August 24, 2026

Submitted electronically

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

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

MEMX LLC ("MEMX") appreciates the opportunity to provide comment on the Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance recently published by the U.S. Securities and Exchange Commission ("SEC") and U.S. Commodity Futures Trading Commission ("CFTC") (collectively, the "Commissions").[1] As discussed in this comment letter:

[1] See Securities Exchange Act Release No. 105735 (June 18, 2026), 91 FR 37873 (June 24, 2026) (File No. S7-2026-21) ("Request").

1. **Securities event contracts**, such as MEMX's proposed Equities Based Exchange Prediction Contracts ("EPCs"),[2] are appropriately classified as binary options rather than security-based swaps if traded on a registered U.S. options exchange.
2. **NMS stock perpetual contracts** should be classified as security-based swaps and traded on a national securities exchange, subject to SEC approval and oversight.

I. MEMX'S EQUITIES BASED EXCHANGE PREDICTION CONTRACTS AND OTHER SIMILAR PRODUCTS ARE PROPERLY CLASSIFIED AS BINARY OPTIONS

Section 3(a)(10) of Securities and Exchange Act of 1934 ("Exchange Act") defines the term "security"[3] to include, among other instruments, "any... option... on any security... including any interest therein or based on the value thereof."[4] Listed options that fall within this statutory definition are subject to SEC's jurisdiction and generally must trade on a national securities exchange that is registered pursuant to Section 6 of the Exchange Act.[5]

Today, standardized options are generally offered based on the price of the underlying security or index and include puts, calls, and other complex instruments whose value is based on price of the underlying security or securities. As discussed, MEMX recently filed a proposal with the SEC that would expand the universe of listed options to include

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2 See SR-MEMX-2026-25 (Proposal to Adopt Rules for the Listing and Trading of Securities Event Contracts) (pending publication) *available at* https://info.memxtrading.com/sr-memx-2026-25-proposal-to-adopt-rules-for-the-listing-and-trading-of-securities-event-contracts/.

3 15 U.S. Code § 78c(a)(10).

4 Id.

5 15 U.S. Code § 78f.

contracts based on the issuer achieving financial performance or related milestones that are material to the price of the underlying NMS stock rather than the stock's share price itself. As proposed, EPCs would reference an issuer's earnings, revenues, sales, or other key financial metrics, enabling investors to invest in securities and/or the hedge the economic risk associated with such securities. Another U.S. options exchange has also filed a similar proposal to list binary options on certain key performance indicators.[6] Such securities event contracts would be based on an interest in and relate to the value of the underlying NMS stock. While the Exchange Act definitions are somewhat overlapping, classifying these securities as binary options contracts rather than security-based swaps is in keeping with the relevant statutory definitions and the SEC's prior interpretations thereof.

Moreover, trading such instruments as binary options would promote a fair and orderly market and facilitate new investment and hedging opportunities on an SEC regulated exchange. In certain cases, financial instruments may contain features similar to both options contracts (as defined above) and security-based swaps. As compared to characterizing an instrument as a security-based swap, which would typically be traded bilaterally in the over-the-counter ("OTC") market, categorizing an instrument as an options contract comes with a more robust set of regulatory requirements and market practices that MEMX believes would aid in the development of such securities event contracts.[7] To the

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6 See Securities Exchange Act Release No. 105877 (July 10, 2026), 91 FR 43418 (July 15, 2025) (SR-CBOE-2026-061).

7 For example, options investors are provided with an Options Disclosure Document ("ODD") that highlights risk and characteristics of options products. This allows for more tailored information to be provided to investors and avoids the need to file a

extent there is uncertainty regarding how best to characterize these contracts under the statute, MEMX believes that the best interpretation is the one that promotes innovation and competition while providing robust investor protection guardrails on a regulated exchange.

As discussed, MEMX has proposed to list securities event contracts for trading on its registered U.S. options exchange, MEMX Options. MEMX Options currently trades standardized options based on the price of an underlying NMS stock, i.e., ordinary puts and calls. Securities event contracts would be different from the contracts currently traded on MEMX Options primarily in two separate respects: (1) securities event contracts would have a fixed or "binary" payout at expiration, regardless of the magnitude of the difference between the option's exercise price and the settlement value for the underlying; and (2) the price of such contracts would be based on the issuer achieving financial performance or related milestones that are material to the price of the underlying NMS stock rather than the stock's share price itself. MEMX does not believe that either of those differences are germane to whether this product is an options contract as defined in the Exchange Act.[8]

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registration statement for each individual instrument, which would be complicated by the need to offer multiple strikes and expirations for each underlying security.

8 EPCs would generally trade pursuant to the same rules as other options products traded on MEMX Options. However, similar to certain other options products, MEMX has also developed rules that are specific to this product. These include, for example, use of product specific terminology, e.g., "yes" and "no" contracts instead of standard "put" and "call" terminology used by other options exchanges to identify products that offer similar economic exposure, and the ability for such "yes" and "no" contracts to trade together in a single market, thereby increasing liquidity and reducing unnecessary intermediation. These differences are not relevant to the product definitions included in the Exchange Act and are therefore not discussed in this comment. Moreover, as discussed elsewhere in this letter, the proposed market structure for securities event contracts is much more similar to other options

Notably, options as defined in Section 3(a)(10) encompass not only options on a security but further include options on any interest in a security or based on the value thereof. This broad statutory language is sufficient to support the trading of securities event contracts on an SEC-regulated options exchange, including contracts that reference an issuer's earnings, revenues, sales, or other key financial metrics that investors commonly use to inform their investment decisions. Indeed, such options contracts would reference financial results that are material to the value of the underlying security and are therefore included in the issuer's periodic financial reports submitted to the Commission, including information submitted in the issuer's Form 8-K, 10-K and 10-Q filings.

This read of the statute is also consistent with the SEC's own interpretation of the statute when analyzing its application to similar products offered by another national securities exchange. Consider the SEC's approval of proposals by the by the Chicago Board Options Exchange ("Cboe") to list and trade: (1) credit default options;[9] and (2) credit default basket options.[10] As the SEC explained in its order approving credit default options for trading on Cboe, "credit default options... are binary options that are automatically exercised upon the occurrence of specified credit events or expire worthless."[11] While such

products, with limited carve outs to address product specific features, than to securities-based swaps that are typically traded bilaterally in the OTC market.

9 See Securities Exchange Act Release No. 55871 (June 6, 2007), 72 FR 32372 (June 12, 2007) (SR-CBOE-2006-84).

10 See Securities Exchange Act Release No. 56275 (August 17, 2007), 72 FR 47097 (August 22, 2007) (SR-CBOE-2007-26).

11 See supra note 9.

products were therefore different in certain important respects from existing options contracts, "[a]fter careful analysis, the Commission [found] that credit default options are options based on the value of a security or securities"[12] and also "options on an interest in, or based on the value of an interest in, a security or securities."[13] The SEC made a similar finding when it later approved Cboe's proposal to introduce credit default basket options.

All of the above would also be true of EPCs traded on MEMX Options. Similar to Cboe's credit default options and credit default basket options, MEMX's proposed securities event contracts are "binary options that are automatically exercised upon the occurrence of specified... events or expire worthless."[14] The Commission has repeatedly found that contracts with a binary payout structure may nevertheless be properly classified as options contracts under the Exchange Act and, while most options contracts have historically had a variable payment structure, such a structure is not required by the Exchange Act, which does not specify a particular payment structure. In addition, while in some cases binary options offered by other securities exchanges have referenced the price of some underlying security or index, such binary options also encompass contracts like the ones discussed above that are instead based "upon the occurrence of specified events."[15]

When classifying similar products in the past the SEC has interpreted the relevant statutory language to "include options whose pricing in the secondary market moves in

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12 Id.

13 Id.

14 Id.

15 Id.

relation to the value of the underlying security or securities."[16] As was the case with Cboe's credit default options, this requirement is satisfied where there is a "close empirical correlation between the pricing of"[17] the option contract and the relevant underlying security or securities. Like Cboe's credit default options and credit default basket options, MEMX intends only to list securities event contracts that are closely correlated with the pricing of the underlying security. Such contracts may include contracts based on an issuer's earnings, revenues, sales, or other key financial metrics reported in the company's financial statements as filed with the Commission on Form 8-K, 10-K, or 10-Q. This information, which is reported by issuers in their financial reports, is considered material to the price of the underlying NMS stock and easily meets the requirement that there be a close empirical relationship between the pricing of the option and the underlying security. Indeed, such information is generally considered to be the most important information disclosed to investors under the federal securities laws and fundamental price movements often happen following its disclosure. MEMX therefore believes that these products are appropriately listed and traded as binary options when offered on a registered U.S. options exchange.

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16 Id.

17 Id.

II. THE EXCHANGE ACT SPECIFICALLY EXCLUDES OPTIONS CONTRACTS FROM THE STATUTORY DEFINITION OF SECURITY-BASED SWAP

Pursuant to Section 3(a)(68),[18] a "security-based swap"[19] is a "swap"[20] as defined in the Commodity Exchange Act that is based on: (1) "an index that is a narrow-based security index, including any interest therein or on the value thereof;"[21] (2) "a single security or loan, including any interest therein or on the value thereof;"[22] or (3) "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."[23] In turn, the Commodity Exchange Act defines "swap" to include "any agreement, contract, or transaction... that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more... securities."[24]

All listed options contracts, including those currently traded on MEMX Options and other U.S. options exchanges, would therefore fall within the statutory definition of security-based swap, unless an exclusion applies. Importantly then, the Commodity Exchange Act defines the term "swap" to specifically exclude "any... option... on any security... or group

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18 15 U.S. Code § 78c(a)(68).

19 Id.

20 7 U.S. Code § 1a(47).

21 15 U.S. Code § 78c(a)(68)(A)(ii)(I).

22 15 U.S. Code § 78c(a)(68)(A)(ii)(II).

23 15 U.S. Code § 78c(a)(68)(A)(ii)(III).

24 7 U.S. Code § 1a(47)(A)(i).

or index of securities, including any interest therein or based on the value thereof," that is subject to both the Exchange Act and Securities Act of 1933.[25] As a practical matter, this exclusion means that listed options contracts traded on U.S. options exchanges like MEMX Options are therefore not considered security-based swaps under the Exchange Act, notwithstanding that they would otherwise meet the relevant statutory definition.

In determining whether a particular security is a security-based swap under the Exchange Act, the SEC must therefore determine not only whether the product falls within the security-based swap definition but *also* whether it is an "option... on any security... or group or index of securities, including any interest therein or based on the value thereof."[26] If the SEC concludes that the product in question falls within the statutory definition of an option, then the product is excluded from the definition of security-based swap. For the reasons discussed above, MEMX's proposed securities event contracts would be properly classified as options on a security, including any interest therein or based on the value thereof, and therefore should not be considered security-based swaps if traded on a national securities exchange under SEC rules that apply to the trading of options contracts.

By contrast, the CFTC has recently indicated that prediction markets currently trade event contracts as: (1) swaps; (2) commodity options, which "are also covered by the

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25 7 U.S. Code § 1a(47)(B)(iii).

26 Id.

statutory swap definition in CEA section 1a(47)(i));"[27] or (3) futures.[28] While exchange listed options on securities are excluded from regulation as swaps and therefore security-based swaps, this exclusion does not apply to options on commodities. As a result, commodity options traded on a CFTC-regulated DCM may be subject to the CFTC's swap regulations even though properly classified as options while options on securities traded on a national securities exchange would be regulated as options rather than security-based swaps.

MEMX takes no position on whether securities event contracts with features different from the ones described herein, or that trade under a different market structure outside of a regulated U.S. options exchange — for example, contracts traded bilaterally in the OTC derivatives market — could otherwise be classified as security-based swaps. Rather MEMX asserts the specific products to be traded and the market structure under which they would trade is more akin to traditional listed options than the largely bilateral OTC market for security-based swaps. Allowing MEMX's proposed EPCs and similar products to trade as options is consistent with both the Exchange Act and the SEC's prior interpretations thereof and would further ensure a robust and well-regulated market for such products.[29]

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27 See Commodity Exchange Act Release No. 9194-26 (March 12, 2026), 91 FR 12516, 12523 (March 16, 2026).

28 Id.

29 Notwithstanding any questions as to whether securities event contracts should be classified as options or security-based swaps, such products are clearly securities and therefore subject to the SEC's exclusive jurisdiction.

III. PERPETUAL CONTRACTS OFFERED ON NMS STOCKS ARE PROPERLY CLASSIFIED AS SECURITY-BASED SWAPS

In addition to event contracts, the Commissions have requested comment on whether there is "a need for greater clarity regarding whether a cash-settled 'perpetual' contract referencing an equity security could be treated as a security future?"[30] MEMX does not believe that such treatment is necessary or appropriate. Such contracts have the features of and should instead be listed as security-based swaps, which would be subject to the exclusive jurisdiction of SEC rather than the joint jurisdiction of the two Commissions.

Notably, while the CFTC has allowed perpetual contracts on digital asset commodities to be traded as futures contracts,[31] any decision providing similar treatment to similar security-based products would expand the jurisdiction of the CFTC beyond the boundaries established by Congress. And, without a clear line as to what makes such products "contracts of sale for future delivery"[32] under the Commodity Exchange Act, allowing such contracts to trade as security futures is likely to raise more not fewer jurisdictional questions that would need further clarification. Put another way, if any contract could be deemed a futures contract, then *all* products historically subject to the SEC's exclusive jurisdiction could be determined to be security futures contracts. This would expand the jurisdiction of the CFTC to *any* securities product proposed by a DCM.

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30 See Request, supra note 1, at 37876.

31 See Order Approving KashiEX LLC BTCPERP Futures Contract, *available at* https://www.cftc.gov/filings/documents/2026/orgdcmkexbtxperporder26601.pdf.

32 7 U.S. Code § 1a(44); 15 U.S. Code § 78c(a)(55)(A).

MEMX does not believe that this is what Congress intended when it established the CFTC as the primary regulator of commodity-based derivatives under the Commodity Exchange Act.

MEMX understands that the CFTC has recently ruled that certain digital asset perpetual contracts may be traded on a DCM as a futures contract. However, that classification remains controversial and there is currently pending litigation in the D.C. Circuit on this question.[33] If the petitioner in that case is correct that contracts of sale for future delivery must have some future delivery to be considered futures contracts, as the statutory text surely implies, then any security-based contracts offered on the same basis would clearly fall outside of the definition of a security future. Moreover, with respect to security-based perpetual contracts in particular, this question is jurisdictional. As a result, this is not a mere question of statutory interpretation. The answer to this question has the potential to significantly reshape existing jurisdictional lines and could result in the CFTC encroaching on the jurisdiction of the SEC, allowing a wide range of securities products to be listed and traded by DCMs with little oversight from the nation's securities regulator.

While digital asset commodity swaps and futures are both subject to the exclusive jurisdiction of the CFTC, the CFTC would have no jurisdiction over these products if classified as security-based swaps rather than security futures. That is because Congress determined that the SEC should have exclusive jurisdiction over the trading of securities products, including security-based swaps. To be clear, much swaps trading relates to

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[33] *Chicago Mercantile Exchange Inc. v. Michael S. Selig and Commodity Futures Trading Commission*, Case No. 1:26-cv-02157 (D.D.C. 2026).

swaps on commodities and therefore, as a practical matter, much of the swaps market is within the CFTC's exclusive jurisdiction. However, Congress determined that security-based swaps should instead fall within the exclusive jurisdiction of the SEC, aligning oversight over such derivatives with the SEC's existing authority over the underlying securities market. The Commissions should not override this legislative judgment now.

The Commodity Exchange Act defines the term "swap"[34] to include contracts that provide "for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more... securities"[35] and that transfer "as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest"[36] in the underlying security. In turn, the Exchange Act provides that the term "security-based swap"[37] includes, in relevant part, swaps based on "a single security... including any interest therein or on the value thereof."[38] Perpetual contracts on NMS stocks meet both portions of these statutory definitions. With respect to the swap definition, perpetual contracts do not have a delivery date and instead include a funding rate mechanism that is designed to keep the price of the perpetual contract in line with the price of the underlying. This funding rate mechanism requires the exchange of periodic payments

34 7 U.S. Code § 1a(47).

35 Id.

36 Id.

37 15 U.S. Code § 78c(a)(78).

38 Id.

between buyers and sellers based on the delta between the value of the perpetual contract relative to that of the underlying, thereby transferring risk associated with changes in the price of the underlying without conveying an ownership interest in the underlying itself. And since NMS stock perpetual contracts would be based on a single security, such contracts are classified as security-based swaps subject to the SEC's exclusive jurisdiction.

Not only is this the best reading of the statute, it also makes sense from a practical perspective. NMS stock perpetual futures are intended to be a capital efficient vehicle to provide exposure to the underlying equity security and would compete with trading in the underlying on national securities exchanges regulated by the SEC. Allowing such products to trade on CFTC-regulated DCMs would therefore allow equity products to trade outside of the regulatory perimeter of the agency that Congress picked to regulate securities markets. MEMX does not object to the Commissions providing regulatory clarity on the treatment of NMS stock perpetual futures, particularly as such products have already begun trading outside of the U.S. However, the Commissions should not do so in a way that would make the CFTC, an agency that currently has no authority over securities markets, the *de facto* regulator of such markets as CFTC-regulated DCMs look to trade even more products.

Nor do we believe the fact that such products would be subject to the Commissions' joint jurisdiction would solve this issue. Under existing rules, CFTC-regulated DCMs may notice register with the SEC.[39] Such notice-registered DCMs would continue to be primarily regulated by the CFTC, and the SEC's role would be limited as proposed rules filed by such

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[39] 17 CFR § 240.6a-4.

DCMs would generally be immediately effective under the Exchange Act and SEC rules.[40] MEMX supports innovation in securities products and believes the Commissions should take necessary steps to ensure that activity in such products is not offshored. However, this should not come at the expense of a consistent regulation by our nation's securities regulator, i.e., the SEC, which is better positioned to make the decisions necessary to both support innovation and to ensure that U.S. investors and the broader market are protected. Any decision to the contrary would effectively create a dual-track regulatory structure where market operators can effectively opt out of any meaningful SEC oversight based on the label it has chosen to apply rather than the economic substance of the product. This would have significant repercussions for the securities markets that go far beyond this product.

Moreover, without some intelligible limiting principle, it is easy to see how allowing this treatment would further invite additional regulatory encroachment. For example, if a standard securities product could be deemed a security future if classified as such by a DCM, then options on such security future would *also be* a security future product.[41] Since NMS stock perpetual contracts are designed to mirror pricing of the underlying equity, such options would be a direct replacement for existing options products traded on U.S. options exchanges. So not only would this reading be inconsistent with the statutory text, it would

40 17 CFR § 240.19b-7.

41 The term "security futures product" means a security future or any put, call, straddle, option, or privilege on any security future.

have the potential to create an exception that swallows the rule, replacing Congress's reasoned judgment about allocation of regulatory authority between the Commissions.

Indeed, MEMX has observed that certain CFTC-regulated DCMs have already begun offering event contracts on securities that mirror existing options contracts without registering with the SEC as a national securities exchange or complying with related rules.[42] Rather than provide needed clarity, allowing products without a clear futures component to trade as security futures is likely to invite further gamesmanship outside of the regulatory structure dictated by Congress. Such decisions are not for the Commissions to second guess, and the agencies should instead focus on ensuring that there is a clear path to offering innovative products within the ambit of the federal securities laws.

Given the above, MEMX believes that any perpetual contracts on NMS stocks should be listed and traded by national securities exchanges registered with the SEC. Any other treatment would rewrite nearly a century of decisions by Congress and expand the jurisdiction of the CFTC into securities markets far beyond its core competencies or authority. Legal certainty is important for innovation, and we appreciate the Commissions' desire to establish clear rules of the road for market participants. However, clarity alone is insufficient. Reading statutory text in a manner that expands the jurisdiction of one regulator at the expense of the other would be unprecedented and unwise. Because the products at issue here are security-based swaps that are designed as an alternative vehicle to invest in

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[42] For example, Kalshi has self-certified contracts on the price of the S&P500 and Nasdaq-100 indexes that are similar to existing index option products.

U.S. equity securities, they should trade pursuant to the jurisdiction of the regulator that Congress chose to regulate the securities markets, subject to all of the relevant investor protection guardrails that the SEC has determined appropriate for that market.

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MEMX thanks the Commissions for the opportunity to provide comments on the statutory definition of swap and security-based swap. As the Commissions explain, these statutory definitions were adopted in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Title VII”),[43] which “established a comprehensive regulatory framework for swaps and security-based swaps.”[44] However, while these statutory provisions have now been around for some time, their application to new and innovative derivatives products has been challenging and the resulting uncertainty has made it more difficult for market participants to bring such products to market. As a national securities exchange that has been working on offering products being considered in this release, we encourage the Commissions to continue to work together to resolve these questions. At the same time, and as discussed above, it is important that the Commissions ensure that any interpretations they adopt following this request for comment are in line with statutory requirements and provide for appropriate investor protection guardrails.

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43 Public Law 111-203, 124 Stat. 1376 (2010), *available at* https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

44 Request, supra note 1, at 37874.

Sincerely,

/s/ Adrian Griffiths

Adrian Griffiths

Head of Market Structure