August 24, 2026

<u>Via Electronic Submission</u>

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

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

Re: Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance, RIN 3038-AF71 and File No. S7-2026-21

Dear Mr. Kirkpatrick and Ms. Countryman:

Intercontinental Exchange Inc., on behalf of itself and its subsidiaries (collectively, "ICE"), appreciates the opportunity to respond to the Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC" and together, the "Commissions") joint request for comment on the further definition of "swap" and "security-based swap" and on alternative compliance (the "JRFC").[1] ICE operates regulated marketplaces for the listing, trading and clearing of a broad array of derivative contracts and financial instruments, such as commodities, interest rates, foreign exchange equities, and options, as well as corporate and exchange-traded funds ("ETFs"). ICE operates trading venues that include 13 regulated exchanges and six clearing houses, which are strategically positioned in major market centers around the world, including the U.S., United Kingdom, European Union, Canada, Asia Pacific, and the Middle East. As an operator of regulated marketplaces, ICE is keenly interested in the questions raised by the JRFC and appreciates the opportunity to comment.

Markets function best when they are transparent, competitive, and well regulated. Regulation should promote fair competition and regulatory frameworks and be guided by a simple principle: the same risks should be subject to the same standards. Clear and consistently applied rules are essential to promoting innovation, competition, market integrity, and investor confidence.[2] They

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[1] CFTC and SEC, *Joint Request for Comment on Further Definition of 'Swap' and 'Security-Based Swap' and on Alternative Compliance*, Release No. 33-11424, 91 FR 37873 (June 24, 2026) (RIN 3038-AF71; and File No. S7-2026-21).

[2] The CFTC has stated that groundbreaking technologies, platforms, and products can only transform markets if the CFTC provides a foundation of regulatory clarity. CFTC Agency Financial Report Fiscal Year 2025 Annual Report, January 16, 2026, *available at*: https://www.cftc.gov/media/13096/2025AFR/download. The SEC has also stated that regulatory clarity is a precondition for market development. Paul S. Atkins, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at the Federal Reserve Bank of Philadelphia Ninth Annual Fintech Conference: The SEC's Approach to

also help ensure that U.S. markets remain the most competitive and attractive in the world by providing strong incentives for market participants to conduct their activities onshore. Accordingly, ICE is providing the following recommendations for the Commissions' consideration.

Regulatory Clarity Drives Innovation

ICE supports the Commissions' policy objectives of providing a clear regulatory framework that fosters innovation in U.S. financial markets. Achieving these objectives requires clear, durable rules governing the treatment of new and emerging products. As CFTC Chairman Selig and SEC Chairman Atkins have both noted, there is a strong need to future-proof agency actions.[3] Future-proofing the regulatory framework requires establishing clear and enduring rules that provide market participants with regulatory certainty. Although no-action letters, staff guidance, and public statements can help address evolving issues, they are not substitutes for the certainty and permanence provided by formal rulemaking. Rather, rulemaking with notice and comment, especially when novel or complex issues, or new and emerging products, are involved, should be the Commissions' default policymaking vehicle.

The financial services industry has consistently demonstrated that innovation thrives when supported by clear and consistent regulation. When ICE was founded, OTC energy trading was largely opaque and bilateral. ICE helped bring transparency and efficiency to this market through electronic trading and by transitioning activity into regulated derivatives markets and central clearing, where robust risk management, market surveillance, and margin requirements apply. Moreover, following the 2008 financial crisis, ICE established ICE Clear Credit, the first clearinghouse for credit default swaps, partnering with regulators to bring a critical market within a transparent and resilient risk-management framework. ICE Clear Credit has cleared hundreds of trillions of dollars in notional value, substantially reducing the systemic vulnerabilities that once characterized the OTC credit default swap market. Across each of these markets, experience has shown that innovation is most robust, attracts the greatest investment, and earns the strongest public trust when it develops within a clear and predictable regulatory framework.

The regulatory uncertainty surrounding innovative products, including perpetual and event contracts, limits U.S. regulated entities' ability to list and trade such products and limits regulated U.S. market participants from trading such products. It is, therefore, difficult for platforms and market participants to develop these products in the U.S. and to expand their use on a meaningful scale while their regulatory status, and primary regulator, remains unresolved. In the absence of regulatory clarity, innovation and market activity are driven toward offshore jurisdictions that operate outside the Commissions' regulatory framework and market integrity protections, as well as outside U.S. anti-money laundering and sanctions requirements. Clear, permanent rules would enhance the competitiveness and attractiveness of U.S. markets, support responsible innovation, and discourage the continuing growth of activity on less regulated venues.

Digital Assets: Inside "Project Crypto" (Nov. 12, 2025), https://www.sec.gov/newsroom/speeches-statements/atkins-111225-secs-approach-digital-assets-inside-project-crypto.

[3] Chairman Selig, "America's Financial Markets are Ready for a Golden Age," Jan. 20, 2026 (available at https://www.cftc.gov/PressRoom/SpeechesTestimony/seligstatement012026); speech by Chairman Atkins at the Security Traders Association Market Structure Conference (October 2025).

Characterization of Perpetual Contracts

The regulatory characterization of swaps, security-based swaps, mixed swaps, futures and security futures products is a fundamental question that directly affects the application of each Commissions' regulatory framework. Perpetual contracts, with their lack of a fixed expiration date, absence of a delivery obligation, and system enforced price convergence with the spot market through periodic funding payments, do not fit neatly within existing regulatory definitions and related interpretations. Staff no-action relief and product-specific orders are not substitutes for a clear and explicit legal categorization of perpetual contracts. We urge the Commissions to initiate a rulemaking that establishes a clear, binding, and consistently applicable classification of perpetual contracts across a range of different underlying reference interests.[4]

Event Contracts and Perpetual Contracts Related to Securities Warrant Careful Consideration

Increasingly, event contracts reference securities-related events, including earnings announcements, merger transactions, corporate Key Performance Indicators ("KPIs") and stock-price performance. At the same time, some platforms are offering products that closely resemble securities-linked derivatives,[5] creating potential regulatory gaps and raising important questions regarding investor protection, market integrity, and the consistent application of federal law. In particular, contracts tied to a single issuer's earnings, stock price, or merger outcome, as well as leveraged products referencing individual equities, raise significant jurisdictional and regulatory considerations. The key principle for all of these is that products that provide substantially similar economic exposure should be subject to consistent standards, including for disclosure, margin, and customer protection, regardless of how they are labeled or where they are offered. In other words, whether deemed a security or a commodity, the regulatory obligations should be the same, which is achievable through, for example, alternative compliance (as discussed below). We strongly believe the Commissions should clarify the treatment of event contracts and other products referencing securities, for purposes of establishing regulatory obligations and market expectations.

Furthermore, the treatment of material nonpublic information also warrants attention. Securities markets are subject to well-established prohibitions on trading based on confidential information. Prediction markets should not create opportunities to profit from material nonpublic information.

Gaps in Investor Protection Arising from Unregistered Activity

The Commissions have established a comprehensive regulatory framework requiring platforms that offer securities and futures products to U.S. persons to register and comply with applicable federal securities and futures laws. This framework reflects the longstanding policy that registration, disclosure, and regulatory oversight provide important investor protections. When

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[4] Courts have expressed that they expect federal agencies to evaluate how to categorize certain products. In *Susquehanna Int'l Grp. v. SEC*, the D.C. Circuit faulted the SEC for failing to do its homework and laying out its own reasoning and findings for accepting an OCC proposed rule change. An agency "cannot simply accept what a self-regulatory organization has done, but rather is obligated to make an independent review." Whether the CFTC's review of the Kalshi BTCPERP contract meets this standard is currently the subject of litigation.

[5] For example, pre-IPO perpetual contracts are being offered giving participants price exposure to private companies before they go public.

platforms offer securities- and futures-related products to U.S. customers without registering, those protections may be unavailable to the investors who need them most. U.S. investors who use these platforms may not receive the disclosures, protections, and oversight that federal law is designed to provide and the Commissions should consider whether the current framework adequately addresses this activity. Consistent application of registration requirements, regardless of a platform's structure or location, would help ensure that all U.S. investors receive the protections underlying the federal securities and futures laws.

Alternative Compliance to SEC and CFTC Regulatory Frameworks

Currently, overlapping and inconsistent SEC and CFTC regulations impede U.S. exchanges and clearing organizations from listing and clearing economically related products. For example, to offer futures on a broad-based, market-wide index alongside futures on narrow-based indices relating to the sectors or countries that compose that broad-based index (*e.g.*, offering futures on the MSCI World Index alongside futures on a component country index), a CFTC-regulated designated contract market ("DCM") must notice register with the SEC as a national securities exchange ("NSE"). Notice registration subjects the DCM and its derivatives clearing organization ("DCO") to overlapping regulation by the SEC and CFTC in several key areas, including listing standards, product pricing conventions, prevention of fraud and manipulation, sales practice regulation, preventing unfair discrimination among members, disciplinary procedures for members, preventing burdens on competition, margin requirements and clearance and settlement.[6] Additionally, an exchange dually registered as a DCM and as an NSE is subject to overlapping rulemaking requirements,[7] recordkeeping requirements[8] and examination authority.[9] Similarly, to offer exchange-traded products ("ETPs") on a commodity, which are securities, alongside options or futures on the same commodity underlying such ETPs (*e.g.*, offering Bitcoin ETPs alongside Bitcoin options), an SEC-regulated NSE and clearing agency must also register with the CFTC as a DCM or swap execution facility ("SEF") and DCO, which would unnecessarily subject it to overlapping regulation.

Offering these products together would benefit investors, enabling them to recognize risk offsets between the products for margining purposes and to engage in basis trades and similar transactions more easily. Notably, outside the United States, exchanges do not face similar product-based regulatory obstacles to offering these products together. Also, under an SEC exemption for foreign security futures products,[10] a non-U.S. exchange can offer these products

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[6] *See, e.g.*, 15 U.S.C. § 78f(h)(2) (enumerating listing standards for security futures products on national securities exchanges); 15 U.S.C. § 78f(g)(4)(B)(i) (requiring national securities exchanges to file proposed rule changes related to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, decimal pricing for security futures products and sales practices for security futures products); 15 U.S.C. § 78f(b)(5) (requiring national securities exchanges to establish rules designed to prevent fraudulent and manipulative acts or unfair discrimination); 15 U.S.C. § 78f(b)(8) (prohibiting national securities exchange rules that impose an unnecessary burden on competition).

[7] Notably, a notice-registered exchange (like an SEC-registered NSE) is required to submit rule changes in certain of these areas to the Commission for prior approval pursuant to Section 19(b)(2) and Rule 19b-4 of the Exchange Act, which can take up to 240 days to complete. In contrast, Section 5c of the CEA and CFTC Rule 40.6 permit a DCM to make rule changes in these areas via self-certification to the CFTC, which allows rules to take effect in 10 business days unless stayed by the CFTC.

[8] 17 C.F.R. § 38.950 (CFTC recordkeeping requirements); 15 U.S.C. § 17(a) (SEC recordkeeping requirements).

[9] 17 C.F.R. § 1.31(d) (CFTC inspection authority); 15 U.S.C. § 17(b) (SEC examination authority).

[10] Order under Section 36 of the Securities Exchange Act of 1934 Granting an Exemption from Exchange Act Section 6(h)(1) for Certain Persons Effecting Transactions in Foreign Security Futures and under Exchange Act Section

together to U.S. institutional investors without triggering overlapping SEC and CFTC regulation. This policy effectively encourages investors to trade on non-U.S. exchanges instead of trading in the United States.

Overlapping regulation is not necessary to protect investors. SEC regulation of NSEs and clearing agencies and CFTC regulation of DCMs and DCOs serve the same market integrity, customer protection, and risk mitigation objectives, just with somewhat varying methods of oversight. The SEC's framework for regulating NSEs is different than the CFTC's framework for regulating DCMs (e.g., a more prescriptive rulemaking approval process relative to the CFTC's self-certification process). The Commissions' frameworks for regulating clearing agencies and DCOs are both designed to satisfy CPMI-IOSCO Principles for Financial Market Infrastructures. Importantly to the question of whether alternative compliance is necessary and appropriate, the Commissions are party to a memorandum of understanding that permits information sharing on matters of common regulatory interest, including security futures.[11]

The agencies have ample authority to recognize each others' regulatory frameworks. In the case of futures on a narrow-based index, the SEC could use its authority pursuant to Section 36 of the Exchange Act to exempt the products from the definition of "security future," subject to limitations in appropriate areas, such as retaining antifraud and antimanipulation jurisdiction or limiting eligible investors to those who could purchase the products without registration under the Securities Act. Because those futures are already subject to concurrent jurisdiction of the CFTC, the CFTC's DCM and DCO framework would natively apply. In the case of futures on a commodity, the CFTC could use its authority pursuant to Sections 4(c), 5b(h), and 5h(g) of the CEA to exempt the products from requirements to trade on a DCM or SEF and clear at a DCO, subject to the SEC exercising concurrent jurisdiction over the products pursuant to Section 3B of the Exchange Act and Section 717 of the Dodd-Frank Act.

Conclusion

Innovation is most robust, attracts the greatest investment, and earns the strongest public trust when it develops within a clear and predictable regulatory framework. Innovative securities and futures products warrant regulatory certainty through clear, enforceable, and consistent rules that apply a basic principle: the same risks should be subject to the same standards. Without commitment to that principle, there is a real risk that regulatory arbitrage, rather than thoughtful and deliberate policymaking, will define the contours of our markets and drive U.S. investments offshore.

ICE appreciates the opportunity to comment on the JRFC and respectfully requests that the Commissions consider its comments.

15(a)(2) and Section 36 Granting Exemptions from Exchange Act Section 15(a)(1) and Certain Other Requirements, Release No. 34-60194; International Series Release No. 1311, 74 Fed. Reg. 32200 (July 7, 2009).

[11] CFTC and SEC, Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Regarding Coordination in Areas of Common Regulatory Interest and Information Sharing, 5 (June 2018).

Sincerely,

Kara Dutta
VP, Head of Legal, US Futures Exchanges & Clearing
Intercontinental Exchange Inc.

cc: Honorable Chairman Michael S. Selig, Commodity Futures Trading Commission
Honorable Chairman Paul S. Atkins, Securities and Exchange Commission
Honorable Commissioner Hester M. Peirce, Securities and Exchange Commission
Honorable Commissioner Mark T. Uyeda, Securities and Exchange Commission