



August 24, 2026

VIA ELECTRONIC SUBMISSION

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

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

**Re: Joint Request for Comment on Further Definition of “Swap” and
“Security-Based Swap” and on Alternative Compliance (Release Nos. 33–11424,
34–105735; File No. S7–2026–21; RIN 3038–AF71; RIN 3235–AN79)**

Dear Secretary Kirkpatrick and Secretary Countryman:

Rothera Exchange and Clearing LLC (“Rothera”) respectfully submits this letter in response to the joint request for comment published by the U.S. Commodity Futures Trading Commission (the “CFTC”) and the U.S. Securities and Exchange Commission (the “SEC”) (together, the “Commissions”) in Release Nos. 33–11424, 34–105735; File No. S7–2026–21, *Joint Request for Comment on Further Definition of “Swap” and “Security-Based Swap” and on Alternative Compliance* (the “Request for Comment”).¹ We commend the Commissions for undertaking this joint effort to draw clearer regulatory lines in support of efficient markets and responsible innovation.

Rothera’s positions can be stated briefly.

First, existing law answers the classification question at the center of the Request for Comment: an event contract that settles on a reported operational or financial metric of an issuer (and that does not function as a proxy for the price, return, or value of any security) references an “excluded commodity” and is a swap subject to the CFTC’s exclusive jurisdiction. The Commissions should confirm that conclusion through joint guidance built on principled, objective criteria, not open-ended, facts-and-circumstances tests.

Second, the requirement in the “security-based swap” definition that a referenced event “directly affect[]” the financial statements, financial condition, or financial obligations of the

¹CFTC & SEC, *Joint Request for Comment on Further Definition of “Swap” and “Security-Based Swap” and on Alternative Compliance*, 91 Fed. Reg. 37873 (June 24, 2026), <https://www.govinfo.gov/content/pkg/FR-2026-06-24/pdf/2026-12743.pdf> [hereinafter Request for Comment].

issuer reaches extrinsic events that change an issuer's financial condition (defaults, restructurings, and similar credit events), not the ex post measurement and reporting of that condition.

Third, these definitional questions should be resolved in this joint proceeding, on this record, not implied, one product at a time, through rule filings of individual self-regulatory organizations pending before a single Commission.

Fourth, the Commissions should adopt an alternative compliance framework, with concrete mechanics and a defined timeline, under which an entity registered with one Commission may satisfy the substantially similar requirements of the other without duplicative registration.

Finally, enforcement responsibility should presumptively follow primary regulatory responsibility, subject to mandatory coordination between the Commissions.

Background

Rothera is a futures exchange and clearinghouse operator that is registered with the CFTC as a designated contract market (“DCM”) and derivatives clearing organization (“DCO”). Formed as a joint venture of Robinhood and Susquehanna and built on the acquisition of MIAxdx (formerly known as LedgerX), Rothera launched its core platform in June 2026 and currently lists event contracts referencing sports, economic indicators, and election outcomes. We offer these comments from the perspective of an operating DCM and DCO with direct experience in event-contract markets.

That perspective matters because Rothera and its market participants bear directly the costs of the uncertainty the Request for Comment describes. Ambiguity chills the listing of new contracts on regulated U.S. markets, forces market participants to make classification judgments without guidance and at their peril, invites regulatory arbitrage between venues, and diverts trading demand toward less comprehensively regulated alternatives. Ambiguity also creates the wrong incentives. When the rules are unsettled, there is a temptation to settle them one product and one venue at a time, through whatever filing happens to move first, rather than through a joint process designed to answer the question for everyone. None of that serves the interests of the Commissions, market participants, or the investing and trading public.

1. The Commissions Should Confirm Objective Criteria Under Which Event Contracts Referencing Issuer-Specific Metrics Are Swaps Within the CFTC’s Jurisdiction

1.1 The Statutory Framework Allocates These Products to the CFTC

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”) established a comprehensive regulatory framework for “swaps” and “security-based swaps,” allocating regulatory authority over swaps to the CFTC and over

security-based swaps to the SEC, and directing the Commissions jointly to further define the relevant terms.² The Commissions did so in 2012 through jointly adopted rules and interpretations (the “2012 Release”).³

The Commodity Exchange Act (the “CEA”) defines “swap,” as relevant here, to include any agreement, contract, or transaction that “provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence.”⁴ Whether a company’s reported net sales, units produced, or subscriber count meets a specified level is exactly such an occurrence. Contracts on these and other corporate metrics, when listed on a DCM, sit within the CFTC’s exclusive jurisdiction.⁵

The Securities Exchange Act of 1934 (the “Exchange Act”) definition of “security-based swap” is considerably narrower.⁶ In relevant part, it requires that the referenced event “*directly affect[]* the financial statements, financial condition, or financial obligations of the issuer” (the “SBS Event Contract Prong”).⁷ Congress used materially different formulations in defining “swap” and “security-based swap,” and that difference must be given full effect. An expansive reading of the SBS Event Contract Prong (or of the phrases “based on the value” of, or “any interest” in, a security elsewhere in the definitions) would reallocate to the SEC jurisdiction that Congress assigned to the CFTC.

1.2 The Commissions Should Confirm a Bright-Line, Objective Classification Rule

The Request for Comment rightly asks for “principled, objective criteria.”⁸ Rothera proposes one: an event contract that settles on a reported operational or financial metric of an issuer is a swap within the CFTC’s jurisdiction unless the contract functions as a proxy for the price, return, or value of a security. That rule would be administrable at the moment of listing because it turns on the contract’s settlement terms (what the contract actually pays on) rather than on contestable, shifting judgments about how important a given metric may be to equity valuation.

The rule would also reflect how these markets already work. Event contracts referencing macroeconomic statistics (inflation prints, payroll figures, policy rates) have long traded on

²15 U.S.C. § 8302(a)(8).

³CFTC & SEC, *Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48208 (Aug. 13, 2012), <https://www.govinfo.gov/content/pkg/FR-2012-08-13/pdf/2012-18003.pdf> [hereinafter 2012 Release].

⁴7 U.S.C. § 1a(47)(A)(ii).

⁵7 U.S.C. § 2(a)(1)(A).

⁶15 U.S.C. § 78c(a)(68).

⁷15 U.S.C. § 78c(a)(68)(A)(ii)(III) (emphasis added).

⁸Request for Comment, *supra* note 1, at 37875.

CFTC-regulated markets. A corporate operational metric stands in the same relation to an individual enterprise as the Consumer Price Index stands to the economy: a reported statistic measuring realized outcomes. No one contends that a contract on the Consumer Price Index is an option on, or “based on the value of,” Treasury securities merely because inflation prints move Treasury prices. The same logic should control here. Informational relevance to the price of an asset does not convert a statistic into that asset, an interest in that asset, or a derivative on its value.

It should not matter, for classification purposes, whether a metric appears as a financial statement line item, is derived from such line items, or is disclosed elsewhere in an issuer’s periodic reports. What matters is the settlement reference. Settlement by reference to standardized, publicly filed disclosures (Forms 10-K, 10-Q, and 8-K, prepared under established accounting standards and certified by management under the Sarbanes-Oxley Act) supplies an objective, verifiable, and manipulation-resistant settlement source.⁹

1.3 An Event “Directly Affects” an Issuer’s Financial Condition; a Reported Metric Measures It

The Request for Comment asks when an event “directly affects” the financial statements, financial condition, or financial obligations of an issuer.¹⁰ The SBS Event Contract Prong covers a swap that is based on “the occurrence, nonoccurrence, or extent of the occurrence of an event” that “directly affects” the issuer’s financial statements, condition, or obligations. The language is causal and forward-looking: it captures extrinsic occurrences that change an issuer’s financial position—*e.g.*, a default, an acceleration, a restructuring, a bankruptcy filing. It does not capture the periodic measurement and reporting of business performance. A reported quarterly result does not “directly affect” an issuer’s financial statements; it *constitutes* them. Reading the prong to cover the contents of the financial statements themselves would invert the statute, transforming a narrow category defined by consequence into a boundless one defined by reporting. It is difficult to identify any issuer-related event contract that would remain a swap under such a reading, an outcome impossible to square with Congress’s decision to write two different definitions.

1.4 A Reported Metric Is Not a Security, an Interest in a Security, or the Value of a Security

The second prong of the “security-based swap” definition covers a swap that is “based on a single security or loan, including any interest therein or on the value thereof.”¹¹ It is sometimes suggested that this prong captures contracts on issuer-reported metrics directly on the theory that

⁹See 15 U.S.C. § 7241; 18 U.S.C. § 1350.

¹⁰Request for Comment, *supra* note 1, at 37875 (Question 7).

¹¹ 15 U.S.C. § 78c(a)(68)(A)(ii)(II).

a metric drawn from an issuer's financial statements is itself an interest in, or a measure of the value of, the issuer's security.

However, a contract is “based on” a single security where its payout is a function of the security's price, value, or return. Likewise, an “interest” in a security is a legal or beneficial interest, such as ownership or the right to acquire it. By contrast, a reported metric is a statistic: it is not property, it confers no rights against the issuer, and settlement of a contract referencing it delivers nothing but cash measured against a published number.

A security's price can double (or halve) while the referenced metric is unchanged, and the metric can improve while the price increases or declines. A contract on a reported metric cannot be hedged or replicated by holding the security, and no arbitrage tethers the one to the other. An instrument that neither tracks the security nor can be reproduced from it is not “based on” the security.

The Commissions have drawn this line before, in the 2012 Release. A contract referencing a bond's yield is a security-based swap only where the yield is used as a proxy for the price or value of the security, because such a yield is another way of expressing that price.¹² A metric that is not derived from the security's price cannot be another way of expressing it. A contract on such a metric is therefore a swap, not a security-based swap.

Nor does stating a metric on a per-share basis alter the analysis. Earnings per share is net income divided by shares outstanding; the division changes the scale of the number, not the nature of the exposure. A contract on net income and a contract on net income per share carry the same economic position on the issuer's business performance. If division by share count could convert a business metric into the security itself, a contract on revenue per share would be a security while a contract on revenue remained a swap, a distinction with no economic content and no plausible claim to congressional design.

1.5 The Exclusion for Options on Securities Sorts Instruments; It Does Not Classify Them

A related argument runs through the “swap” definition itself. The CEA excludes from the term “swap” any put, call, straddle, option, or privilege on any security, or on any interest therein or based on the value thereof, “that is subject to the Securities Act of 1933 and the Securities Exchange Act of 1934.”¹³ Accordingly, if a binary contract is an option on a security, it was never a swap at all. But the exclusion applies only to an instrument that already is an option on a security and already is subject to the securities laws; it presupposes classification rather than supplying it. Its function in the statute is to prevent double coverage. Options on securities are themselves securities, and Congress excluded them from the swap definition so that a single instrument would not carry two regulatory characters at once.

¹²2012 Release, *supra* note 3, at 48263–64.

¹³ 7 U.S.C. § 1a(47)(B)(iii).

An exclusion written to sort instruments after they are classified cannot be recursively deployed to classify them. Yet that is precisely how the pending proposals use it: Cboe asserts that its proposed contracts would likely meet the definition of a security-based swap were they not excluded from the definition of a swap as options on securities.¹⁴ We disagree with the designation, for the reasons stated in Sections 1.3 and 1.4; a contract on a reported metric satisfies neither the single-security prong nor the event prong, and absent the claimed exclusion it would simply be a swap. But the structure of the assertion is the point: the exclusion is asked to do the work of classification, the one function it cannot perform. Courts have refused this maneuver before. When index participations were recast as options on securities in defense of an SEC approval order, the Seventh Circuit set the orders aside in favor of the Chicago Mercantile Exchange’s argument that index participations are futures, warning that “symbols that comprise everything mean nothing.”¹⁵

The structure of Title VII confirms as much, for this exclusion and for the single-security prong alike. Congress wrote a deliberately narrow event prong into the “security-based swap” definition, reaching events relating to a single issuer that “directly affect” the issuer’s financial statements, financial condition, or financial obligations. That prong has work to do only if event contracts referencing issuers begin their analytical life as swaps, with a defined subset assigned to the SEC. If either the option exclusion or the single-security prong swept such contracts out of the swap definition at the threshold, the event prong would classify nothing, and Congress does not enact carefully limited provisions to govern an empty category.

The precedents observe the same boundary. The binary and fixed-return options that securities exchanges have listed as securities settle on whether the price of a security crosses a specified level,¹⁶ and the 2007 credit default options discussed below tied payouts to credit events on an issuer’s debt securities. Each instrument in that lineage pays on the security or on its value. None pays on a reported statistic.

1.6 Materiality-Based and Issuer-by-Issuer Tests Would Be Unworkable and Would Exceed the Statutory Allocation

The Request for Comment also asks when an option or event contract is “based on” a security or “any interest” in a security, and what characteristics distinguish event contracts from options on securities.¹⁷ Some have suggested (including in the notice of a rule filing now pending

¹⁴See Securities Exchange Act Release No. 34-105877, 91 Fed. Reg. 43418, 43429 & n.71 (July 15, 2026) (File No. SR-CBOE-2026-061) [hereinafter Cboe KPI Notice].

¹⁵*Chicago Mercantile Exchange v. SEC*, 883 F.2d 537 (7th Cir. 1989).

¹⁶ Securities Exchange Act Release No. 34-56251 (Aug. 14, 2007), 72 Fed. Reg. 46523 (Aug. 20, 2007) (SR-Amex-2004-27) (approving the listing of fixed return options on individual stocks and exchange-traded funds that pay a fixed sum if the settlement price of the underlying security finishes above, or below, the strike price); see also Securities Exchange Act Release No. 34-57850 (May 22, 2008), 73 Fed. Reg. 31169 (May 30, 2008) (SR-CBOE-2006-105) (approving the listing of binary options on broad-based security indexes).

¹⁷Request for Comment, *supra* note 1, at 37875–76 (Questions 4 and 8).

before the SEC, discussed below) that binary contracts on corporate key performance indicators (“KPIs”) are options on securities because KPIs are recognized as important inputs into the valuation of an issuer’s stock, or because issuers deem them material enough to require disclosure.¹⁸ That test proves far too much. Materiality is the organizing principle of the entire federal securities disclosure regime: virtually everything an issuer discloses is, by design, information a reasonable investor would consider important. If informational materiality to equity valuation were the touchstone, a binary contract on whether an issuer files a cybersecurity disclosure under Item 1.05 of Form 8-K would be a security;¹⁹ commercial arrangements conditioned on financial milestones (earn-outs in acquisition agreements, performance-vesting compensation awards) would be options on securities; and no issuer-related event contract would remain within the CFTC’s jurisdiction. A construction that swallows an entire statutory category is wrong for that reason alone.

Issuer-by-issuer, facts-and-circumstances tests fail for related reasons. Under such a test, a contract on “number of recurring customers” might be a security-based swap when the reference issuer is a subscription-based entertainment company, a swap when the issuer is a car manufacturer, and might migrate between the two as business models evolve. Exchanges cannot list, clear, and surveil standardized contracts whose regulatory character shifts with a reweighing of qualitative factors, and market participants cannot trade such contracts with confidence. The Commissions’ experience with securities indexes that migrate between broad-based and narrow-based status (which has required repeated filings and successive forms of relief simply to keep identical products continuously available to U.S. persons) illustrates the burdens that classification instability imposes on markets and on the Commissions themselves.²⁰ Classification should attach to objective product terms fixed at listing, and should not change absent a change in those terms.

For the same reasons, the Commissions should confirm that a contract is “based on the value” of a security, or on “any interest therein,” only where its payout is a function of the security’s price, value, or return, not where the referenced metric is merely relevant to, or correlated with, valuation. In the 2012 Release, the Commissions likewise explained that the nature of the security that informs the setting of a fixed term of an instrument does not itself determine whether the instrument is a swap or a security-based swap; classification follows the instrument’s operative payment terms. That passage addresses fixed terms rather than settlement references, and we do not suggest it is dispositive here, but its logic is instructive: what the parties consult does not classify the contract; what the contract pays on does.²¹ And reliance on the SEC’s 2007 approvals of exchange-traded credit default options would be misplaced in this

¹⁸See Cboe KPI Notice, *supra* note 14.

¹⁹See 17 C.F.R. § 249.308 (Form 8-K, Item 1.05).

²⁰See 17 C.F.R. §§ 240.3a55-2, 240.3a55-3; 17 C.F.R. pt. 41.

²¹2012 Release, *supra* note 3, at 48270.

context: those instruments tied payouts to defined credit events on an issuer's debt securities, and they predate the Dodd-Frank Act's assignment of single-name credit-event instruments to the security-based swap category.²² Whatever their continuing vitality, they cannot carry contracts settling on operational metrics into securities status.

1.7 Resemblance Is Not a Statutory Test

The Commissions should also resist a less formal version of these arguments—for example, the potential notion that whatever the definitions provide, a contract referencing an issuer's performance simply resembles or “seems like” trading in the issuer's securities, and ought to be regulated accordingly. Resemblance is not the statutory standard, nor did Congress provide the SEC and CFTC with discretion to divide jurisdiction based on vague notions of what “feels” right. Congress allocated jurisdiction over these products through enacted text. Exchanges and market participants—and the agencies—are bound by the statutes. It would not be consistent with Congressional intent or the statutory text, nor workable in practice, to attempt to place each contract along a spectrum of “greater” or “lesser” similarity to a security, with close cases resolved by judgment.

1.8 The Anti-Proxy Principle Supplies the Limiting Principle

The rule Rothera proposes has limits. A contract labeled as a KPI contract whose settlement value in substance tracks the price, return, or value of a security (for example, a contract settling on an issuer's share price, market capitalization, or total shareholder return) is properly analyzed under the securities laws. Metrics inextricably bound up with the market for an issuer's securities, such as insider share sales, may likewise warrant closer analysis. Per-share financial-statement measures, such as earnings per share, may present a closer question, and we recognize that there are arguments on both sides. For the reasons stated in Section 1.4, we believe the better reading is that such measures remain reported measurements rather than interests in the security. Should the Commissions take a different view as to particular per-share measures, any resulting line would be best drawn categorically rather than case by case, and it would not affect operational metrics such as units produced, subscribers added, or revenue reported. The anti-proxy principle polices evasion at the margin without sacrificing the administrability of the general rule, and it does so by reference to the same objective question: what does the contract pay on?

It would also be helpful for the Commissions to distinguish event contracts from single stock futures, which can share structural similarities, including reference to a single issuer and settlement based on issuer-specific outcomes. We encourage the Commissions to address this distinction in any guidance issued in response to the Request for Comment.

²²Securities Exchange Act Release No. 34-55871 (June 6, 2007) (File No. SR-CBOE-2006-84) (order granting accelerated approval of the listing of credit default options), <https://www.sec.gov/files/rules/sro/cboe/2007/34-55871.pdf>.

1.9 Requested Actions

Rothera respectfully requests that the Commissions (i) issue joint interpretive guidance (or, to the extent necessary, joint rules) confirming the classification criteria described above, including the proper scope of the statutory exclusion for options on securities, with illustrative examples spanning common metric types; and (ii) pending completion of that process, refrain from taking the position, in any proceeding or filing, that an event contract listed on a DCM and settling on a reported operational or financial metric is a security or security-based swap.

The Request for Comment asks for data-driven input.²³ Rothera has developed a detailed taxonomy of more than one hundred operational metrics suitable for event-contract settlement, drawn from standardized public filings, and would welcome the opportunity to share it with the staffs of both Commissions.

2. These Questions Should Be Resolved in This Proceeding, Not Through Pending Self-Regulatory Organization Filings

The classification questions posed by the Request for Comment are squarely presented by a rule filing now pending before the SEC: Cboe Exchange, Inc.'s proposal to list binary options on KPIs reported by certain issuers.²⁴ Nor is that filing an isolated case. A second national securities exchange has since filed a proposed rule change to list exchange prediction contracts settling on earnings, revenue, and other issuer-specific metrics.²⁵ These questions will recur, venue by venue, until the Commissions resolve them in this proceeding.

The notice of the Cboe filing rests on the premise that such contracts are options on securities (and therefore excluded from the “swap” and “security-based swap” definitions) because KPIs are recognized as important inputs into the valuation of an issuer’s stock. That is precisely the materiality-to-valuation theory addressed above, and precisely the subject of Questions 7 and 8 of the Request for Comment. Yet the comment period on the Cboe filing closed on August 5, 2026, nineteen days before comments on the Request for Comment are due. Acting on that filing before this proceeding concludes would prejudice, through a single-Commission adjudication on a compressed record, the very questions the Commissions have jointly asked the public to address.

²³Request for Comment, *supra* note 1, at 37876 (Section IV).

²⁴Cboe KPI Notice, *supra* note 14.

²⁵ Press Release, MEMX, MEMX Announces Plans to List NMS Securities Based Exchange Prediction Contracts (Aug. 12, 2026), <https://www.businesswire.com/news/home/20260812516180/en/MEMX-Announces-Plans-to-List-NMS-Securities-Based-Exchange-Prediction-Contracts> (announcing a proposed rule change filed with the SEC) (File No. SR-MEMX-2026-25 (filed Aug. 11, 2026); notice pending publication in the Federal Register).

Rothera has separately urged the SEC to defer action on the Cboe filing, and other commenters across the industry have done the same.²⁶ We reiterate that request here, and add two related ones. *First*, no classification determination should be inferred from, or effected by, any order under section 19(b) of the Exchange Act while this proceeding remains pending; jurisdictional boundaries between two Commissions should not be set by the approval mechanics of one.

Second, consistent with their March 2026 memorandum of understanding (in which the Commissions committed to coordinate in areas of common regulatory interest and to treat functionally and economically similar products consistently), the Commissions should confirm that classification attaches to a product's terms, not to the venue proposing to list it.²⁷ Functionally identical KPI contracts cannot be securities when filed by a national securities exchange and swaps when listed on a DCM. Pending resolution, neither Commission should treat a DCM's listing of event contracts settling on reported corporate metrics (whether by self-certification or voluntary submission for approval) as a basis for enforcement or other adverse action.

3. The Commissions Should Adopt an Alternative Compliance Framework with Concrete Mechanics

We urge the Commissions to adopt an alternative compliance framework that eliminates duplicative registration requirements for entities that are appropriately subject to oversight by one Commission but engage in event-contract activities that implicate regulatory interests of the other.

CFTC oversight of DCMs and DCOs provides robust investor and market protections that are substantially similar to the SEC requirements applicable to national securities exchanges and clearing agencies. Both regimes are designed to ensure market oversight and integrity, mitigate risk, protect against fraud and manipulation, and provide for orderly trading, clearing, and settlement. Requiring an entity registered with the CFTC as a DCM or DCO also to register with the SEC would serve neither Commission's interests; it would impose substantial compliance costs and operational complexity and discourage innovation on regulated U.S. markets.

"Substantially similar" should be assessed by reference to regulatory outcomes (market integrity, customer protection, financial resources, surveillance, and reporting) rather than

²⁶Letter from Thomas Chippas, CEO, Rothera Exchange and Clearing LLC (Aug. 5, 2026) (File No. SR-CBOE-2026-061), <https://www.sec.gov/comments/SR-CBOE-2026-061/srcboe2026061-993080-3105908.pdf>; *see also* Letter from Sudhir Jain, Chief Compliance Officer, Kalshi Inc. (Aug. 5, 2026); Letter from Stefan Schropp, Senior Regulatory Counsel, Paradigm Operations LP (Aug. 5, 2026) (each urging deferral pending completion of this proceeding) (File No. SR-CBOE-2026-061).

²⁷SEC & CFTC, *Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Regarding Harmonization in Areas of Common Regulatory Interest* (Mar. 11, 2026), <https://www.sec.gov/files/mou-sec-cftc-2026.pdf> [hereinafter MOU].

line-by-line identity of rules.²⁸ As to mechanics, the Request for Comment identifies the right toolkit: joint or coordinated notice registration, deemed filing, tailored rules, and tailored trade reporting.²⁹ A DCM or DCO in good standing should be able to file a notice with the SEC, rely on its CFTC registration, examinations, and rule framework to satisfy substantially similar SEC requirements, and provide the SEC with access to relevant data through the Commissions' information-sharing arrangements.

Substituted compliance is a longstanding feature of both Commissions' regimes (including the SEC's substituted compliance framework for security-based swap dealers and the CFTC's exemptive framework for clearing organizations subject to comparable, comprehensive supervision), and the Commissions should extend the same architecture here.³⁰ Appropriate coordination and data-sharing arrangements should ensure that each Commission retains access to the information necessary to satisfy its mandate and that no regulatory gaps arise. We encourage the Commissions to commit to a defined pathway and timeline for implementing such a framework.

4. Surveillance and Enforcement Under an Alternative Compliance Framework

The Request for Comment asks how surveillance, examination, and enforcement should operate under an alternative compliance approach, and how the Commissions can best deter manipulation and trading on material non-public information.³¹ The premise sometimes advanced, that customer protections would be diminished if these products trade outside the securities framework, is mistaken. DCMs are subject to comprehensive statutory core principles requiring, among other things, real-time market surveillance, trade practice monitoring, position accountability, and enforcement of exchange rules; DCOs are subject to parallel risk-management and oversight requirements.³² CFTC Regulation 180.1 was expressly modeled on Rule 10b-5, and the CFTC has stated that it will be guided by the substantial body of judicial precedent applying Rule 10b-5.³³ Insider trading and fraud in connection with event contracts are as unlawful on a DCM as they are on a national securities exchange.

Two features of KPI event contracts make cross-market surveillance particularly tractable. Settlement references are public, standardized SEC filings, so both Commissions already possess the disclosure record relevant to settlement. And the Commissions' memorandum of understanding provides the framework for sharing surveillance data, referrals,

²⁸Request for Comment, *supra* note 1, at 37876 (Question 12).

²⁹*Id.* (Question 13).

³⁰*See* 17 C.F.R. § 240.3a71-6 (substituted compliance for security-based swap dealers); 7 U.S.C. § 7a-1(h) (exemption for clearing organizations subject to comparable, comprehensive supervision); MOU, *supra* note 27.

³¹Request for Comment, *supra* note 1, at 37876 (Questions 14 and 15).

³²*See* 7 U.S.C. § 7(d) (DCM core principles); 7 U.S.C. § 7a-1(c)(2) (DCO core principles).

³³*Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation*, 76 Fed. Reg. 41398, 41399 (July 14, 2011); 17 C.F.R. § 180.1.

and examination findings.³⁴ Rothera supports enhanced information sharing (including access by each Commission to relevant order, trade, and position data for cross-market products) as a condition of any alternative compliance framework.

Finally, on enforcement allocation: the Commission with primary registration responsibility for an entity should presumptively take the lead in examinations and enforcement respecting that entity and its listed products, subject to mandatory notice, consultation, and referral protocols between the Commissions. A presumptive-lead framework preserves each Commission's statutory authority while giving market participants a predictable enforcement interface and avoiding the inefficiency, and the risk of inconsistent outcomes, inherent in parallel investigations of the same conduct. An alternative compliance framework will not achieve its purpose if a registrant that relies on it nonetheless faces duplicative enforcement exposure for the same activity.

Conclusion

Rothera believes contracts that settle on reported operational or financial metrics, and that do not function as proxies for the price, return, or value of a security, are swaps within the CFTC's jurisdiction. The Commissions should confirm that rule through objective criteria and illustrative examples; decline to resolve these questions through individual self-regulatory organization filings while this proceeding is pending; and adopt an alternative compliance framework, supported by information sharing and a presumptive-lead enforcement protocol, that permits regulated entities to serve this market without duplicative registration. Each day of continued uncertainty taxes regulated markets and subsidizes unregulated ones.

Rothera commends the CFTC and the SEC for their attention to these important issues. We appreciate the opportunity to submit this letter and would welcome the opportunity to discuss any of the matters addressed herein with the Commissions or their staffs.

Respectfully submitted,

/s/ Thomas Chippas

Thomas Chippas, CEO

Rothera Exchange and Clearing LLC

³⁴MOU, *supra* note 27.