribe registration-statement and prospectus forms appropriate to particular classes of securities and issuers,[59] to permit the omission or summarization of information that is inapplicable or unnecessary,[60] and to require substitute disclosure adequate for investor protection.[61]

That flexibility is especially appropriate here. For a standardized, centrally cleared SBS, the information most material to the customer concerns the contract rather than the business prospects of the clearinghouse acting as central counterparty. A specialized registration statement should therefore focus on matters such as:

- contract terms and payout methodology;
- maximum customer loss and maximum payout;
- the referenced issuer, security, or financial metric;
- settlement source and methodology;
- clearing and collateral arrangements;
- material market, liquidity, settlement, and manipulation risks;
- applicable fees;
- material conflicts of interest; and
- the availability of public information concerning the referenced issuer or security.

Where the contract references an Exchange Act reporting issuer, the filing should be permitted to incorporate the issuer's existing public reports rather than duplicate that information.

The registration framework should also leverage the DCM's existing Part 40 materials. The Part 40 filing and contract specifications should be incorporated by reference into a short-form Securities Act registration statement filed by the DCO or other appropriate SBS issuer. The Securities Act filing would then contain only the incremental retail and securities-law disclosures necessary to satisfy Section 5(e).

Registration should occur at the level of a standardized product, series, or class rather than treating every matched transaction or strike as a separate offering. A base registration statement could describe a common methodology, settlement source, clearing structure, and risk framework, while individual strikes, expirations, or contract identifiers could be added through supplements or incorporated exchange specifications. The SEC should likewise use the flexibility available under Section 8 to establish an accelerated effectiveness process for qualifying standardized filings.[62]

This approach preserves the two principal protections Congress required for retail SBS—trading through a comprehensively regulated market structure and registered disclosure—while adapting the mechanisms used to deliver those protections to the characteristics of standardized, fully collateralized exchange-traded products.

IV.G Surveillance, Examination, and Enforcement

Alternative compliance should be accompanied by a clear primary-regulator model. The CFTC should remain the principal day-to-day regulator of the DCM and DCO, including routine examination and surveillance of trading conducted on the DCM. The SEC should receive direct access to SBS-related

[59] 5 U.S.C. § 77g(a)(1)
[60] 15 U.S.C. § 77j(a)(4), (b), (d)
[61] 15 U.S.C. § 77s(a)
[62] 15 U.S.C. § 77h(a)

records and data and retain the ability to conduct targeted examinations or investigations where securities-specific issues arise.

The allocation should avoid duplicative routine oversight while preserving effective cross-market surveillance. For issuer-related contracts, the SEC should have access to information necessary to compare SBS activity with trading in the issuer's securities, options, and other securities-based products. Where settlement depends directly on the price of an individual security, coordinated surveillance of the SBS and underlying securities markets will be particularly important.

The existing DCM framework already requires access to information concerning participant activity in relevant underlying and related markets. Alternative compliance should build on those requirements rather than create a parallel surveillance program. Standing SEC-CFTC arrangements should facilitate the sharing of relevant alerts, trade and position data, examination findings, and referrals.

The same model should apply to manipulation and trading involving material non-public information. The DCM and CFTC would remain responsible for enforcing applicable CEA and DCM requirements concerning conduct on the alternative-compliance market, while the SEC would retain its statutory authority over securities-law violations and related securities-market conduct. Where conduct crosses markets—for example, manipulation of an underlying security intended to influence settlement of an SBS—the agencies should coordinate surveillance and enforcement rather than subject the trading venue to duplicative standing regulation.

Alternative compliance can function only if one regulator is permitted to act as the principal supervisor while the other receives the information and retains the targeted authority necessary to protect its distinct regulatory interests.

IV.H Recommended Framework

The Commissions should establish a joint alternative-compliance regime for qualifying standardized, fully collateralized SBS with the following principal features:

1. CFTC-primary venue regulation. A qualifying DCM remains primarily supervised by the CFTC and receives conditional relief from separate SBSEF registration pursuant to Exchange Act Section 3D(e).
2. CFTC-primary clearing regulation. A qualifying DCO remains primarily supervised by the CFTC and receives appropriate relief from separate SEC clearing-agency registration pursuant to Exchange Act Section 17A(k).
3. Defined product eligibility. Qualifying products are standardized, fungible, centrally cleared, fully collateralized, bounded-payout, cash-settled products subject to objective settlement criteria and DCM surveillance.
4. Institutional direct participation. Direct DCM membership and trading privileges in qualifying SBS are limited to ECPs and regulated intermediaries such as FCMs. Non-ECP customers may participate only through appropriately regulated intermediaries.
5. Alternative compliance for substantially similar requirements. Existing CFTC requirements satisfy corresponding SEC requirements where they address the same regulatory objective and provide comparable substantive outcomes, supervision, and enforcement.

6. Targeted treatment of genuine differences. Discrete differences—including SBS reporting, any unresolved Rule 834 ownership conflict, SEC record access, and other securities-specific requirements—are addressed through conditions rather than duplicative registration.
7. Deemed product and rule filings. The DCM's Part 40 filing serves as the principal substantive venue-level filing and is transmitted to the SEC with only a short securities-specific supplement.
8. Harmonized transaction reporting. The DCM directly provides required public transaction transparency and regulatory information to the SEC through an integrated reporting process, with appropriate relief from duplicative SBSDR reporting where legally available.
9. FCM intermediary treatment. CFTC-registered FCMs may intermediate qualifying SBS in an agency capacity without maintaining duplicative securities-broker infrastructure, subject to appropriately tailored SEC relief.
10. Part 22 customer accounts. Qualifying SBS and associated collateral may be carried under the CFTC Part 22 cleared-swaps customer framework rather than requiring a separate account structure solely because the product is classified as an SBS.
11. Tailored retail treatment. Non-ECP transactions receive appropriate Section 6(l) relief for trading through a qualifying DCM while remaining subject to a streamlined Securities Act registration and disclosure framework under Section 5(e).
12. Primary-regulator supervision and coordinated enforcement. Routine examination and surveillance remain primarily with the CFTC and DCM, while the SEC receives direct information access and the agencies coordinate cross-market surveillance, manipulation, MNPI, and enforcement matters.

Such a framework would give meaningful effect to the alternative-compliance concepts raised in Questions 12 through 15. It would respect the statutory classification of security-based swaps and preserve the SEC's securities-specific regulatory interests while using express statutory authorities that contemplate reliance on comprehensive CFTC supervision.

Most importantly, it would prevent the difficult swap/SBS jurisdictional boundary from unnecessarily dictating market structure. A standardized, fully collateralized contract should not require an exchange, clearing organization, intermediary, and customer to operate through materially different infrastructures solely because the contract falls on one side rather than the other of a difficult definitional line where comparable federal regulation can achieve the same substantive protections.

V. Conclusion

ForecastEx appreciates the Commissions' efforts to provide greater clarity at the boundary between swaps and security-based swaps. A workable framework should give meaningful effect to the statutory distinctions Congress established, including the requirement that issuer-related events directly affect specified financial interests and the distinction between broad-based and narrow-based securities exposure, without allowing economically similar products to receive materially different treatment based solely on form or payoff structure. Where products nevertheless fall within the SBS definition, the Commissions should use the alternative-compliance authorities Congress provided to permit comparable CFTC regulation to satisfy duplicative SEC requirements while preserving appropriate securities-specific oversight.

ForecastEx respectfully encourages the Commissions to adopt clear, objective standards that promote jurisdictional certainty, regulatory consistency, and continued innovation in standardized, exchange-traded derivatives markets.

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ForecastEx appreciates the opportunity to provide input on this important topic and would welcome continued engagement with the Commission as it considers the next steps in this process. If the Commission has any questions regarding this letter, please feel free to contact me through email at gdeese@forecastex.com.

Respectfully,



Graham Deese
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ForecastEx LLC