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

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington DC 20581

Re: **Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance (RIN Nos. 3038-AF71, 3235-AN79)**

Dear Ms. Countryman and Mr. Kirkpatrick:

Nasdaq, Inc. ("Nasdaq")[1] appreciates the opportunity to respond to the Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance (the "Request for Comment"),[2] issued by the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC" and, together with the CFTC, the "Commissions"). The Request for Comment seeks to draw clear regulatory lines for innovative products that implicate both Commissions' regulatory interests, including the definitions of swaps and security-based swaps, the treatment of mixed swaps and novel products, and potential approaches to alternative compliance.

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1 Nasdaq is a Fortune 500 global technology company serving the capital markets and other industries. Our diverse offering of data, analytics, software, and services enables clients to optimize and execute their business vision with confidence. Nasdaq owns and operates The Nasdaq Stock Market LLC, Nasdaq PHLX LLC, Nasdaq TEXAS, LLC, Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC markets, each of which is registered as a national securities exchange. To learn more about the company, technology solutions, and career opportunities, visit us on LinkedIn, on Twitter @Nasdaq, or at www.nasdaq.com.

2 See RIN Nos. 3038-AF71, 3235-AN79, Release Nos. 33-11424, 34-105735, File No. S7-2026-21, 91 FR 37873 (June 24, 2026) (Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance).

Nasdaq operates multiple regulated U.S. securities exchanges facilitating trading across equities, options, and other listed securities and derivatives. As an exchange that serves both the companies listed on our markets and the millions of investors who trade on them, Nasdaq brings a distinct market transparency and investor protection perspective to definitional questions under Dodd-Frank.[3] The classification of security-linked derivatives directly affects the investors who hold the underlying securities — including the integrity of the price discovery on which they rely, the transparency of positions that may influence the value of their holdings, and the adequacy of safeguards against fraud and manipulation. Nasdaq is also one of the world's leading index providers, licensing indices that underlie exchange-traded derivatives, structured products, and other financial instruments. These roles inform each of the recommendations set forth below. Nasdaq respectfully submits the following comments for the Commissions' consideration.

Nasdaq applauds the Commissions' efforts to increase definitional clarity for innovative products, beginning with the clear definitional lines that already exist between swaps and security-linked derivatives, including security-based swaps and security options.[4] Nasdaq urges the Commissions to enforce the jurisdictional boundaries that Congress defined for these distinct product classes. Such line-drawing is needed because certain CFTC-registered designated contract markets ("DCMs") appear to have listed security-linked derivatives as swaps through self-certification, although these products appear to fall within the regulatory ambit of the SEC.[5] This practice could undermine liquidity, transparency, price discovery, and market integrity in the securities markets that underlie security-linked derivatives.

The clear jurisdictional boundary between swaps and security-based swaps is drawn expressly by statute. Section 1a(47)(B)(x) of the Commodity Exchange Act ("CEA") excludes security-based swaps from the definition of "swap," and Section 2(a)(1)(A) of the same Act confines the CFTC's exclusive jurisdiction to swaps and certain futures and commodity contracts. Because security-based swaps are not "swaps" under the CEA, they fall outside the CFTC's general regulatory perimeter. Correspondingly, Section 3(a)(68)(A) of the Securities Exchange Act of 1934 ("Exchange Act") defines a "security-based swap" as any swap based on (i) a narrow-based security index ("SBS NBSI Prong"), (ii) a single security or loan ("SBS Single Security Prong"), or (iii) the occurrence or nonoccurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided the event directly affects the financial statements, financial condition, or financial obligations of the issuer ("SBS Event Contract Prong").[6]

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3 See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. VII, 124 Stat. 1376, 1641–1802 (2010).

4 For purposes of this letter, the term "security-linked derivative" does not include: (i) swaps on broad-based security indices, which are classified and regulated as swaps; or (ii) security futures, which are jointly regulated by the SEC and CFTC.

5 See Examples at Appendix A, infra.

6 15 U.S.C. 78c(a)(68); see also 7 U.S.C. § 1a(47)(B)(x), excluding security-based swaps from the definition of "swap."

Congress was also clear about the classification of security options. Congress excluded from the swap and security-based swap definitions "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 of 1933 ("Securities Act") and the Exchange Act, confirming that instruments properly classified as security options, including those referencing a material term or attribute of a security or group of securities, likewise fall within the SEC's regulatory regime.[7] Read together with the statutory definition of "security-based swap," these provisions reflect a deliberate statutory design: whether an instrument is labeled a security option or a security-based swap, Congress intended the SEC to oversee derivatives whose value or payout is tied to a security or to events directly affecting a security's issuer.

In light of this statutory backdrop, Nasdaq respectfully requests that the Commissions consider the following as they navigate a harmonized approach for innovative products involving swaps, security-based swaps, and novel instruments:

- Exclusive SEC oversight of security-linked derivatives, including security options and security-based swaps, promotes market transparency and investor protection in the securities markets.
- The Commissions are charged with enforcing the statutory lines separating swaps from security-linked derivatives. Where product classifications are unclear, the Commissions should exercise their authority to issue joint interpretations to determine proper regulatory treatment. Security-linked derivatives that are improperly listed on CFTC-registered trading venues should be de-listed.
- The SEC should implement mandatory clearing and trade execution requirements for security-based swaps that are de-listed from CFTC-registered DCMs.
- Perpetual contracts are better understood as swaps or security-based swaps rather than as futures.
- Where the Commissions share joint jurisdiction, Nasdaq supports an alternative compliance framework that reduces regulatory burdens and decreases regulatory arbitrage between the agencies.

I. Exclusive SEC Oversight of Security-Linked Derivatives Promotes Market Transparency and Investor Protection in the Securities Markets

A. A Bright-Line, Mutually Exclusive Regulatory Framework Promotes Market Transparency in Securities Markets

Trading activity in security-linked derivatives markets is interconnected with the underlying securities markets. End-users routinely use security-linked derivatives to hedge or speculate on risk tied to specific securities or issuers, and information flows between the security-linked derivatives markets and the related underlying securities markets. For example, the SEC has noted that "prices of both [credit default swaps] and corporate bonds are sensitive to the credit risk of underlying reference securities, and therefore, trading across markets may sometimes result in a potential positive spillover

[7] 7 U.S.C. § 1a(47)(B)(iii).

effect between informational efficiency, pricing and liquidity in security-based swap markets, and market quality in bond markets."[8] The SEC is well positioned to see across the full range of instruments that reference, and thereby transmit risk and information to and from, the securities markets it already regulates. Vesting oversight of security-linked derivatives in the same regulator responsible for the underlying securities avoids the blind spots and jurisdictional gaps that would arise if these interconnected markets were split across regulators, and instead allows a single body to monitor cross-market exposure, detect manipulation or systemic risk building in one market that may spill into another, and maintain consistent, comprehensive transparency over instruments that ultimately place pricing and default risk on the same underlying securities the SEC already oversees.[9]

Allowing security-linked derivatives to trade outside the SEC-regulated ecosystem also risks fragmenting liquidity away from the transparent, cross-surveilled exchanges on which investors rely for accurate price discovery. Exchange-established prices serve as reference points for trading, executive compensation, index inclusion, margin calculations, and corporate transactions; permitting parallel channels for equivalent securities exposure across disparate regulators, without parallel protections, threatens the reliability of those benchmarks. For example, allowing security options to be listed as swaps on CFTC-regulated DCMs could harm liquidity in the SEC-regulated security options market: if cash-settled security options can trade on CFTC-regulated venues with lower margin requirements, no options disclosure document, no FINRA oversight of selling practices, and no OCC clearing guarantee, those products would enjoy a structural cost advantage over equivalent listed options through regulatory arbitrage — harming liquidity on SEC-regulated options exchanges and undermining the price discovery function those markets serve. Exclusive SEC oversight of security-linked derivatives preserves investors' visibility into significant derivative positions that can influence the prices of the securities they hold; fragmented oversight, by contrast, would obscure the true landscape of ownership and control and cause investors to lose the safeguards Congress designed to protect them. Accordingly, in the interest of market transparency in the securities markets, any security-linked derivative that is improperly listed on a CFTC-registered trading venue should be de-listed unless and until the SEC approves its listing on a national securities exchange or other SEC-regulated marketplace.

B. The SEC's Regulatory Framework is Well-Suited to Address Investor Protection in Security-Linked Derivatives

Security-linked derivatives, regardless of their structure or settlement method, create exposure to securities and thus raise the same investor protection needs as the securities themselves. An instrument that replicates a long or short position in a security, whether a total return swap, a security option, or a contract for differences, exposes participants to the same directional risk, the same potential for price manipulation, and the same impact on the transparency investors depend on as trading the underlying security. For this reason, such products fit well within the jurisdiction of the

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8 See Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, 80 FR 48964, 49002 (Aug. 14, 2015).

9 Security futures are a narrow, congressionally created exception to this general rule: a designated contract market may list them so long as it has also registered with the SEC as a national securities exchange for that limited purpose, placing the product under the joint jurisdiction of both agencies. See 15 U.S.C. § 78f(g) and 17 C.F.R. § 240.6a-4; 7 U.S.C. § 7b-1, 17 C.F.R. § 41.31.

regulator whose institutional architecture, statutory mandate, and enforcement infrastructure are purpose-built and proven to protect the investors most affected by securities market activity, the SEC.

The SEC has long been a guardian of investor protection in the U.S. securities markets, a mandate reinforced by a comprehensive and time-tested ecosystem of safeguards —including FINRA's oversight of broker-dealer conduct, suitability and best-interest obligations under Regulation Best Interest, the Options Disclosure Document and associated due diligence requirements, and the robust disclosure framework that governs the offering and trading of securities and securities-based products.[10] These layered protections exist precisely because the securities markets are where retail investors — the Main Street Americans saving for retirement, education, and long-term financial security — have historically participated most directly and most consequentially.

II. The Commissions Should Enforce the Statutory Definitional Lines Separating Swaps from Security-Linked Derivatives

In light of the policy considerations outlined above, Nasdaq urges the Commissions to enforce the clear, congressionally-defined jurisdictional separation between swaps and security-linked derivatives. As illustrated below and in Appendix A, certain security-linked derivatives appear to be listed on CFTC-registered venues as swaps, notwithstanding Nasdaq's view that such products fall within the exclusive jurisdiction of the SEC. In Nasdaq's view, most of these products should be properly classified as security options or security-based swaps. When definitional boundaries are not consistently enforced, products may be structured to exploit jurisdictional gray areas, which can create competitive imbalances among regulated venues rather than superior execution or innovation.

A. Security Options

Congress excluded from the swap and security-based swap definitions "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.[11] In Nasdaq's view, this exclusion encompasses options whose payout is based on a metric or occurrence that an issuer has disclosed in its securities filings or otherwise disclosed in a manner compliant with Regulation Fair Disclosure ("Reg FD"), which aims to ensure that all investors have simultaneous access to material information affecting a security's value — meaning that any disclosure made under Reg FD is, by definition, material to that security's value. An option whose payout turns on the contents of such a disclosure is therefore an option "based on the value" of the related security and so falls within the security options excluded from the swap definition under CEA section 1a(47)(B)(iii). Further, an issuer's voluntary inclusion of a metric in its earnings-related filings, or its voluntary disclosure of that metric where no regulation otherwise requires it, is strong evidence that the metric affects the issuer's financial statements, financial condition, or financial obligations. In such cases, a facts-and-circumstances analysis should be used to determine whether a

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10 See, e.g., FINRA Rule 2111 (Suitability); Regulation Best Interest, 17 C.F.R. § 240.15l-1; Options Disclosure Document at https://www.theocc.com/company-information/documents-and-archives/options-disclosure-document, 17 C.F.R. § 240.9b-1.

11 7 U.S.C. § 1a(47)(B)(iii).

security option based on such a disclosure would similarly be “based on the value” of the related security.

Nasdaq has observed several event contracts that appear to constitute security options trading as swaps on certain CFTC-regulated DCMs.[12] For example, event contracts tied to key performance indicators of publicly listed companies — such as the release date of Apple's next iPhone or American Airlines' quarterly passenger load factor — as well as contracts tied to the timing of companies' initial public offerings ("IPOs"), have appeared on certain CFTC-registered DCMs. These contracts’ settlement terms frequently reference an issuer's statements in earnings calls, investor presentations, or government filings, and some reference specific SEC filings directly. As such, these event contracts appear to constitute security options that are excluded from the "swap" definition. Because the SEC is uniquely positioned to oversee these instruments — through its cross-market surveillance of securities and security-linked derivatives and its mandate to protect retail investors in the securities markets — security options should fall within its exclusive purview.

Pursuant to CFTC regulation 1.8(d) and SEC rule 3a68-2(d), the CFTC and SEC shall notify one another if either agency receives “a proposal to list, trade, or clear an agreement, contract, or transaction (or class thereof) that raises questions as to the appropriate characterization of such agreement, contract, or transaction (or class thereof) as a swap, a security-based swap, or both (*i.e.,* a mixed swap).”[13] The CFTC and the SEC may then, jointly or unilaterally, request a joint interpretation of the Commissions regarding the appropriate treatment of such a product.[14] When the Commissions adopted these provisions, they noted the joint interpretation mechanism “is intended to ensure that Title VII instruments do not fall into regulatory gaps and will help the Commissions to fulfill their responsibility to oversee the regulatory regime established by Title VII of the Dodd-Frank Act by making sure that Title VII instruments are appropriately characterized, and thus appropriately regulated.”[15]

Nasdaq respectfully encourages the Commissions to exercise this authority to consider whether particular security options may have been improperly listed on certain CFTC-registered DCMs as swaps. If the Commissions determine, pursuant to a joint interpretation, that any security options are improperly listed on certain CFTC-registered trading venues as swaps, such products should be de-listed unless and until the SEC approves their listing on a national securities exchange or other SEC-regulated marketplace.

B. Security-Based Swaps – SBS Event Contract Prong

Where a security-linked derivative is not structured as a security option, it may nonetheless fall under the SEC’s purview as a security-based swap. These products often take the form of event

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12 See also Appendix A.

13 17 C.F.R. § 1.8(d); 17 C.F.R. § 240.3a68-2(d).

14 Id.

15 See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208, 48295 (Aug. 13, 2012).

contracts. Section 3(a)(68)(A) of the Exchange Act defines a "security-based swap" to include, among other things, a swap based on "the occurrence or nonoccurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided the event directly affects the financial statements, financial condition, or financial obligations of the issuer" ("SBS Event Contract Prong").[16] Nasdaq believes that the Reg FD-based test for security options, as described above, is also relevant in assessing the SBS Event Contract Prong. In Nasdaq's view, the SBS Event Contract Prong encompasses any security-based swap whose settlement depends on a metric or occurrence disclosed in the issuer's securities filings or is otherwise disclosed by an issuer in a Reg FD-compliant manner. Such a contract cannot be priced, hedged, or settled without the information the issuer has placed into the federal disclosure regime and, on its face, directly affects the issuer's securities and that fact alone brings the contract within the SBS Event Contract Prong.

To avoid unintended consequences, Nasdaq respectfully suggests that any guidance under the SBS Event Contract Prong confirm that the issuer's disclosure choice is being used as an administrable proxy for the Title VII classification inquiry only. It is not, and should not be treated as, a determination of materiality for purposes of the antifraud provisions of the Exchange Act, Item 303 of Regulation S-K, Regulation FD, or any other regime in which materiality is the governing standard. Materiality in those contexts remains the fact-specific inquiry the case law requires. In addition to the bright-line threshold for Reg FD disclosures, Nasdaq proposes that the test also accommodate a facts-and-circumstances analysis for contracts tied to other issuer-related events. For example, an issuer's voluntary inclusion of a metric in its earnings-related filings, or its voluntary disclosure of that metric where no regulation otherwise requires it, is strong evidence that the metric directly affects the issuer's financial statements, financial condition, or financial obligations.

As with security options, the SEC is well positioned to regulate security-based swaps, given its cross-market surveillance of securities and security-linked derivatives and its mandate to protect retail investors in the securities markets. As with security options, Nasdaq encourages the Commissions to exercise their authority to issue joint interpretations to consider whether any particular security-based swaps have been improperly listed on CFTC-registered DCMs as swaps.[17] Event contracts satisfying the SBS Event Contract Prong that are listed on CFTC-registered DCMs should then be de-listed unless and until the SEC approves their listing on a national securities exchange or other SEC-regulated marketplace.

III. The SEC Should Implement Mandatory Clearing and Trade Execution Requirements for Security-Based Swaps that are De-listed from CFTC-Registered DCMs

Misclassified security options and security-based swaps do not present the same path onto SEC-regulated venues. Security options are readily accommodated; they can be listed and traded on existing national securities exchanges under those exchanges' current options-trading rules and clearing arrangements, without need for further regulatory process. Security-based swaps present a materially more complex transition, since neither the mandatory-clearing determination under Section

[16] 15 U.S.C. § 78c(a)(68)(A)(ii)(III).

[17] 17 C.F.R. § 1.8(d); 17 C.F.R. § 240.3a68-2(d).

3C(a) nor the trade-execution requirement under Section 3C(h) is self-executing — the SEC must first evaluate and designate the appropriate clearing agency and trading venue for each category of instrument before it can be lawfully executed on-exchange or on an SBSEF. Under Section 3C(a) of the Exchange Act,[18] the SEC has independent authority — and, in Nasdaq's view, a corresponding responsibility — to determine that a security-based swap, or a group, category, type, or class of security-based swaps, is required to be submitted for central clearing to a registered clearing agency. Once the SEC makes such a determination, Section 3C(h) of the Exchange Act[19] imposes a parallel trade-execution requirement, mandating that counterparties execute the transaction either on a national securities exchange or on a registered security-based swap execution facility ("SBSEF") that has made the instrument available to trade.

Absent SEC action on both fronts, security-based swaps de-listed from CFTC-registered venues would predictably migrate into bilateral, over-the-counter execution channels — an outcome even more opaque than the current state of affairs, and one that would perpetuate, rather than remedy, the very transparency, price-discovery, and cross-market surveillance deficits that motivate the recommendations in this letter. The result would be a regulatory asymmetry that harms investors: exchange-listed cash-equity and options positions would remain subject to the full apparatus of SEC-regulated pre-trade and post-trade transparency, while economically equivalent security-linked derivative exposures would be executed and held in an off-venue channel invisible to the same investors and regulators. Nasdaq accordingly urges the SEC to promptly initiate the Section 3C(a) mandatory-clearing review process for the categories of security-based swaps that are de-listed from CFTC-registered DCMs, so that the accompanying Section 3C(h) trade-execution requirement channels these instruments onto the transparent, SEC-regulated national securities exchanges and SBSEFs on which they properly belong.

Nasdaq recognizes that the SEC has already adopted much of the regulatory infrastructure that a mandatory-clearing determination presupposes, including the clearing-agency submission-and-review framework under Sections 3C(b) and 3C(c) of the Exchange Act,[20] the covered clearing agency standards under Section 17A,[21] the security-based swap execution facility regime and made-available-to-trade mechanism under Section 3C(h),[22] the uncleared-security-based-swap margin, capital, and segregation rules,[23] the business conduct standards[24] for security-based swap dealers, and the

[18] 15 U.S.C. § 78c-3(b) (authorizing the SEC to determine that a security-based swap, or any group, category, type, or class of security-based swaps, is required to be cleared).

[19] 15 U.S.C. § 78c-3(h)(1) (requiring counterparties to a security-based swap subject to the clearing requirement of § 78c-3(a)(1) to execute the transaction on a national securities exchange or on a security-based swap execution facility registered under, or exempt from registration under, § 78c-4); id. § 78c-3(h)(2) (exception where no exchange or SBSEF has made the security-based swap available to trade, or where the transaction is subject to the clearing exception in § 78c-3(g)).

[20] 17 C.F.R. §§ 240.3Ca-1, 240.3Ca-2, 240.19b-4(o).

[21] 17 C.F.R. § 240.17Ad-22.

[22] 17 C.F.R. §§ 242.800 et seq., 242.816, 242.817.

[23] 17 C.F.R. §§ 240.18a-1, 240.18a-3, 240.18a-4; see also id. § 240.15c3-1.

[24] 17 C.F.R. §§ 240.15Fh-1 – 240.15Fh-6.

reporting framework of Regulation SBSR.[25] These pieces provide much of the operational framework on which a Section 3C(a) mandate would run. Several companion rulemakings expressly contemplated by Section 3C nevertheless require attention, and their completion is a necessary predicate to a workable mandatory-clearing determination for the categories of security-based swaps de-listed from CFTC-registered DCMs.[26]

IV. Perpetual Contracts Are Not Futures

The current ambiguity regarding the regulatory treatment of perpetual contracts also warrants further clarity. Perpetual contracts create continuous, leveraged exposure to an underlying asset through periodic cash payments without any fixed settlement date or delivery obligation, and raise many of the same investor protection and market integrity concerns described above. Under the CEA as amended by Dodd-Frank, a "swap" includes any agreement providing on an executory basis for the exchange of one or more payments based on the value or level of one or more commodities that "transfers, as between the parties, 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."[27] Perpetual contracts fit this definition precisely: the funding payments constitute exchanges of payments based on an underlying asset's value, the contract transfers price risk between parties, and no underlying instrument is delivered and no cash settlement at a fixed date ever occurs.

The CFTC's recent approval[28] of a cash-settled bitcoin perpetual contract as a futures contract on a DCM creates regulatory uncertainty. This action contradicted several of the CFTC's own prior actions that had classified perpetual contracts as swaps — including actions against Binance,[29]

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25 17 C.F.R. §§ 242.900 – 242.909.

26 In particular, the SEC should finalize rules implementing the end-user exception, adopt the anti-evasion rules directed by Section 3C(d), and set the compliance and transition schedule under Sections 3C(e) and 3C(f) in coordination with Regulation SBSR. See 15 U.S.C. § 78c-3(g). Nasdaq accordingly urges the SEC to complete these companion rulemakings in parallel with the initiation of any Section 3C(a) review, so that the mandate can operate as Congress designed rather than being frustrated by unfinished regulatory prerequisites.

27 7 U.S.C. § 1a(47)(A)(iii).

28 See Order Approving KalshiEX LLC BTCPERP Futures Contract, In re Request for Approval by KalshiEX LLC of the BTCPERP Futures Contract (CFTC May 29, 2026); see also CFTC Policy Statement Concerning the Listing of Perpetual Contracts (May 29, 2026) (stating that perpetual contracts referencing asset classes other than digital commodities, including equity securities and narrow-based security indices, should be submitted for Commission review and approval pursuant to Commission Regulation 40.3).

29 See CFTC v. Zhao, No. 1:23-cv-01887 (N.D. Ill. filed Mar. 27, 2023) (complaint alleging "Binance's perpetuals are swaps" that "transfer the price risk of the underlying digital asset as between the counterparties to a transaction" and do "not have a pre-determined expiration date"); see also CFTC Press Release No. 8680-23 (Mar. 27, 2023).

BitMEX,[30] Mango Markets,[31] Deridex,[32] and KuCoin[33] — each time citing the contracts' exchange of payments, transfer of price risk, absence of a fixed expiration date, and funding-fee mechanism as the basis for swap classification. In a recent lawsuit against the CFTC, the Chicago Mercantile Exchange, Inc. ("CME") articulated concerns aligned with Nasdaq's view regarding the Commission's approval of Kalshi's bitcoin perpetual contract as a futures contract.[34] CME's complaint also highlighted judicial precedent supporting its definition of a futures contract, stating "As the D.C. Circuit has put it: 'A commodities futures contract is an executory contract for the sale of a commodity executed at a specific point in time with delivery of the commodity postponed to a future date.'"[35] Nasdaq respectfully submits that the statute's plain text, reinforced by controlling judicial interpretation, compels the conclusion that perpetual contracts are not futures.

The CFTC's policy statement that accompanied its approval of Kalshi's cash-settled bitcoin perpetual contract underscores the urgency for clear jurisdictional lines. Specifically, the policy statement indicated that perpetual contracts on equity securities raise distinct regulatory questions warranting case-by-case review. Nasdaq submits that where securities are the underlying reference asset, the answer should be unequivocal. Cash-settled derivatives creating ongoing exposure to securities are security-based swaps subject to SEC jurisdiction, and permitting such instruments to trade as futures on DCMs would undermine the investor protection framework Congress designed Title VII to preserve.

V. The Commissions Should Establish an Alternative Compliance Framework for Jointly-Regulated Products

While a bright-line jurisdictional line would help market participants distinguish between swaps and security-linked derivatives, Nasdaq recognizes that there is an opportunity for an alternative compliance regime for functionally similar product classes that implicate both agencies' regulatory interests, including derivatives involving certain types of digital assets that do not squarely fit within the definition either of "security" or "commodity." A strong substituted compliance framework serves to reduce regulatory burdens that can arise from duplicative or overlapping regulations, without sacrificing the attendant policy objectives of those regulations. In designing this

[30] See CFTC v. HDR Global Trading Ltd., No. 1:20-cv-08132 (S.D.N.Y. filed Oct. 1, 2020) (complaint alleging BitMEX's "perpetual swaps" or "perpetual contracts" on bitcoin, ether, and litecoin "are swaps as defined by 7 U.S.C. section 1a(47)"); see also CFTC Press Release No. 8270-20 (Oct. 1, 2020).

[31] See CFTC v. Eisenberg, No. 1:23-cv-00173 (S.D.N.Y. filed Jan. 9, 2023) (complaint alleging "perpetual contracts" or "perpetual futures" on Mango Markets "are swaps" that "provide for the exchange of one or more payments based on the relative value" of digital assets); see also CFTC Press Release No. 8647-23 (Jan. 9, 2023).

[32] See In re Deridex, Inc., CFTC Docket No. 23-42 (Sept. 7, 2023) (order finding perpetual contracts "are 'swaps' under Section 1a(47) of the Act" and that Deridex operated as an unregistered swap execution facility); see also CFTC Press Release No. 8774-23 (Sept. 7, 2023).

[33] See CFTC v. Mek Global Ltd., No. 1:24-cv-02255 (S.D.N.Y. filed Mar. 26, 2024) (complaint alleging KuCoin's " 'perpetual futures' . . . are 'swaps' under the Act. 7 U.S.C. section 1a(47)"); see also CFTC Press Release No. 8884-24 (Mar. 26, 2024).

[34] See Complaint, Chicago Mercantile Exchange Inc. v. Selig, No. 1:26-cv-02157 (D.D.C. filed June 18, 2026).

[35] Id. at 36, citing Hunter v. FERC, 711 F.3d 155, 156 (D.C. Cir. 2013).

framework, the Commissions should consider codifying a practical standard of review alongside specific areas of substituted compliance in a joint rulemaking. The Commissions should leverage their collective experience in designing cross-border substituted compliance frameworks, as well as the regulatory treatment of mixed swaps.[36]

A. Standard of Review

The Commissions can establish a robust alternative compliance framework that emphasizes a flexible, outcomes-based approach. Where the SEC and CFTC have established different mechanisms to achieve similar regulatory outcomes, substituted compliance should be available. The standard of review for determining whether various regulations are comparable in outcome should rely on a holistic review of each regulation, as implemented, and whether it achieves the same policy-grounded objectives.

B. Opportunities for Alternative Compliance

Listing Procedures

While the Commissions must undertake a detailed, holistic review of where overlapping regulations exist, and whether they achieve similar policy-grounded outcomes, Nasdaq highlights a few areas where substituted compliance may be particularly useful. First, Nasdaq notes that the SEC and CFTC have materially different listing procedures for new products. The CFTC relies heavily on an expedited self-certification regime, whereby CFTC-registrants may self-certify a product's compliance with the CEA and regulations thereunder, and list the product for trading the following business day.[37] The SEC's analogous security-based swap product certification process requires security-based swap execution facilities ("SBSEFs") to submit the certification 10 business days prior to listing.[38] Moreover, there is no self-certification track for security-based swaps listed on a national securities exchange. Such listings are subject to a more onerous rule filing process pursuant to SEC Rule 19b-4, where approval could take as long as 240 days. Accordingly, substituted compliance for product listing procedures would create a more level playing field for dually-registered exchanges that list products that may implicate the interests of both Commissions.

More specifically, and to address this asymmetry within the SEC's own regime, Nasdaq recommends that the SEC extend its SBSEF product certification process to national securities exchanges that list security-based swaps. Making the 10-business-day pre-listing certification track available to national securities exchanges for security-based swap listings, in lieu of the current Rule 19b-4 rule filing process, would eliminate a material procedural asymmetry between two categories

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36 See, e.g., Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Swap Participants and Capital and Segregation Requirements for Broker Dealers, 84 FR 43872 (Aug. 22, 2019); Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924 (Sept. 14, 2020); Regulation of mixed swaps, 17 C.F.R. §§ 1.9, 240.3a68-4.

37 17 C.F.R. § 40.2.

38 17 C.F.R. § 242.804.

of SEC-regulated venues trading an identical class of instruments. Further, this would give SROs a workable path to bring these identical security-based swaps to market on comparable timelines with competing SEC-regulated venues.

Surveillance

Substituted compliance should also extend to trade surveillance obligations for products where each Commission may have a regulatory interest. Both the SEC's Regulation SE framework and the CFTC's parallel SEF and DCM regulations require trading facilities to maintain robust trade surveillance programs.[39] Where an exchange's audit trail, real-time monitoring, and market-abuse detection systems already satisfy one Commission's core surveillance principles for a product touching both agencies' regulatory interests, the exchange should be able to rely on that single surveillance program to satisfy the other Commission's parallel oversight objective, rather than operating and reconciling two independently built surveillance programs.

Examinations

Where dual-registrants list novel products that implicate both SEC and CFTC interests, a substituted compliance framework for examinations could reduce burdens for registrants and regulators alike. CFTC-registered DCMs and SEFs are subject to periodic rule enforcement reviews designed to assess each registrant's compliance with CFTC requirements. On the other hand, the SEC assesses SBSEFs' and national securities exchanges' compliance with SEC requirements as part of the SEC's Division of Examinations annual examination priorities. Jointly-regulated products implicate similar overlapping product types, as well as overlapping expertise from each Commission's examinations staff. Where a limited number of jointly-regulated products may trigger a dual-registrant's examination obligations under both the CFTC and SEC, regulatory efficiency may dictate that an examination by the dual-registrant's primary regulator should suffice, subject to appropriate information-sharing agreements between the Commissions.

[39] See, e.g., SEC and CFTC trade surveillance and audit trail requirements, 17 C.F.R. §§ 37.205, 37.406, 38.156, 38.551; 242.613, 242.818–242.821, 242.826, and 242.830.

* * *

Nasdaq appreciates the opportunity to respond to the Request for Comment and applauds the Commissions' efforts to draw clearer regulatory lines for swaps, security-based swaps, and innovative financial products. Nasdaq respectfully requests that the Commissions consider the concerns and recommendations set forth above as they evaluate next steps.

Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,

John A. Zecca

Appendix A

In the attached table, Nasdaq has identified several event contracts that were listed on CFTC-registered DCMs as of August 24, 2026, and appear to constitute security options or security-based swaps. Of note, many of the identified event contracts specifically cite SEC filings (Forms 10-Q, 8-K, S-1, etc.), company statements in earnings calls, and related issuer regulatory disclosures as relevant payout criteria. The identified event contracts represent a small sample of the universe of DCM listings that should be evaluated as potential security options or security-based swaps that should be de-listed from CFTC-registered DCMs.

Appendix A

Quarterly KPI Contracts	
Contract Terms:	<Metric> as officially reported by <company> in their quarterly earnings release, earnings call, investor presentation, or government filings for <quarter>.
Settlement Sources:	<Company>, the official investor relations website of <company>, federal government financial regulatory authorities, The New York Times, Associated Press, Bloomberg News, Reuters, The Wall Street Journal, Financial Times, CNBC, Fox Business, MarketWatch, Barron's, Yahoo Finance, and Seeking Alpha
Relevant Payout Criteria:	• The metric must be explicitly reported by <company> in their earnings materials; calculated or derived metrics by third parties do not qualify • The first official report of the metric will be used; subsequent restatements or corrections after initial reporting will not affect resolution • If <company> reports a range instead of a specific number, the midpoint will be used • If an open range is used exclusively (e.g. "over X") then that will resolve the market if sufficient to resolve the market to Yes (e.g. if the strike was "over 15 million" but not if the strike was "over 21 million") • If <company> changes their metric definition or stops reporting <metric>, the market resolves to the last fair market price as determined by the Exchange • Metrics must be reported for the full quarter unless otherwise specified (not month-to-date or partial quarter) • Reporting hierarchy (in order of precedence): 1. Earnings press release 2. Prepared remarks in earnings call transcript 3. Investor presentation published concurrent with earnings 4. Q&A portion of earnings call (only if specific number stated by company representative) 5. Government filings
Sample Listings:	• American Express cards-in-force in Q3 • Lockheed Martin F-35 deliveries in Q3 • American Airlines passenger load factor in Q3 • Meta headcount in Q3

Appendix A

IPO Timing Contracts	
Contract Terms:	Whether <company> has confirmed an initial public offering (IPO) of its equity securities after Issuance and before <date>.
Settlement Sources:	In hierarchical order, the U.S. Securities and Exchange Commission (SEC), <company> , the exchange on which it is planning to IPO (including but not limited to: the New York Stock Exchange (NYSE), the Nasdaq Stock Market (NASDAQ), the Shanghai Stock Exchange (SSE), the Hong Kong Stock Exchange, and the London Stock Exchange (LSE)), The New York Times, the Wall Street Journal, Bloomberg News, BBC, Australian Broadcasting Corporation (ABC), Reuters, CNBC, and Financial Times.

Relevant Payout Criteria:	• An IPO is considered "officially confirmed" if any one of the following occurs after Issuance and before <date>:
	  ◦ The company's Form S-1 (or equivalent IPO registration statement) is declared effective by the U.S. Securities and Exchange Commission (SEC), or an equivalent regulatory filing is approved by a recognized national securities regulator (e.g., FCA, SEBI, MAS, etc.) and made public;
	  ◦ The IPO is priced, meaning a final pricing press release or SEC filing (e.g., 424B4 or equivalent) publicly confirms the number of shares and offering price;
	  ◦ A public securities exchange (e.g., NYSE, NASDAQ, LSE, ASX) assigns a ticker symbol and announces that it has been approved for initial listing pursuant to an IPO.

Sample Listings:	• Will OpenAI officially announce an IPO before March 1, 2027? • Will Starlink officially announce an IPO before April 1, 2027?
IPO Underwriter Contracts	
Contract Terms:	• Whether <bank> serves as a lead underwriter for <company's> 's initial public offering (IPO) in the United States after Issuance and before <date>.
Settlement Sources:	• In hierarchical order, the U.S. Securities and Exchange Commission (SEC), EDGAR database, <company>, <bank>, The New York Times, the Associated Press, Bloomberg News, Reuters, The Wall Street Journal, Financial Times, Axios, Politico, MarketWatch, Yahoo Finance, CNBC, Fox Business, ABC, CBS, CNN, MSNBC, and NBC.
Relevant Payout Criteria:	• The role must be officially documented in at least one of the following: SEC Form S-1 or other registration statement filed with the SEC, final prospectus filed with the SEC, press

Appendix A

	release from <company> announcing the IPO and underwriting syndicate, or official announcement from <bank> confirming their role
Sample Listings:	• Will Citigroup take Kraken public before 2027? • Will Stifel Financial take Anthropic public?
IPO Announcement Contracts	
Contract Terms:	Will {company} announce that it will {action} an initial public offering on {listing exchange} by {date}?”
Settlement Sources:	In hierarchical order: (i) Primary Source: official press releases or SEC filings by {company}; (ii) major financial news organizations reporting the official statement by {company}.
Relevant Payout Criteria:	An announcement may be made through any of the following: (i) a press release issued by {company}; (ii) a filing with the SEC (including an S-1, S-1/A, F-1, F-1/A, or equivalent registration statement or a prospectus supplement); (iii) an earnings call, investor presentation, or official statement subsequently transcribed and publicly disseminated; or (iv) any other public communication expressly authorized by {company}.
Sample Listings:	• When will Stripe announce an IPO?
Corporate Action Contracts	
Contract Terms:	Will [company a] [acquire/merge/spinoff] [with/of] [company b] by [date]?
Settlement Source:	Listing Exchange
Relevant Payout Criteria:	The Corporate Action Forecast Contract is resolved based upon official public filing or disclosure confirming the legal consummation of the transaction between [company a] and [company b]. Form 8-Ks are submitted by public companies to the Securities and Exchange Commission through the SEC’s Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) system on a continuous, event-driven basis. Filings are time-stamped at the time of submission and are made publicly available by the SEC through EDGAR upon acceptance.
Sample Listings:	• Will Tesla merge with SpaceX by December 31, 2026?
Doordash Orders Contracts	
Contract Terms:	Will DoorDash orders exceed [###] in [quarter]?
Settlement Source:	DoorDash, Inc.
Relevant Payout Criteria:	The DoorDash Orders Forecast Contract is resolved based upon the total number of completed DoorDash orders during the specified quarter, as reported in DoorDash, Inc.’s official SEC filings

	(Form 10 Q or Form 10-K). The Underlying may be accessed on the official DoorDash website here, where the 10 K/10-Qs reports are publicly available. The Underlying is typically accessible under the "SEC filings" section, where users may select the applicable reporting year and filing type (either "Annual Filings" for Form 10-K or "Quarterly Filings" for Form 10-Q). The "Total Orders" metric is currently reported within the "Financial and Operational Highlights" section of the filing. If the 10-K includes only the full-year figure and does not separately disclose the specified quarter, the specified quarter will be calculated by subtracting the prior three quarters from the full-year amount stated in the 10-K. Links are provided for informational purposes only and the source agency may decide to publish the data at a different location at any time.
Sample Listings:	• Will DoorDash orders exceed 940 million in Q3 2026?
NVIDIA Revenue Contracts	
Contract Terms:	Will NVIDIA Corporation report that "Inference" revenue exceeded "Training" revenue within its Data Center segment for any fiscal quarter ending in calendar year [year]?
Settlement Source:	NVIDIA Corporation
Relevant Payout Criteria:	The NVIDIA Revenue Breakdown Forecast Contract is resolved based upon the publication of an explicit statement by NVIDIA Corporation, within its official quarterly earnings press releases, Form 10 Q or Form 10-K filings, or accompanying prepared CFO or CEO earnings commentary, stating that inference-related revenue either constituted a majority of, or exceeded, training-related revenue within the Data Center segment for any fiscal quarter ending in the specified calendar year. The underlying information may be accessed through NVIDIA Corporation's investor relations website, where Earnings Press Releases, prepared CFO or CEO commentary, and Form 10-Q / Form 10-K filings are made available. From the source page, users should select "All Documents," navigate to the applicable calendar year, and select the relevant fiscal quarter. Resolution-relevant disclosures are typically located within the "Data Center" or "Financial Commentary" sections of NVIDIA's official earnings materials.
Sample Listings:	• Will NVIDIA Corporation report that "Inference" revenue exceeded "Training" revenue within its Data Center segment for any fiscal quarter ending in calendar year 2026?
Product Release Contracts	
Contract Terms:	Will {company} release {product} before {date}?
Settlement Sources:	In hierarchical order: (i) Primary Sources: official announcements, press releases, official blog posts, or official API/distribution channels of {company}; (ii) Secondary Sources: filings by

	{company} with the U.S. Securities and Exchange Commission (including Forms 8-K, 10-K, 10-Q, or equivalent disclosures); (iii) Tertiary Sources: Reuters, the Associated Press, Bloomberg News, Agence France-Presse, The New York Times, the Financial Times, The Wall Street Journal, BBC, The Washington Post, CNBC, ABC, CBS, CNN, Fox, Fox News, MSNBC, and NBC.
Relevant Payout Criteria:	The Payout Criterion for the Contract is met if, before {date}, {company} has commercially released {product} in accordance with the {releasetype}. (i) A "commercial release" means the product meets ALL of the following criteria: • The product is available for purchase, subscription, download, or access by the general public or by API customers (as applicable to {releasetype}), and not solely by employees, contractors, or members of a limited private beta or closed pilot group; • The product is available through {company}'s official channels, authorized retailers, licensed distributors, or official platform stores; and • The availability is not explicitly labeled as "beta," "early access," "preview," "prototype," or "test," unless the Exchange specifies otherwise for a given iteration.
Sample Listings:	• Will Tesla Optimus be released this year?