Jonathan Marcus
Senior Managing Director and General Counsel
Legal Department

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VIA ELECTRONIC SUBMISSION

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

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F. Street N.E.
Washington, DC 20549-1090

Re: Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance
RIN 32358-AN79
File Number S7-2026-21

Dear Mr. Kirkpatrick and Ms. Countryman,

CME Group Inc. ("CME Group") appreciates the opportunity to provide our comments on the request for comment ("RFC")[1] jointly issued by the Commodity Futures Trading Commission ("CFTC") and Securities and Exchanges Commission ("SEC," together with the CFTC, the "Commissions"). CME Group supports the Commissions' objective "to draw clearer regulatory lines with respect to innovative products that may implicate both SEC and CFTC regulatory interests"[2] under the respective statutes they each administer – the Commodity Exchange Act ("CEA") for the CFTC and the Securities Exchange Act of 1934 ("Exchange Act") and other federal securities laws for the SEC. The financial markets benefit from well-reasoned actions by the Commissions to provide regulatory clarity on when and how the CEA and federal securities laws apply to products that have elements of both derivatives and securities, where legal uncertainty exists under the established definitions used to legally classify derivatives.

I. <u>Background on CME Group and CME Group Exchanges</u>

CME Group is a corporate holding company that owns and operates multiple futures exchanges registered as designated contract markets, one of which is also a clearing house registered as a derivatives clearing organization. Throughout its history, CME Group's exchanges – Chicago Mercantile Exchange ("CME"), Chicago Board of Trade ("CBOT"), New York Mercantile Exchange ("NYMEX) and the Commodity Exchange ("COMEX") (collectively, "CME Group

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[1] Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance, 91 FR 37873 (June 24, 2026).

[2] 91 FR 37873.

Exchanges") – have participated in the major developments that form the foundation of today's futures industry. The CME Group Exchanges led the expansion of exchange markets beyond agricultural futures to futures on physical commodities such as energy commodities (NYMEX) and metals (NYMEX and COMEX) and the expansion of the markets beyond futures on physical commodities to a wide array of financial futures, such as futures on Eurodollars and sovereign fiat currencies (CME) and U.S. Treasury securities (CBOT and CME). This product innovation is a continuing arc, reflected for example, in CME's listing of bitcoin futures in 2017, its recent listing of cash-settled single stock futures, and announced plans for CME to list futures on compute power. CME Group devotes significant time and resources developing new products and taking care to comply with applicable regulatory requirements, while remaining committed to offering efficient, competitive liquid markets for our core futures and options offerings relied upon by businesses globally for price discovery and risk management.

CME Group has also been at the forefront of the most profound technological shifts that have shaped the modern marketplace. CME Group has harnessed technological innovation as a driving force for our success. CME launched the first electronic trading platform for futures, which paved the way for the modern derivatives system. CME, in its capacity as a derivatives clearing organization, uses state of the art technology for straight through processing of executed trades to clearing, to monitor risks associated with cleared positions and to run its daily and intra-day clearing settlement cycles for novated trades, which involve billions in margin and settlement exposure payment flows daily.

II. General Comments

The RFC is framed as a reevaluation of the statutory definitions for the legal classifications of derivatives as "swaps" and "security-based swaps" and as a consideration of "alternative compliance." The RFC and the questions it poses, though, implicate broader issues as to how those definitions interrelate with the legal classifications of derivatives as futures contracts or options and the statutory authorities available to the CFTC and SEC to provide for alternative compliance.

The RFC also suggests that technology-driven changes to market operations are relevant for assessing the proper legal classification of derivative products. The Commissions should not conflate product innovation with the evolving ways in which certain markets seek to offer derivative products. The CEA and Exchange Act set out definitions for different types of derivatives and assign jurisdiction between the CFTC and SEC over those products that have elements of either derivatives or securities or both based on the legal classification of the derivative, not based on how the product is traded. The Commissions do not have the statutory authority to treat product definitions as malleable for the purpose of shifting a product covered by one definition into a different set of regulatory requirements that attach to another product classification.

Given the significant issues embedded within the RFC, we first provide general comments including some historical context and background, which inform our specific responses to the RFC questions.

A. Overlapping Regulatory Interests between the CFTC and SEC are Not New

Issues of jurisdictional overlap between the CFTC and SEC are not new. The Commissions have grappled with jurisdictional overlap issues for decades. Congress, in turn, has amended the CEA and Exchange Act from time to time over the course of the years to clarify the jurisdictional boundaries or give the Commissions the tools to address the appropriate regulatory treatment for products with elements of both derivatives and securities that may defy ready classification under the statutory definitions Congress has provided.

The Commissions faced jurisdictional disputes soon after Congress enacted the Commodity Futures Trading Commission Act of 1974, which created the CFTC and vested it with "exclusive jurisdiction" over futures on commodities under a newly expanded "commodity" definition in CEA Section 1a. Disputes arose over whether futures exchanges or securities exchanges could list futures or options on exempted securities subject to the oversight of their regulator. An early example involved Government National Mortgage Association ("GNMA") certificates .Following CFTC approval in the 1970s of the CBOT's plans to list futures on GNMAs, which are exempted securities under the Exchange Act, the SEC asserted that trading the contract might be illegal, although it did not take formal action against the CBOT when it launched trading.

When the SEC approved plans of the Chicago Board Options Exchange ("CBOE") to list options on GNMA certificates for trading, the CBOT in 1981 petitioned the Seventh Circuit Court of Appeals to set aside the SEC's approval order. The CBOT successfully argued that GNMA certificates are commodities under the CEA definition, bringing the options within the CFTC's exclusive jurisdiction. As this dispute was pending, the respective Chairs of the CFTC and SEC at the time, Philip Johnson and John Shad, negotiated the "Shad-Johnson Accord" to delineate which agency regulated these types of securities-related derivatives. Although under the terms of the accord the SEC would have jurisdiction over GNMA options, that did not affect the outcome of the case because Congress had not enacted the accord into law. The Seventh Circuit disregarded the accord. Applying the statutory provisions as they existed, the court held that GNMA certificates were commodities, the CFTC had exclusive jurisdiction over GNMA options, and the SEC lacked the authority to authorize CBOE to list them for trading.[3] The case is significant because it confirms that courts will not permit the CFTC or SEC to "enlarge or relinquish their statutory jurisdictions" or "reapportion their jurisdictions in the face of a clear, contrary statutory mandate."[4]

The Shad-Johnson Accord nonetheless represents a milestone of cooperation between the two Commissions, in that Congress enacted the terms of the accord into law via amendments to the Exchange Act in October 1982[5] and amendments to the CEA via the Futures Trading Act of

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[3] *Bd. of Trade of City of Chicago v. SEC*, 677 F.2d 1137 (7th Cir. 1982), *vacated as moot on other grounds sub nom*., *SEC v. Bd. Of Trade of City of Chicago*, 459 U.S. 1026 (1982).

[4] *Id.,* 677 F.2d at 1142 n. 8.

[5] Pub. L. No. 97-803 (Oct. 13, 1982),

1982.[6] Those amendments vested the CFTC with jurisdiction over futures and options on futures on exempted securities including GNMA certificates and on broad based indices of non-exempted securities; the amendments vested the SEC with jurisdiction over options on all securities and securities indices. The Chairs were unable to agree as to which Commission should regulate futures or options on futures on individual non-exempt securities or a narrow-based index of such securities, and the statutory amendments at the time banned such products from trading.

Although the Shad-Johnson Accord provided significant legal certainty, it addressed the types of products known or anticipated at the time and did not resolve all jurisdictional controversies, which continued. One important dispute involved the SEC's approval in 1988 of the filings of three securities options exchanges to list "stock index participation" instruments. The index participations were designed as cash-settled products with "indefinite duration" based on the value of a basket (index) of securities, but which also notably provided for quarterly or monthly scheduled settlement dates where longs could "cash out" their positions valued against the current index value. The SEC took the position that the index participations were securities and not futures. The CME and CBOT petitioned the Seventh Circuit Court of Appeals challenging the SEC's approval orders. The Circuit Court concluded that the index participations were futures contracts subject to the CFTC's exclusive jurisdiction, citing the periodic settlement dates as the determinative factor for classifying the instruments as futures.[7]

Hybrid instruments that are securities whose value or return is tied to the market price of another asset or commodity also raise jurisdictional issues. When Congress enacted the Futures Trading Act of 1992 it gave the CFTC new authority in Section 4(c) to exempt transactions from CEA requirements, subject to certain conditions including making certain public interest determinations. Congress provided this exemptive tool, in part, so the CFTC could provide regulatory relief, within guardrails, for securities with embedded commodity derivative features as well as for the then emerging institutional OTC markets for swaps where market participants faced the risk that their transactions could be invalidated as illegal off-exchange futures. Pursuant to its new authority, the CFTC adopted its Part 34 Regulations exempting hybrid equity or debt securities (and depository instruments) with one or more commodity-dependent components that have payment features similar to commodity futures or commodity option contracts or combinations thereof from regulation as futures, subject to meeting prescribed conditions.

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[6] Pub. L. No. 97-444 (Jan. 11, 1983).

[7] *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, at 546 (7th Cir. 1989). This periodic settlement date feature distinguishes the index participation products in a material way from the perpetual contracts the CFTC recently approved as futures contracts, which CME Group is challenging. The settlement date structure effectively operated as a series of expiration dates, and as we explain in our complaint having an expiration date is an essential defining element of a futures contract. Another material difference between the index participations and the perpetual contracts is that the index participations did not have any funding mechanism to force market prices to a spot value.

In 2000, as part of the Commodity Futures Modernization Act ("CFMA") amendments,[8] Congress added Section 2(f) to the CEA to provide a statutory exclusion for hybrid instruments that are predominantly securities, which is available as an alternative to the relief provided under the CFTC's Part 34 Regulations. The CFMA also amended the CEA and Exchange Act to lift the ban described above on trading of futures and options on futures on a single non-exempt security or narrow-based index of such securities and established a structure for joint CFTC and SEC jurisdiction over such products as security futures products.[9]

The more recent history reflects ongoing cooperation between the two Commissions to address areas where their respective regulatory interests converge due to the nature of the products. The CFTC and SEC entered into a Memorandum of Understanding ("MOU") in March 2008 to establish an approach for addressing novel derivatives products that "may reflect elements of both securities and commodity futures or options, and may impact the regulatory mission of each agency."[10] The CFTC quickly followed to exercise its exemptive authority under CEA Section 4(c) to permit options on the shares of exchange-traded funds ("ETFs") that passively hold physical commodities to be traded on securities exchanges as options on securities and futures on such ETF shares to be traded on exchanges as security futures.[11] The CFTC did not take a position on whether such ETF shares should be considered a security or as a non-security commodity for CEA purposes. As shares of an ETF would be a type of security under the federal securities laws, the SEC could regulate options on ETF shares as securities and the CFTC and SEC jointly could regulate futures on the ETF shares as security futures; that division of authority over products that contained elements of both securities and commodities provided the basis for the CFTC to determine that it could exercise its exemptive authority under these circumstances consistent with the public interest.

The CFTC and SEC next recommended legislation that would provide a process for addressing new products over which they each have a regulatory interest and for expedited judicial review of jurisdictional matters regarding new products in a joint report they issued in 2009.[12] They developed the report at the request of the then-Administration to "identify 'all existing conflicts in statutes and regulations with respect to similar types of financial instruments and either explain

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[8] Pub. Law No. 106-554 (Dec. 21, 2000).

[9] These are principally set out in CEA Section 2(a)(1)(C) and in Exchange Act Sections 6(g), 15(b)(11) and 19(b)(7).

[10] *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* (March 11, 2008); *Addendum to CFTC – SEC Memorandum of Understanding Regarding Coordination in Areas of Common Regulatory Interest: Principles Governing the Review of Novel Derivative Products* (Mar. 11, 2008).

[11] *See, e.g.*, *CFTC Exemptive Order for SPDR Gold Futures Contracts* (May 30, 2008); *CFTC Order Exempting the Trading and Clearing of Certain Products Related to SPDR Gold Trust Shares* (April 28, 2008) (permitting options on SPDR Gold Trust Shares to be listed by securities exchanges and cleared by Options Clearing Corporation as options on securities).

[12] A Joint Report of the SEC and the CFTC on Harmonization of Regulation (Oct. 16, 2009).

why those differences are essential to achieve underlying policy objectives with respect to investor protection, market integrity, and price transparency or make recommendations for changes to statutes and regulations that would eliminate those differences.'"[13] To inform their recommendations, the Commissions convened a meeting of industry experts, who discussed past disagreements between the CFTC and the SEC regarding which Commission had jurisdiction over particular products when there is uncertainty as to the proper classification of products with elements of both securities and derivatives. The report noted that "[t]he lack of legal certainty is costly and confusing to market participants, and it can impede innovation, undermine competition."[14]

To address these concerns, the Commissions jointly called for (i) a review process to ensure that the Commissions resolve any jurisdictional dispute against a firm timeline and (ii) legal certainty with respect to the agencies' authority over products touching each agency's statutory interests when exempted by the other agency.[15] Congress acted upon the report's recommendations by including Sections 717 and 718 in the Dodd-Frank Wall Street Reform and Protection Act of 2010 ("Dodd-Frank Act" or "Dodd-Frank"), which established comprehensive regimes for the CFTC to regulate swaps and the SEC to regulate security-based swaps.[16] We discuss Sections 717 and 718 of Dodd-Frank more below.

To set out the statutory boundaries for each Commission's jurisdiction over OTC traded derivatives swept into the swaps regulatory regimes, Dodd-Frank added the legal classification definitions to the CEA and Exchange Act that are the subject of this RFC, and authorized the CFTC and SEC to further define those terms jointly via rulemaking. Under that allocation of jurisdiction, Congress gave the CFTC exclusive jurisdiction over instruments that meet the "swap" definition, the SEC jurisdiction over instruments that meet the "security-based swap" definition, and the CFTC and SEC joint jurisdiction over swaps that are "mixed swaps." To reinforce the jurisdictional lines, the Dodd-Frank Act amended the CFTC's exemptive authority under CEA Section 4(c) and the SEC's exemptive authority under Exchange Act Section 36 to prohibit each Commission from exempting an instrument covered by the statutory swap definition from that definition. Relatedly, Section 712(b)(2) of Dodd-Frank explicitly states that nothing in Title VII of Dodd-Frank confers jurisdiction on the SEC "to issue a rule, regulation, or order providing for oversight or regulation of … swaps" "unless specifically provided."[17]

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[13] *Id*. at 1, quoting from the Administration's Financial Regulatory Reform – A New Foundation: Rebuilding Financial Supervision and Regulation (June 17, 2009) at 50-51.

[14] *Id*. at 26.

[15] *Id*. at 87.

[16] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[17] *Id.*

The CFTC and SEC have continued their cooperative efforts post-Dodd-Frank. In July 2018 they updated the 2008 MOU[18] acknowledging that "enhanced coordination and cooperation concerning issues of common regulatory interest is necessary in order to foster market innovation and fair competition and to promote efficiency in regulatory oversight."[19] We also highlight the MOU the CFTC and SEC signed in March 2026 "[t]o achieve the goals of closer harmonization in areas of common regulatory interest," by striving "subject to applicable law, to clarify, coordinate, and harmonize policies and practices wherever feasible and relevant."[20]

Under the statutory construct in place, the CFTC and SEC regulate different segments of the derivatives markets involving securities. As a result, linkages across the CFTC-regulated markets and SEC-regulated markets are inevitable, highlighting the need for regulatory cooperation and coordination between the Commissions as they each perform their oversight responsibilities. This, too, is not new. On October 19, 1987, stock prices on the New York Stock Exchange fell by more than 20%, at the time the largest single day market decline since the Great Depression. That event was followed by several days of extreme market volatility. The Presidential Task Force convened to determine the causes found that institutions engaged in cross-market trading were caught in a series of correlated selling triggered by price declines, and its report highlighted the role of algorithmic trading by large institutions in the stock and stock index futures markets.[21] The Presidential Task Force recommended in its report that a single agency should coordinate cross-market trading issues, suggesting that the Federal Reserve Board would be "well qualified" to do so. Others responded by proposing merger of the CFTC and SEC, while the President in 1990 recommended that the CFTC's jurisdiction over stock index futures should be moved to the SEC. Congress declined to act on those proposals and instead when it enacted the Futures Trading Act of 1992 amendments it gave the Federal Reserve Board limited authority over margins for stock index futures.[22]

As a further response to the 1987 stock market crash, in 1988 then President Ronald Reagan established pursuant to Executive Order the President's Working Group on Financial Markets as a forum for interagency coordination on regulatory matters that may affect the financial markets. Over the years, this working group, comprised of the Chair of the Federal Reserve Board,

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[18] *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* (July 11, 2018).

[19] *Id.*at 1.

[20] *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* (March 11, 2026).

[21] Report of Presidential Task Force on Market Mechanisms (Jan. 1988).

[22] The Federal Reserve Board delegated its limited authority over stock index futures margins to the CFTC in 2001. *See* Letter from Jenniefer J. Johnson, Secretary of the Board, Federal Reserve Board, to James E. Newsome, Acting Chairman, CFTC, and Laura S. Unger, Acting Chairman, SEC (Mar. 6, 2001).

Secretary of the Treasury and the Chairs of the CFTC and SEC, has proven effective for developing consensus views of its members on important policy matters.

More generally, over the years Congress has added provisions to the CEA and federal securities laws directing the CFTC and SEC to coordinate on how they implement their respective regulatory regimes as appropriate to minimize the imposition of duplicative or inconsistent regulatory obligations on the markets and market participants. A notable example is the Dodd-Frank provisions directing the CFTC and SEC to jointly adopt many of the rules required to implement the statutory schemes for regulating swaps and security-based swaps, including the rules to further define swap product definition terms.[23]

The MOUs between the CFTC and SEC described above also represent the agencies' recognition that when interconnections between the respective markets they each regulate implicate both of their regulatory interests, the appropriate regulatory response is cooperation and coordination.

B. Derivatives Legal Classifications Dictate Regulatory Treatment

1. Statutory Definitions Matter

The statutory allocation of jurisdiction between the CFTC and SEC over a product that has both derivatives and securities elements hinges on its legal classification. The legal classification of a derivative without any securities element is also important for determining how the product will be regulated under the CEA, and that classification can in turn have cross-statutory implications for classification of an instrument with the same structure that has a security or security index as the underlier. Where the legal classification of a type of derivative product is established by statute, that classification should prevail.

We understand that certain derivative products may not fit cleanly within product classification definitions used in the statutes to allocate jurisdiction between the CFTC and SEC, and such products are properly the focus of the Commissions' attention to provide legal certainty and clarity. Where the application of a definition to a particular derivatives structure is clear and well-established – such as the treatment of binary options as options – the Commissions should adhere to the established legal precedent. To do otherwise will cause significant, unnecessary confusion, not result in more clearly drawn regulatory lines, and could have ramifications far beyond the CFTC's and SEC's administration of their respective statutes. Upending established classifications of derivatives can create confusion as to how other laws that use terms similar to the derivatives classifications in the CEA or Exchange Act apply or how other regulators should apply statutory authority they have with respect to derivatives, such as the Federal Reserve Board's authority to establish margin requirements for securities including options on securities

[23] As an earlier example, the 2000 CFMA added paragraph (c) to CEA Section 4d (now CEA Section 4d(e) and paragraph (c)(3)(B) to Exchange Act Section 15, to direct each Commission, in consultation with the other , to issue such rules, regulations, or orders to avoid duplicative or conflicting regulations applicable to firms that are fully registered as future commission merchants and broker-dealers involving the application of certain provisions involving security futures products.

or its limited margin authority with respect to futures on broad based stock indices. It could also have unnecessary, adverse consequences for the compliance programs and client documentation that market participants have developed for their derivatives trading activities on the basis of the understood legal meanings of the product definitions.

In short, the statutory definitions establishing the legal classifications for derivatives matter and should be applied consistently.

2. Definitions Under the CEA and Their Significance Within the CEA Framework

The CEA's approach for regulating markets for derivatives varies based on the legal classification of the derivative. The important classifications are (i) futures contracts, (ii) options on futures contracts, (iii) options on commodities, and (iv) swaps.

Futures and Options on Futures. The concept of a futures contract is core to the CEA. The CEA does not include the term "futures contract" in Section 1a of the CEA – the *Definitions* section – but it ubiquitously and consistently uses the following language to define futures contracts throughout the CEA: "contracts of sale of a commodity for future delivery."[24] Further, Section 1a contains the definitional elements of "contracts of sale of a commodity for future delivery." The CEA in Section 1a defines "contracts of sale" as "sales, agreements of sale, and agreements to sell" and "future delivery" to exclude from the meaning of the phrase "any sale of a cash commodity for deferred shipment or delivery." (The latter is the basis of the forward contract exclusion that excludes from regulation as futures bilateral commercial transactions where the parties intend to deliver the commodity sold on a deferred basis and delivery routinely occurs between the parties.) These definitional terms delineating the boundaries of what is a futures contract have been part of the statute dating to the Grain Futures Act of 1922, which regulated exchanges offering futures on a list of agricultural commodities.

Futures contracts are a type of exchange-listed contract. They are a promise to buy or sell a quantity of a commodity on a prescribed delivery date in the future. The delivery or expiry date is an essential element that must be present for a contract to be a futures contract. Another defining feature of futures contracts is that their prices reflect changes in the expected future price at expiration of the referenced asset, where gains tied to market value changes on one side are symmetrically matched to losses on the other side of the trade. At expiration, depending on the contract design, a futures contract held open to expiration may be settled by physical delivery of the underlying commodity or by payment of a cash amount representing the difference between the original contract price and the final settlement price.

Futures are typically standardized but standardization is also typically a feature of other derivatives that DCMs list for trading because standardization facilitates centralized auction markets and centralized clearing. Thus, the fact that a contract is standardized does not make the contract a futures. Nor does a contract have to be standardized as a condition to be legally

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[24] Most notably referred to in the CEA's grant of exclusive jurisdiction to the CFTC over "contracts of sale of a commodity for future delivery" in CEA Section 2(a)(1).

classified as a futures contract. The fact that an exchange-listed contract is centrally cleared also does not make the contract a futures contract, because all CFTC regulated derivatives listed by a DCM – swaps and futures alike – must be centrally cleared.

As discussed further below, the CFTC has plenary authority under CEA Section 4c(c) to regulate options, which has been read to apply to options on futures as well as options on commodities. The CFTC adopted its Part 33 Regulations pursuant to this authority to set out rules that apply to options on futures listed on contract market exchanges. In practical effect, subject to the additional conditions set out in Part 33, options on futures are generally grouped together with futures contracts for purposes of how they are regulated under the CEA and CFTC regulations.

Futures and options on futures may only be traded on or subject to the rules of an exchange that is a designated contract market ("DCM") (or a foreign board of trade). The exchange-trading requirement for futures has been a constant requirement since the futures markets were first subject to federal regulation, starting with the Grain Futures Act of 1922. The exchange trading requirement has been carried forward under successive statutory amendments, including the Commodity Exchange Act of 1936, the Commodity Futures Trading Commission Act of 1974, the 2000 CFMA amendments, and the 2010 Dodd-Act amendments. Exchanges offer centralized public markets, open generally to market participants. All transactions occurring in a DCM's listed products must be centrally-cleared by a derivatives clearing organization.

Commodity Options. Although today, post-Dodd Frank, commodity options are covered by the CEA's swap definition, we describe this classification separately because they are also subject to the CFTC's plenary authority to regulate options trading set out in CEA Section 4c, which pre-dates Dodd-Frank. The Commodity Exchange Act amendments in 1936 banned trading of options on the agricultural commodities listed in the statute. When Congress amended the CEA in 1974, it continued the ban on agricultural options (which was later lifted with the Futures Trading Act of 1982) but gave the CFTC plenary authority to regulate options on other commodities. Notably, the CEA's definition of "option" adopted in 1936 encompasses more than traditional put or call options, in that it covers "an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call", 'advance guaranty', or 'decline guaranty'."

Securities are commodities for CEA purposes and prior to codification of the Shad-Johnson Accord the Seventh Circuit in 1982 held that the CFTC regulated options on the exempted securities (GNMA certificates) that were the subject of the litigation. Following codification of the accord in the early 1980s, options on all securities or on a group or index of securities are securities under the Exchange Act definition of the term in Section 3(a)(10) and thus are regulated by the SEC.

We recount this abbreviated historical background on the CEA's treatment of options in part because it illustrates the CEA's bifurcated approach for treating futures and options as two distinct, nonoverlapping, classifications of derivatives. An option may overlay a futures contract, but an option in and of itself is not a futures contract. This history and the history discussed in the prior section also underscore that the option classification is important for delineating jurisdiction between the CFTC and SEC.

Swaps. Congress added the swap product definitions to the CEA and Exchange Act with the 2010 Dodd-Frank Act amendments. Prior to that, institutional trading of OTC swaps largely occurred without regulation under the CEA, first pursuant to the CFTC's exercise of its Section 4(c) exemptive authority to adopt regulations to exempt swap transactions between eligible contract participants from regulation as future contracts and then pursuant to broad exemptions added to the CEA with the 2000 CFMA amendments. Following the 2008-2009 Great Recession, the Dodd-Frank Act unwound those exemptions and replaced them with the statutory provisions that establish the comprehensive regimes that exist today for regulating swaps and security-based swaps.

The swap definition that Dodd-Frank added to the CEA is very broad. As provided in CEA Section 1a(47), the swap definition covers a wide range of derivative structures, along with various exclusions from the term. The term covers:

(i) Puts, calls, caps, floors, collars or similar options on the value of one or more interest rates or other rates, currencies, commodities, securities (yet options on securities are also excluded from the definition), instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;

(ii) Contracts for the purchase, sale, payment or delivery (other than payment of a dividend on an equity security) that are dependent upon the occurrence, nonoccurrence or extent of occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence;

(iii) Executory contracts for the fixed or contingent exchange of one or more payments based on the value or level of one or more interest rates, other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, 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 in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred;

(iv) Contracts that are or in the future become commonly known to the trade as swaps;

(v) Security-based swap agreements that meet the definition of "swap agreement" under Section 206A of Gramm-Leach-Bliley Act, a material term of which is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein; or

(vi) Any combination or permutation of the foregoing types of contracts, including any option thereon.

The element of the definition described in (i) covers options but as explained above the CEA also grants the CFTC separate plenary authority to regulate options (other than options on securities). The CFTC determined to regulate most commodity options under the swap regime, with a limited carve out for bilateral trade options.

The CEA's swap definition contains several exclusions. Among others, the definition excludes a security-based swap, other than a mixed swap. The definition also excludes an option on a security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof that is subject to the Securities Act of 1933 ("Securities Act") and the Exchange Act. This exclusion recognizes that such securities options were already regulated as securities under those statutes when Dodd-Frank was enacted, under established requirements. The effect of the exclusion is that options on securities are not swaps or commodity options under the CEA and are not security-based swaps under the Exchange Act and are instead subject to separate regulatory requirements under the Securities Act and Exchange Act and the SEC's rules thereunder. The definition also excludes futures and options on futures. When a DCM lists a contract that meets the legal classification of a futures contract as a futures contract or an option on such a contract, the exclusion protects the DCM from having the instrument also classified and regulated as a swap, to avoid duplicative regulation of the instrument under the swaps regulatory regime.

The CEA's regime for regulating swaps is comprehensive and imposes a range of requirements of general applicability to swap activities, while also imposing certain obligations that are specific to institutional trading of swaps. On the latter, the CEA permits swaps transactions to occur as OTC bilateral transactions or on swap execution facilities but limits such transactions to persons that are eligible contract participants, and gives the CFTC the authority to mandate that certain types of swaps must be centrally cleared or traded on a swap execution facility (or a DCM). The CEA also requires that uncleared swaps—which can only legally occur in the institutional swap markets—must be reported to a swap data repository.

Notably, the CEA allows DCMs to list swaps for trading, where market participants may trade such products without the status of an eligible contract participant, but transactions must be centrally cleared even if clearing would not be required for the type of swap if transacted in the institutional swap markets.

Certain of the swaps requirements imposed by the CEA apply to activities in both the institutional only and public exchange markets, including public reporting of swaps transactions, customer funds segregation requirements for swap transactions that are centrally cleared, and registration and regulation of dealers and major participants engaged in swaps trading above thresholds the CFTC has prescribed.

3. Derivatives Legal Classifications Dictate Allocation of Jurisdiction Between the CFTC and SEC Over Securities-Related Derivatives

Just as the legal classification of a derivative dictates how a derivative is regulated within the CEA framework, for instruments with both derivatives and securities characteristics, the legal classification dictates whether the product is regulated by the CFTC or SEC or by neither Commission or both. As laid out in the CEA and Exchange Act, the following regulatory treatment attaches to different classifications of instruments with both derivatives and securities characteristics:

- A futures contract or option on a futures contract on an exempted security or on a broad-based index of equity or other non-exempted securities is subject to the CFTC's exclusive jurisdiction, whereas a futures contract on an individual non-exempted security or narrow-based index of such securities, including any interest therein or based on the value thereof, is jointly regulated by the CFTC and SEC as a security future.

- An option on a futures contract on an individual non-exempted security or narrow-based index of such securities, including any interest therein or based on the value thereof, is a security futures product that the CFTC and SEC will jointly regulate, but only once they lift what was supposed to be a short term (3-year) ban on exchanges listing such products following the 2000 CFMA amendments that established the structure for joint regulation of security futures products.

- An option on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof) is a "security" under the Exchange Act definition of the term and is subject to the SEC's jurisdiction. The options clause element of the "security" definition in Exchange Act Section 3(a)(10) refers to a "put, call, straddle, option, or privilege" on the underlying interests listed. Although this phrase does not exactly track the CEA's option definition, the inclusion of "option" in sequence after "put" and "call" indicates the definition covers more than traditional put or call option structures.

- With respect to swaps, the Dodd-Frank Act amendments generally but not exactly follow the jurisdictional lines drawn for futures and preserved the SEC's pre-existing authority over securities options. The CFTC regulates swaps linked to a broad-based index of non-exempted securities or to Treasury securities (or certain other exempted securities) as swaps, but as noted options on securities are excluded from the swap definition.

- The SEC, in contrast, regulates swaps linked to an individual security, other than Treasury securities or certain other exempted securities, or to a narrow-based index of such securities as security-based swaps including in each case any interest therein or based on the value thereof. The SEC also regulates as security-based swaps a swap based on "the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer."[25]

[25] Exchange Act Section 3(a)(68)(A)(ii)(III).

- The CFTC and SEC jointly have jurisdiction over mixed swaps. The definition that Dodd-Frank added for this term to the CEA and Exchange Act is identical.[26] A mixed swap is a swap that meets the security-based swap definition in the Exchange Act, and which is also “based on the value of 1 or more interest or other rates, currencies, commodities, instruments of indebtedness, indices, quantitative measures, other financial or economic interest or property of any kind (other than a single security or a narrow-based security index), or the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence.” The definition, though, excludes an event covered by the “occurrence, nonoccurrence, or extent of the occurrence” element in the Exchange Act’s security-based swap definition described in the prior bullet point.

4. <u>Legal Classification Interpretive Issues</u>

We understand that the swap product definitions present some interpretive issues and the breadth of the CEA’s swap definition may overlap with other definitions, raising issues with respect to the interplay of certain definitions. But the swap definition is broad whereas the futures definition is not and many instruments covered by the swap definition do not have the characteristics to be classified as futures and thereby be excluded from the swap definition. In that regard, as we explain in our complaint challenging the CFTC’s approval of perpetuals as futures, the perpetuals at issue there are swaps and cannot be classified as futures because they lack the essential defining element of having a fixed expiration date and use a funding rate mechanism designed to negate any futurity.

The swap definition covers other types of derivatives as well that are outside the futures contract definition, including options, binary options based on the value of an underlying asset and binary event contracts based on whether a single event has occurred. As explained above, the CEA treats the options classification and futures classification as non-overlapping. Thus, if a derivative’s structure dictates it be classified as an option, it is an option and cannot also or instead be classified as a futures contract. An option, though, as noted, may overlay a futures contract.

Traditional options on commodities are covered by the first element of the swap definition and thus are subject to the CFTC’s exclusive jurisdiction to regulate as swaps or pursuant to its plenary authority over commodity options under CEA Section 4c(c).

With respect to binary options, it is important that the CEA’s “option” definition and the options clause in the Exchange Act’s “security” definition each covers more than traditional put and call options. Although the text of each does not match exactly, there is substantial overlap between the two in that they both cover puts, calls, options and privileges, providing room for the Commissions to interpret the provisions in a consistent manner. Such consistency is important given that the options classification defines an important jurisdictional boundary between the

[26] CEA Section 1a(49)(D) and Exchange Act Section 3(a)(68)(D), respectively.

CFTC and SEC with respect to derivatives based on securities. An instrument that is an option for CEA purposes cannot be treated as something else for SEC purposes and vice versa.

Both Commissions have long classified one type of non-traditional option structure as options for purposes of legally classifying the product within their respective statutes by designating contracts that provide for a fixed payout based on the price or value of an underlying asset as a type of option known as a binary option. The CFTC accepted the classification of contracts with this type of fixed payout feature as options when it approved the application of HedgeStreet, Inc. over 20 years ago, in 2004, to register as a DCM to list such contracts for trading.[27] Since then, multiple DCMs have submitted numerous product filings to the CFTC to list this type of contract as options and post-Dodd-Frank as binary option swaps.

The SEC likewise has approved product filings by national securities exchanges to list binary options on the price of an underlying security, treating such products as securities under the options clause.[28] As further confirmation that the legal status of these fixed payout contracts as options is settled, the Commissions have jointly issued an Investor Alert on Binary Options and Fraud, describing a binary option as "a type of options contract in which the payout will depend entirely on the outcome of a yes/not proposition," focusing on products where the yes/no proposition "relates to whether the price of a particular asset that underlies the binary option will rise or fall."[29]

When the underlying reference asset for a traditional option or a binary option is a non-security commodity, such as a bitcoin index, the contracts are subject to the CFTC's exclusive jurisdiction over commodity options and swaps. When the underlying reference is a security or security index, the contract is a security option and thus a security subject to the SEC's regulatory oversight and jurisdiction under the Exchange Act and other federal securities laws. When the underlying reference for a traditional option or binary option is the price of a futures contract, it likewise is not a futures contract and is an option, but because it is an option on a futures contract, it generally will be subject to the regulatory treatment that applies to exchange-listed futures contracts, as explained above.

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[27] The CFTC approved the application in February; Letter dated February 18, 2004, from Jean Webb, Secretary of the CFTC, to Gregory Robbins. As part of the application, HedgeStreet described its intention to offer European-style binary options on various economic indices. CFTC staff discussed the contracts' unique fixed payout feature in its memorandum analyzing and recommending approval of HedgeStreet's application for contract market designation, accepting the classification of the products as options. CFTC Division of Market Oversight Designation Memorandum to the Commission Recommending Approval of the Application of HedgeStreet, Inc. for Designation as a Contract Market (Feb. 10, 2004).

[28] NYSE American's Rules allow for the listing of Binary Return Derivatives, or ByRDs, which are cash-settled single stock options products. The SEC approved NYSE American's (then American Stock Exchange LLC) proposed rulemaking to list ByRDs in 2007. Securities Exchange Act Release No. 34-56251 (Aug. 14, 2007), 72 Fed. Reg. 46523 (Aug. 20, 2007).

[29] CFTC/SEC Investor Alert: Binary Options and Fraud, available at https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/fraudadv_binaryoptions.html

When a contract's binary fixed payout structure is a yes/no proposition tied to whether an event occurs (in contrast to what the underlying asset's value is on a certain date), we note that the contract was historically classified as an option. Specifically, pre-Dodd-Frank, the CFTC classified such contracts as a type of option, as far back as 1997 when it approved the application of the CBOT for designation as a contract market for European-style Single-Event PCS Catastrophe Insurance Options. Under the contract terms as approved, the holder of a single-event call option would receive a fixed payment of $10,000 when the settlement value of the underlying risk measure is greater than the exercise price and the holder of a single-event put option would receive a fixed payment of $10,000 when the settlement value is lower than the exercise price. CFTC staff specifically described the binary payout structure of the contracts in its memorandum to the Commissioners recommending approval of the contracts as options.[30] However, post-Dodd Frank, we understand that this type of contract structure would be covered by the second element of the swap definition specific to event contracts.

C. Changes or Desired Changes to Market Structure Are Not a Basis to Change The Legal Classification of a Derivative

The RFC states that "[f]inancial markets are evolving rapidly and becoming more interconnected through global technologies" and "[n]ew trading models, digital infrastructure, and onchain, automated systems are increasingly blurring traditional jurisdictional lines."[31] We recognize that technology-driven changes to market infrastructure may increase connections between markets or create market cross-over pressures on how markets would like to distribute their products, but we disagree that such changes blur traditional jurisdictional lines. The CEA and Exchange Act frameworks are unambiguous: it is the legal classification of a derivative product that determines how a product is regulated, not how the product is traded or how certain markets would like to offer it for trading.

Where changes to market infrastructure increase the connections between the markets the CFTC and SEC each regulate, the appropriate response, affirmed time and again, is for the Commissions to cooperate and coordinate with one another in carrying out their respective market oversight responsibilities, while respecting and preserving the statutorily-prescribed jurisdictional lines between them.

D. The Commissions Must Act in Accordance with their Prescribed Statutory Authorities

The RFC asks whether there are circumstances "in which compliance with one Commission's regulatory framework could appropriately satisfy substantially similar requirements of the other Commission," when "trading in economically related or functionally similar product classes

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30 CFTC Division of Economic Analysis Memorandum to the Commission Recommending Approval of CBOT Application for Designation as a Contract Market for Single-Event PCS Catastrophe Insurance Options (Dec. 8, 1997).

31 91 FR 37874.

implicates both SEC and CFTC regulatory interest," referred to in the RFC as "alternative compliance."[32]

We appreciate the Commissions' desire to encourage product innovation, but any proposal for alternative compliance must be anchored to the statutory provisions that each Commission is entrusted to administer. Alternative compliance cannot be achieved by changing product classification definitions beyond their statutory boundaries to move a derivative product from one classification to another to change how it is regulated or by mutual agreement to have one Commission shift its exclusive jurisdiction over a product to the other. The Commissions can engage in rulemaking, as they are considering in the RFC, to harmonize and streamline their rules, but they cannot adopt rules that are contrary to the statutes they each administer or that have the effect of re-writing those statutes. The Commissions can also coordinate in performing their respective oversight responsibilities where their jurisdictional interests overlap, under the frameworks of the MOUs established between them.

As described above, the Dodd-Frank Act also gave the Commissions certain statutory tools to promote legal certainty where products contain elements of securities and derivatives that implicate both agencies' respective jurisdictions via Sections 717 and 718 of Dodd-Frank. These tools do not provide an open-ended means for the Commissions to agree to shift jurisdiction from one to the other. We raise this point because we believe that SEC staff, acting pursuant to delegated authority, misapplied these provisions when it approved a rule filing by Nasdaq PHLX LLC ("Phlx") to list options on the Nasdaq Bitcoin index as securities. Bitcoin index options, though, are unequivocally commodity options subject to the CFTC's exclusive jurisdiction. The approval order is subject to the condition that the CFTC will exempt Phlx and the Options Clearing Corporation, which will clear the transactions, from requirements of the CEA and CFTC regulations on terms that grant the SEC with concurrent jurisdiction to regulate the bitcoin index options. The CFTC does not have the authority under CEA Section 4(c) to grant such an exemption but that aside, the SEC staff approval order is wrong on its own terms as a matter of law, for reasons that CME Group has set out in a petition it filed with the SEC to review SEC staff's approval order and set the order aside. The SEC granted the petition to review and the review process is pending.[33]

Staff's approval order reflects a fundamental misunderstanding of the scope of Dodd-Frank Sections 717 and 718, and the Commissions should not repeat that error in this rulemaking by reading those provisions to permit the agencies to opt out of exercising their exclusive jurisdiction or exercise jurisdiction that exclusively belongs to the other agency. Section 718 establishes a procedure for the CFTC and SEC to determine the status of "novel derivative products" that implicate the regulatory interests of both agencies. The process may be initiated by a person that has filed with one Commission a proposal to list or trade a novel derivative product that has elements of both securities and futures contracts, options on futures, or

[32] 91 FR 37876.

[33] The SEC issued an order granting CME's petition on July 29, 2026, and the review is pending, available at https://www.federalregister.gov/documents/2026/08/03/2026-15615/in-the-matter-of-nasdaq-phlx-llc-order-granting-petition-for-review-and-scheduling-filing-of.

commodity options. The process is initiated by concurrently providing a copy of the filing to the other Commission or by one Commission notifying the other when it receives a proposal to list a novel derivative product that may implicate the jurisdiction of the other. Section 718 further provides that the SEC or CFTC may request the other to issue an exemption with respect to a novel derivative product pursuant to their respective exemptive authorities under CEA Section 4(c) and Exchange Act Section 36. Section 718 also provides a mechanism for the SEC or CFTC to challenge the other Commission's determination as to whether a novel derivative product is a security or a futures contract, option on futures, or commodity option via judicial challenge.

Section 717 amended the CEA and Exchange Act to provide legal certainty for derivative products that implicate the jurisdiction of both the CFTC and SEC. As one set of parallel amendments, Section 717(a) amended CEA Section 2(a)(1)(C) and 717(b) added Section 3B to the Exchange Act to clarify that when one Commission exempts a derivative product it still retains jurisdiction over the product when its exemption is conditioned upon the other Commission exercising concurrent jurisdiction over the product. Section 3B further provides that a contract exempted by the CFTC pursuant to CEA Section 4(c)(1) with the condition that the SEC exercise concurrent authority is deemed a security for purposes of the federal securities laws. Section 3B is explicitly entitled "Securities-Related Derivatives," clearly indicating the scope of the provision is limited to agreements, contracts or transactions that have a pre-existing securities-related feature. The CFTC can only grant an exemption pursuant to its authority under CEA Section 4(c) on terms yielding to the SEC's jurisdiction if the SEC has a *pre-existing basis* for claiming a jurisdictional interest. The fact that Section 3B is conditioned upon the SEC exercising concurrent authority reinforces this reading, in that it presupposes the SEC independently has a colorable basis to claim a jurisdictional interest over the instrument as well. The CFTC otherwise has no basis to recognize the exercise of such jurisdiction by the SEC.

Notably, Sections 717 and 718 are interconnected, as Sections 717(c) and (d) made parallel amendments to the CEA and Exchange Act to stay, respectively, the certification of a product filed with the CFTC or the SEC's review of a proposed product rule change filed with it. In both cases, the stay is issued pending the Commission's determination at the request of the other Commission pursuant to Section 718 for a determination of the product's legal classification. In this respect, Section 717(d) added paragraph (10) to Exchange Act Section 19(b), which states that the SEC's period for reviewing a product rule filing is stayed "pending a determination by the Commission upon the request of the Commodity Futures Trading Commission or its Chairman that the Commission issue a determination as to whether a product that is the subject of such proposed rule change is a security pursuant to section 718 of the [Dodd-Frank Act]." To similar effect, Section 717(d) amended the certification product filing provision in CEA Section 5c(c)(1) to stay a product certification made to the CFTC upon the request of the SEC to issue a determination as to whether the product that is the subject of such certification "is a contract of sale of a commodity for future delivery, an option on such a contract, or an option on a commodity pursuant to section 718 *of* the [Dodd-Frank Act]."

Thus, Section 717 read as a whole demonstrates that Sections 717 and 718 are interlocking, with Section 717 providing the legal authority and Section 718 providing the process for the agencies to determine the appropriate exercise of regulatory jurisdiction over products with characteristics of both securities and derivatives. The interlocking structure of the provisions reinforces that, as a matter of statutory construction, Section 3B is limited to instruments that contain features of both securities and CFTC-regulated derivatives.

In short, the tools provided to the Commissions by Sections 717 and 718 of Dodd-Frank are useful for resolving jurisdictional overlap over products with both securities and derivatives elements where there is uncertainty as to how to classify the product under the legal classification definitions. They are not tools the Commissions can use to re-write the longstanding jurisdictional lines set out in the CEA and Exchange Act. As explained above, courts have made clear that the CFTC and SEC cannot "enlarge or relinquish their statutory jurisdictions" or "reapportion their jurisdictions in the face of a clear, contrary statutory mandate."[34]

III. <u>Response to Specific Questions</u>

We provide our responses to certain of the RFC questions in this section, repeating the question followed by our response.

> *2. As discussed above, several exclusions from the definition of "swap" are set forth in CEA section 1a(47)(B). Is additional regulatory clarity necessary with respect to application of these exclusions? For example, are there areas where principled, objective criteria could further clarify the definitional lines?*

With respect to the statutory exclusion from the "swap" definition covering options that are subject to the Securities Act and the Exchange Act, in our view it is well established that the exclusion covers traditional put and call options as well as binary options on the price or value of a security or an index of securities. See our general comments above. We are not aware of other derivative structures involving securities that have option-like features that could raise interpretive issues as to whether the instruments should be classified as options within the scope of this exclusion. If such product structures exist or emerge, the Commissions could address the proper classification of the instrument pursuant to their authority under Dodd-Frank Sections 717 and 718.

With respect to the statutory exclusion from the swap definition for futures and options on futures, as described in our general comments, when a DCM lists a contract that meets the legal classification of a futures contract as a futures contract or an option on such a contract, the exclusion protects the DCM from having the instrument also classified and regulated as a swap, to avoid duplicative regulation of the instrument under the swaps regulatory regime. DCMs may list swaps as well for trading and the core interpretive issue is whether a DCM has correctly

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[34] *Bd. of Trade of City of Chicago v. SEC*, 677 F.2d 11397, 1142 n.8 (7th Cir. 1982), *vacated as mooted on other grounds sub nom.*, *SEC v. Bd. of Trade of City of Chicago*, 459 U.S. 1026 (1982).

classified a product it lists for trading as a futures or options on futures contracts. In this regard, we disagree with the CFTC's classification of perpetual contracts as futures.

> *4. Is there a need for greater clarity regarding when a swap, option (including any put, call, straddle, option, or privilege), or future is based on "any interest" in a security or group or index of securities, particularly when the swap, option, or future is not based on the value of that security or group or index of securities?*

If the interest underlying an option is a commodity that is not a security or a group or index of securities (or an interest in or based on the value thereof), the option is a commodity option and a swap and is subject to the CFTC's exclusive jurisdiction. The CEA is clear on this point. As we explain in our general comments, the Commissions do not have the statutory authority to agree to have the CFTC transfer its exclusive jurisdiction over an instrument with no securities element to the SEC. As the courts have confirmed, the CFTC and SEC cannot "enlarge or relinquish their statutory jurisdictions" or "reapportion their jurisdictions in the face of a clear, contrary statutory mandate."[35]

> *8. Some event contracts settle by reference to a security or group or index of securities (whether narrow-based or broad-based). While certain of these event contracts may generally fall within the prongs of the "swap" and "security-based swap" definitions described above, there is a statutory exclusion from the definitions of "swap" and "security-based swap" for "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof, that is subject to [the Securities Act and the Exchange Act]". Are there circumstances in which an event contract that references one or more securities should or should not be considered a "put, call, straddle, option, or privilege on" a security or group or index of securities for purposes of the exclusion from the definitions of "swap" and "security-based swap"? Is there a need for greater clarity regarding when an event contract is a "put, call, straddle, option, or privilege" on an "interest" in, or "based on the value" of, "any security . . . or group or index of securities" (whether narrow-based or broad-based), that is subject to the Securities Act and the Exchange Act and therefore not a swap or SBS? What are the characteristics of event contracts based on a security or index that are swaps or SBS, that distinguish them from options on securities, including in particular binary options that already trade as standardized options on securities on national securities exchanges?*

As we explain in our general comments, it is well established and has been for decades that binary contracts based on the price or value of an underlying asset are options, both for CEA and for SEC purposes. Thus, a binary option based on the value of a broad-based stock index at a prescribed time is an option on a security regulated by the SEC and cannot be reclassified as a type of event contract swap that the CFTC instead regulates. For the Commissions to take

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[35] *Id.,* 677 F.2d at 1142 n. 8

a contrary position now would create significant, unnecessary confusion, and certainly will not achieve the objective expressed in the RFC of drawing clearer regulatory lines.

> *11. Any contract of sale of a commodity for future delivery (or option on such a contract), as well as any security futures product, is excluded from the "swap" definition. Is there a need for greater clarity from the Commissions regarding the treatment of futures, including security futures, in the context of innovative markets? For example, is there a need for greater clarity regarding whether a cash-settled "perpetual" contract referencing an equity security could be treated as a security future? What effects could the introduction of such products have on liquidity formation, price discovery, and hedging activity, particularly with regards to the derivatives and underlying cash equity markets?*

Our views are well known: a cash settled perpetual contract is not a futures contract and the CFTC erred in approving the listing of such contracts as futures. The language of the CEA is clear and unambiguous, is controlling for all products and requires no additional clarity from the Commission. Simply put, the Commission cannot deviate from the CEA in the name of "innovation". Accordingly, a perpetual contract on a single security would be a security-based swap, not a security future.

> *12. Where trading in economically related or functionally similar product classes implicates both SEC and CFTC regulatory interests, are there circumstances in which compliance with one Commission's regulatory framework could appropriately satisfy substantially similar requirements of the other Commission (alternative compliance)? In this case, how should "substantially similar" be viewed? Should it contemplate scope, objectives and/or outcomes of requirements? Supervisory compliance programs? Enforcement authority? Other considerations/standards?*

As we explain in our general comments, absent clear statutory authority, one Commission cannot cede its exclusive jurisdiction over a derivative product to the other, including where the products are economically or functionally similar to products subject to the other agency's jurisdiction.

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CME Group appreciates the opportunity to submit our comments on the RFC, and we look forward to further engagement with the Commissions on these important issues. Should you have any questions or require any additional information, please contact me at (312) 930-2324 or via email at jonathan.marcus@cmegroup.com.

Sincerely,

Jonathan Marcus

Jonathan Marcus
Senior Managing Director and General Counsel
CME Group Inc.