BETTER MARKETS

August 24, 2026

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

Christopher J. Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
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Re: Joint Request for Comment on Further Definition of 'Swap' and 'Security-Based Swap' and on Alternative Compliance, 91 Fed. Reg. 37873 (June 24, 2026)

Dear Ms. Countryman and Mr. Kirkpatrick:

Better Markets[1] appreciates the opportunity to respond to the above-referenced request for comment.[2] The request for comment seeks input on whether it is necessary for the Commissions "to draw clearer regulatory lines with respect to innovative products that may implicate both SEC and CFTC regulatory interests," specifically with respect to certain event contracts and whether they should be considered swaps subject to the CFTC's jurisdiction or security-based swaps subject to the SEC's jurisdiction.[3] Because the SEC and CFTC already have rules for defining swaps and security-based swaps, and the rules draw clear regulatory lines for how event contracts should be categorized, there is no reason for special event contract rules.

The request for comment appears to be driven by the desire of prediction market platforms to offer event contracts on corporations' key performance indicators (KPIs).[4] The prediction markets undoubtedly would like these event contracts to be regulated as swaps by the CFTC, which does not have an investor protection mandate, rather than as security-based swaps

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 91 Fed. Reg. 37,873 (June 24, 2026).

3 *Id.* at 37,873, 37,875.

4 *See, e.g.*, *Kalshi launches Public Companies Hub as one-stop-shop for tracking corporate metrics*, Kalshi (Aug. 4, 2026), https://news.kalshi.com/p/kalshi-public-companies-hub.

by the SEC, which does. However, the existing definitions of a swap and a security-based swap establish that event contracts on corporations' KPIs should be considered security-based swaps, and the Commissions should not revise these definitions so that the prediction market platforms can obtain the more favorable regulatory treatment that they desire at the expense of investors.

A security-based swap (SBS) includes a swap that is based on the occurrence of an event relating to a single issuer of a security, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.[5] This means that most event contracts on corporations' KPIs should be considered security-based swaps. That is because, by pegging the contract to events such as an issuer's quarterly revenue, or if an issuer's customers are going to meet a certain threshold, the event contracts are based on an event that directly affects the financial condition of the issuer and "have the hallmarks of a security-based swap."[6]

> Prediction markets list a variety of so called 'key performance indicator' (KPI) contracts that settle on specific issuers' activities, such as whether Apple releases a new iPhone model or whether Tesla makes in excess of a specified number of vehicle deliveries. Some of these contracts even settle based on whether an issuer is acquired or undergoes an IPO. It is hard to see how these agreements do not 'directly affect[] the financial statements, financial condition, or financial obligations' of the issuers specified in the contracts.[7]

In this respect, it is important "that 'directly' does not speak to magnitude."[8] Congress "did not require a 'substantial' or 'significant' effect for the financial position of an issuer."[9] So most event contracts on KPIs are SBSs because "a contract settling on even a small event in a specific issuer's financial life has a 'direct,' albeit small, effect on the issuer's financial position."[10]

To the extent there is any question that event contracts on corporations' KPIs involve events that directly affect the issuer's financial statements, financial condition, or financial obligations, the Commissions should clarify that event contracts on corporations' KPI fall within the definition of a security-based swap and should be treated as a security-based swap. What the Commissions should not do is manipulate the definition of a security-based swap to exclude

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5 *Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48,208, 48,273 (Aug. 13, 2012).

6 Gillian R. Brassil, *Prediction Markets Encounter Another Regulator as SEC Joins Fray*, Bloomberg (June 24, 2026), https://news.bloomberglaw.com/securities-law/prediction-markets-encounter-another-regulator-as-sec-joins-fray.

7 Ilya Beylin, *Prediction Markets and Regulation by Non-Enforcement*, The CLS Blue Sky Blog (Aug. 19, 2026), https://clsbluesky.law.columbia.edu/2026/08/19/prediction-markets-and-regulation-by-non-enforcement/.

8 *Id.*

9 *Id.*

10 *Id.*

event contracts on KPIs and allow them to fall under the jurisdiction of prediction markets' preferred regulator. This would expose retail investors to products that should be treated as security-based swaps, which are normally restricted to eligible contract participants (ECPs).

In other words, if "an event contract is a swap, it can be traded by retail persons on a prediction market registered with the CFTC as a designated contract market, as many are today."[11] But if it is a security-based swap, "it may not be offered or sold to retail investors other than pursuant to a registration statement and on a national securities exchange."[12] As a result:

> The question of whether an event contract is an SBS is particularly important for prediction markets because many platforms currently permit broad retail participation from counterparties who are not ECPs. If certain issuer-specific contracts were determined to be SBSs, one of the practical questions would be whether existing prediction market platforms have procedures and limitations in place to operate within the regulatory framework applicable to SBSs. In particular, a threshold question would be whether platforms maintain procedures designed to identify participants who satisfy the ECP requirement and any other applicable eligibility standards.[13]

If prediction markets "do not include ECP-related thresholds for individual U.S.-based investors," but offer event contracts "possessing characteristics that resemble security-based swaps,"[14] the Commissions should ensure prediction markets comply with the rules governing security-based swaps; they should not alter the rules so prediction markets can avoid them.

Excluding event contracts on issuers' KPIs from the definition of a security-based swap also would have significant ramifications beyond to whom such products may be sold.

> To the extent they are allowing derivatives exchanges to mis-certify products as swaps rather than securities, the Commissions are compromising the distinct protections the securities regime provides to market participants, including (a) distinct oversight for insider trading, other fraud, and manipulation, and (b) distinct obligations of intermediaries aimed at market integrity.[15]

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11 *SEC and CFTC consider updating derivatives classification rules for innovative financial products*, Davis Polk (June 23, 2026), https://www.davispolk.com/insights/client-update/sec-and-cftc-consider-updating-derivatives-classification-rules-innovative.

12 *Id.*

13 Jack Habert et al., *Prediction Markets and the Security-Based Swap Question*, Seward & Kissel (Aug. 10, 2026), https://www.sewkis.com/insights/prediction-markets-and-the-security-based-swap-question/.

14 Scott Mascianica and Andy Bastnagel, *Is the SEC Entering Fight Over Prediction Market Oversight?*, Law360 (June 25, 2026), https://www.law360.com/articles/2492390.

15 Beylin, supra note 7.

The securities laws also have stricter rules on "promoting products in return for consideration," which means that, absent treatment as security-based swaps, for event contracts on issuer KPIs there would be "a free-for-all in prediction market advertisement from influencers."[16]

The simple fact is that "the SEC has developed resources for market oversight directed at capital formation, investor protection, and market integrity that the CFTC cannot match in any reasonable period of time."[17] So the Commissions should ensure that event contracts on specific events with respect to public companies are subject to the protections of the securities laws.

The Commissions say that "financial market participants are operating in an increasingly convergent ecosystem."[18] That is because the Commissions themselves are increasingly blurring the lines that separate investing and gambling. The SEC has approved products such as single-stock ETFs that are nothing more than a way to gamble on the stock market.[19] The CFTC has allowed event contracts on sporting events to proliferate under the guise that they involve trading financial derivatives and not gambling on sports.[20] The Commissions should not further blur regulatory boundaries by modifying the definitions of swap and security-based swap so that event contracts that constitute security-based swaps may nonetheless be regulated by the CFTC.

<u>Conclusion</u>

We hope these comments are helpful as the Commissions consider this matter.

Sincerely,
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16 *Id.*

17 *Id.*

18 91 Fed. Reg. at 37,874.

19 *See* Cheryl Winokur Munk, *Single-stock ETFs tap into market's 'gambling mindset,' expert says. What investors need to know*, CNBC (Dec. 20, 2023), https://www.nbclosangeles.com/news/business/money-report/single-stock-etfs-tap-into-the-markets-gambling-mindset-expert-says-what-investors-need-to-know/3294880/.

20 *See, e.g.*, Benjamin Schiffrin, *Everyone Should Go on Kalshi and See for Themselves Whether It Looks Like Sports Betting or Derivatives Trading*, Better Markets (May 6, 2026), https://bettermarkets.org/analysis/everyone-should-go-on-kalshi-and-see-for-themselves-whether-it-looks-like-sports-betting-or-derivatives-trading/.