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November 20, 2026

VIA ELECTRONIC SUBMISSION

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

Re: Rothera Event Contract under CEA § 5c(c)(4)(A) and Regulation 40.3 ("Will Tesla report Q3 2026 Adjusted EPS greater than $0.65?") (Filed Oct. 15, 2026; Approved Oct. 27, 2026)

Dear Mr. Kirkpatrick:

On October 15, 2026, Rothera Exchange and Clearing LLC ("Rothera"), a designated contract market ("DCM") registered with the Commodity Futures Trading Commission ("CFTC" or "Commission"), filed a request pursuant to CFTC Rule 40.3 for CFTC approval of a new contract it classified as a "swap": "Will Tesla report Q3 2026 Adjusted EPS greater than $0.65?" (the "Tesla Contract").[1] For the reasons described in this letter, the Tesla Contract is a securities option, and therefore it is not a swap, regardless of the label Rothera has affixed to it. Cboe Global Markets, Inc. ("Cboe") urges the CFTC to withdraw its approval of the Tesla Contract.

The Tesla Contract is structured almost identically to binary options based on issuer key performance indicators ("KPIs") that the U.S. Securities and Exchange Commission ("SEC") recently approved Cboe to list and trade ("binary KPI options") on the basis that they are options based on the value of, or an interest in, a security ("securities options") under the Securities Exchange Act of 1934 ("Exchange Act") ("KPI Approval").[2] As such, the binary KPI options are securities options under Section 3(a)(10) of the Exchange Act and Section 2(a)(1) of the Securities Act of 1933 ("Securities Act" and, with the Exchange Act, the "federal securities laws"), and they are expressly excluded from the definition of "swap" under the Commodity Exchange Act ("CEA").[3] The same is true of the Tesla Contract.

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1 Rothera has indicated that it intends to list a "broader set" of contracts on issuer metrics, including operational KPIs.

2 Securities Exchange Act Rel. No. 106659 (Oct. 13, 2026), 91 FR 65854 (Oct. 16, 2026).

3 *See* 15 U.S.C. § 78c(a)(10) (definition of security); 15 U.S.C. § 77b(a)(1) (definition of security); 7 U.S.C. § 1a(47)(B)(iii) (securities option exclusion).

Introduction

On October 15, 2026, Rothera submitted the Tesla Contract for CFTC approval under Rule 40.3. The CFTC had 45 days to review the Tesla Contract and determine whether to approve or disapprove it. The CFTC issued an order affirmatively approving the Tesla Contract on October 27 ("Rothera Order").[4] The CFTC neither sought, nor provided time for, views from the public. Cboe had intended to comment on the Rothera filing prior to any approval to urge the CFTC to decline to approve the contract as a swap because the contract is a securities option and falls outside the CFTC's jurisdiction and approval authority, as further discussed below. Given the speed with which the CFTC acted, we are nonetheless providing this letter to identify why the Commission should withdraw that approval, which impermissibly approves an instrument for trading on a DCM inconsistent with the framework and authority set forth in the CEA, and conduct a more thorough analysis of the Tesla Contract. Because the Tesla Contract is not structured differently from the binary KPI options that the SEC found to be securities options under the federal securities laws, it also does not meet the standard the SEC recently articulated around product jurisdiction when the SEC approved binary KPI options to trade on Cboe.

As the Commission is aware, Cboe operates an SEC-regulated market that lists and trades binary options, including the binary KPI options that the SEC approved on October 13, 2026.[5] Cboe's interest in this filing is to ensure continued adherence to the long-standing principle requiring that any party that introduces a securities product into the market be subject to, and comply with, the same securities regulatory framework and SEC oversight to which all other securities market participants, past and present, have been subject. Moreover, Cboe does not object to KPI contracts on a CFTC-regulated market that are appropriately and lawfully structured as products within the CFTC's jurisdiction (i.e., as swaps). Consistent with the approach Congress took in defining these financial instruments, instruments that are alike in structure and economics should be subject to the same regulation, whichever venue seeks to list them, so that regulatory oversight and investor protections do not depend solely on the label a listing venue chooses. This approach is consistent with the SEC Chairman's recent call for harmonization and the avoidance of "turf wars," as well as his comments on regulating products according to how they are structured. The CFTC's approval of the Tesla Contract undermines that harmonization by accepting a label at face value and disregarding the basic structural features of the product at issue. The result is that functionally equivalent products are listed on markets subject to different regulatory frameworks.

Background and Analysis

On October 13, 2026, the SEC issued the KPI Approval (following notice and public comment rulemaking), approving a proposed rule change submitted by Cboe to list and trade binary options

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4 In the Matter of the Request for Approval by Rothera Exchange and Clearing LLC of the "Will Tesla report Q3 2026 Adjusted EPS greater than $0.65?" Contract, available at https://www.cftc.gov/filings/documents/2026/orgdcmrotherakpiorder261027.pdf.

5 *See* KPI Approval.

on certain issuers' KPIs.[6] Of note, Cboe was approved to list and trade binary KPI options of Tesla, Inc., specifically on (i) Net Income per Share of Common Stocks Attributable to Common Stockholders: Diluted; (ii) Total Revenues; (iii) Total Automotive Revenue; (iv) Model 3/Y Production (#); (v) Supercharger Connectors (#); and (vi) Free Cash Flow.[7] The KPI Approval also included the KPI metric of earnings per share ("EPS") of numerous issuers.[8] In approving the binary KPI options, the SEC concluded that the instruments were securities options under the federal securities laws.[9] Of note, the KPI Approval also acknowledged—quite correctly—that products related to KPIs could be structured in a way to constitute other types of regulated instruments, such as swaps.[10]

Section 3(a)(10) of the Exchange Act defines the term "security" to include, among other things, "any put, call, straddle, option, or privilege on any security . . . (including any interest therein or based on the value thereof)." Similarly, CEA Section 1a(47)(B)(iii) expressly excludes from the definition of "swap" any "put, call, straddle, option, or privilege on any security . . . including any interest therein or based on the value thereof, that is subject to [the federal securities laws]." That is, Congress specifically intended by this exclusion that securities options lie solely within the SEC's jurisdiction and not be included in the definition of "swap" notwithstanding the ostensible breadth of the "swap" definition. Thus, as the CFTC acknowledged in the Rothera Order, ***even if*** a contract meets the definition of "swap," including the prong in paragraph (A)(ii) of the swap definition related to contracts involving "potential financial, economic, or commercial consequence," that does not override the securities option exclusion.[11]

Much of the Rothera Order is devoted to a defense of why the Tesla Contract falls within the definition of "swap" rather than why the Tesla Contract is not a securities options; however, because securities options are excluded from the definition of "swap," the swap analysis is not relevant if the Tesla Contract is a securities option. Because it is a securities option, the fact that it may meet one or more prongs of the "swap" definition is of no legal consequence. Put simply, the CFTC's analysis is completely at odds with the SEC's prior analysis of the binary KPI options in which the SEC described instruments structured like the Tesla Contract as a "put, call, straddle, option, or privilege on any security . . . (including any interest therein or based on the value thereof)" subject to the federal securities laws. The SEC, not the CFTC, has the authority to

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6 Notably, Rothera submitted a comment letter in which it did not suggest that Cboe's proposed KPI options were not securities, and in fact stated that it "takes no position here on whether the contracts Cboe describes should ultimately be permitted to trade." *See* T. Chippas letter, dated August 5, 2026.

7 KPI Approval at 65856.

8 *Id.*

9 *Id.* at 65883-85; 65864 n.74.

10 *Id.* at 65884.

11 *See* Rothera Order at 11 (noting that, even though the CFTC concluded the Tesla Contract meets "at least three" prongs of the "swap" definition, it "would nevertheless be excluded from the 'swap' definition if it satisfied any of that definition's exclusions").

determine which products are securities options: "The determination of when a product falls within Exchange Act Section 3(a)(10) (including whether it is based on a security, including any interest therein and based on the value thereof) is within the [SEC]'s statutory authority."[12]

On the same day the SEC approved the binary KPI options to list and trade on Cboe, Chairman Atkins issued a statement on the KPI Approval.[13] Among other things, he delineated the correct approach to evaluating how differently structured products should be categorized and overseen by regulators. His words deserve to be quoted in full rather than excerpted as they were in Rothera's filing and the CFTC's approval:

> As the [KPI Approval] order emphasizes, the order speaks solely to the trading of these specific binary options contracts on a securities exchange that lists and trades standardized options on securities in compliance with the securities laws. The order does ***not*** address what may be similar products with the same underlying KPIs as the binary options described in the order ***structured in different ways***. The SEC's approval order today does not address—and does not foreclose—CFTC jurisdiction over KPI contracts based on the same underlying KPIs as those contemplated in the approval order ***structured to fall under the CFTC's jurisdiction***. [emphasis added]

Cboe notes Chairman Atkins' statement accompanying the KPI Approval, which makes clear that the SEC's action did not foreclose CFTC jurisdiction over KPI contracts that are "structured to fall under the CFTC's jurisdiction"—provided they are "structured in different ways." The plain meaning of this statement confirms a long-established principle: instruments that may be economically equivalent can be classified differently, and made subject to different regulatory regimes, where they are, in fact, structured differently in accordance with distinctions prescribed by Congress or by agencies acting under authority established by Congress. Instruments that are both economically **and structurally the same, however,** cannot be regulated as different instruments insofar as Congress has expressly divided responsibility over certain instruments between the SEC and the CFTC, not permitting them to be jointly regulated except under certain narrow conditions. Indeed, the definition of "swap" in the CEA recognizes this by specifically excluding securities options and security-based swaps (among other things) from the definition of "swap." Simply put, an instrument is one or the other; it cannot be both.

Neither the Rothera filing nor the Rothera Order undertakes an appropriate legal assessment consistent with this requirement, especially given that the Tesla Contract is structured as a securities option. Instead, both focus on the more generic definition of "swap" and only

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12 KPI Approval at 65884.

13 Paul Atkins, Chairman, *Statement on the Commission's Approval of a Proposed Rule Change to Permit the Listing of Binary Options Overlying Key Performance Indicators* (Oct. 13, 2026), available at https://www.sec.gov/newsroom/speeches-statements/atkins-101326-statement-commissions-approval-proposed-rule-change-permit-listing-binary-options-overlying-key.

superficially touch upon the securities option exclusion before concluding that the Tesla Contract possesses the structural and functional characteristics of a CFTC-regulated instrument and therefore falls within the CFTC's jurisdiction.

The Tesla Contract is structured as a securities option: it represents a single, fixed, one-way payout determined at expiration, with no exchange of payments over time. Because it is based on the EPS disclosed by Tesla to the SEC, like Cboe's binary KPI options, it is also based on the value of a security or an interest therein, for precisely the same reasons the SEC described in the KPI Approval.[14] Rothera's self-designation of the Tesla Contract as a "swap" is merely a self-selected label, and that label is the only meaningful difference between the Tesla Contract and the binary KPI options the SEC approved for Cboe to list and trade.[15] As structured, the Tesla Contract is a binary option based on the value of a security.[16]

That the Tesla Contract is ***structured*** almost precisely as Cboe's binary KPI options is obvious when the two are compared side by side. Following is a summary overview of the structural features of the instruments:

Feature	**Cboe binary KPI option (SEC-approved)**	**Rothera Tesla Contract**
Underlier	An issuer KPI, including GAAP EPS, from SEC earnings filings	Tesla non-GAAP diluted EPS, furnished on Form 8-K
Payout	Fixed $1 exercise settlement amount	$1 settlement value
Trigger	KPI meets or exceeds the strike (call) or falls below it (put)	Adjusted EPS greater than $0.65 ("Yes"/"No")

[14] In 1993, CFTC staff previously recognized that contracts on corporate earnings "could be viewed in the nature of options on securities" and referred such a contract to the SEC. *See* 1993 IEM letter, available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/93-66.pdf; *see also* 2008 Sirri letter, available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/frcomment/08-004c028.pdf.

[15] Other options exchanges have likewise sought SEC approval to list and trade binary options based on issuer KPIs. *See, e.g.,* Securities Exchange Act Rel. No. 106182 (Aug. 24, 2026) (SR-MEMX-2026-25); Securities Exchange Act Rel. No. 106918 (Nov. 17, 2026) (SR-MIAX-2026-45); Securities Exchange Act Rel. No. 106367 (Sept. 15, 2026) (SR-NYSEAMER-2026-82); Securities Exchange Act Rel. No. 106370 (Sept. 15, 2026) (SR-NYSEARCA-2026-93).

[16] Rothera's argument that the Tesla Contract should be treated as a "swap" fails on its own terms because a swap on "a single security or loan, including any interest therein or on the value thereof" is a security-based swap, which is also excluded from the reach of the CFTC. Either way, the Tesla Contract falls outside the CFTC's jurisdiction.

Exercise and settlement	Automatic exercise at expiration	Exchange determines the expiration value and pays the in-the-money side
Expiration	Tied to the earnings disclosure date; accelerates on early disclosure	Tied to the scheduled release; moves earlier on early release
Restatements	Settlement value does not change	Later revisions disregarded
Funding	Positions must be fully funded	Fully collateralized
Label, venue and clearing	Standardized option listed and traded on a securities exchange, cleared by an SEC-registered clearing agency	"Swap" on a CFTC-regulated exchange, cleared by Rothera's own DCO

Nothing differs structurally between the two products. The SEC found that Cboe's binary KPI option is a securities option because it meets the functional definition of a securities option; the Tesla Contract meets that definition as well. Consequently, the Tesla Contract is excluded from the definition of a swap and falls outside the CFTC's jurisdiction.

Rothera attempts to factually distinguish the underlier for the Tesla Contract from binary KPI options that are based on EPS, by referencing Tesla's non-GAAP adjusted EPS, furnished on Form 8-K, rather than the GAAP measure used in Cboe's binary KPI options. Such a distinction lacks merit. The SEC's reasoning and analysis turned on whether the metric is material and disclosed by the issuer in its SEC filings, not on whether it is calculated pursuant to GAAP. Cboe's filing defined KPI as a key financial or operating metric disclosed in the issuer's earnings-related filings, expressly including Form 8-K, and the filing also extended eligible KPIs to include "GAAP and non-GAAP measures." The SEC's "based on the value" analysis covers KPIs disclosed in reports "filed with or furnished to" the SEC. This materiality rationale rests on the issuer's own decision to disclose the metric either because it is a required item or because it is material disclosure required under general anti-fraud principles. Whether a metric is a GAAP measure has no impact on that rationale. Further, the "interest in" analysis ties EPS to the shareholder's pro rata claim on earnings, which adjusted EPS measures just as directly—EPS is a measure of a "pecuniary interest in the issuer's stock."

Although Rothera seeks to use Chairman Atkins' statement to support its characterization of the Tesla Contract as a swap, the statement, as well as the SEC's approval order for the binary KPI options, emphasizes a structural test as required by law, which both Cboe's proposal and the SEC's approval order take great care in analyzing. The Rothera Order fails to do this even minimally. The operative words in Chairman Atkins' statement are "structured to fall under the . . . jurisdiction," and the sentence preceding that refers to similar products "structured in different ways." The statement repeats the concept of structure twice and makes no reference to labels or self-designations. Likewise, the KPI Approval, which of course reflects the SEC's views, not just those of the Chairman, includes language consistent with the Chairman's words, noting that the

SEC's approval of the binary KPI options "does not foreclose other markets from ***structuring*** derivative instruments overlying KPIs ***as other products***." These statements all emphasize the importance of an instrument's structure and functional nature; there is no suggestion that merely calling something by a different label or seeking to list it on a different platform suffices to establish a regulatory distinction. The test is structure, not self-interested labeling.

Just as the structure of a product determines jurisdiction, jurisdiction in turn determines which agency has approval authority. An agency cannot extend its jurisdiction over products whose structure puts them outside that agency's reach merely by loose-fitting nomenclature or interpretation that runs contrary to plain statutory language.[17] The CFTC's approval authority under the CEA[18] and Regulation 40.3 reaches only contracts within its jurisdiction, so whether the contract is a swap is the threshold question. Because the Tesla Contract is structured identical to a securities option, it is excluded from the swap definition and is thus outside CFTC jurisdiction. As such, the CFTC has nothing over which to exercise its approval authority, and the CFTC's approval of the Tesla Contract exceeded its jurisdiction and, thus, is inconsistent with established law.

Other Key Considerations from the SEC's Binary KPI Option Approval Order

The SEC has already considered the status of binary options that have EPS KPIs as their underlier and determined that the binary KPI options approved to list and trade on Cboe are options on a security subject to the federal securities laws. The SEC's analysis of securities option status looked at precisely the same features integral to the Tesla Contract: call and put structure, a non-refundable premium, and rights without further obligations. The SEC's analysis of this point bears quoting at length:

> [T]he specific binary KPI options as proposed by the Exchange may be categorized as options on a security. The binary KPI options included in the Amended Proposal are limited to issuers with a class of equity securities that are listed for trading on a national securities exchange. The option prong of the "security" definition includes any option on a security (including any interest therein or based on the value thereof). As the Commission has stated before, the Commission interprets "based on the value [of a security or securities]" in the option prong of Section 3(a)(10) of the Exchange Act "to include any option whose pricing in the secondary market moves in relation to the value of the underlying security or securities of the option in question." In this case, each proposed binary KPI option is based on the issuer's disclosure of the KPI in the issuer's earnings-related reports filed with or

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17 "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate," *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014), and "courts, not agencies, will decide 'all relevant questions of law,'" *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 371 (2024).

18 7 U.S.C. § 5c(c)(4)(A).

> furnished to the Commission (including KPIs such as earnings, sales, revenue, operating margin, net income, interest income, credit losses, trading volume, and free cash flow). ***It is well-established that the value of an issuer's stock moves in relation to issuer performance disclosures like those underlying the proposed binary KPI options. Accordingly, in this case, each Cboe-proposed binary KPI option is correlated with the value of the issuer's stock, and it is expected that the price of each Cboe-proposed binary KPI option will move in relation to the value of the issuer's stock during the life of the option contract.*** [emphasis added]

The SEC noted further:

> Each proposed binary KPI option provides a cash payout based on the disclosed KPI, and ***because the KPI is tied to a pecuniary interest in the issuer's stock, the binary KPI option is an option on an interest in, or based on the value of an interest in, that stock.*** For example, stockholders have a pro rata claim to a residual interest in the net assets of the issuer, which is an interest in the security. The value of that interest is tied to measures such as earnings per share, which is a profitability measure and may be considered by investors, together with other financial and operating information. [emphasis added]

The CFTC's analysis of the Tesla Contract does not comport with the SEC's analysis in the KPI Approval. In approving the Tesla Contract, the CFTC stated that "[w]hatever the correlational relationship, the [Tesla] Contract's statistical underlier is distinct from the referenced issuer's securities, the value thereof, or an interest therein." This conclusory language cannot be squared with the SEC's analysis. The CFTC's apparent claim is that the binary KPI options are securities options solely because they trade on an options exchange while the Tesla Contract is a swap solely because it will trade on a DCM. That reasoning allows the conclusion to drive the analysis, as it accepts Rothera's bald and unreasoned assertion, while ignoring statutory language and structural realities. The CFTC simply "took [Rothera's] word for it."[19] This is not reasoned decision making.[20]

As described above, every structural and economic term that bears on classification matches between the Tesla Contract and Cboe's binary KPI options. Rothera's contract differs only in terms of trading venue, clearing venue, the "swap" label it uses, and a meaningless distinction in its choice of EPS measure, which is, indeed, taken from an SEC-filed document. Under the substance-over-form principle, those differences do not change the appropriate classification of these Rothera instruments as securities options subject to the SEC's exclusive oversight.

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19 *Susquehanna International Group, LLC v. SEC*, 866 F.3d 442, 447 (D.C. Cir. 2017).

20 *Id.* at 446-48.

Regulatory Arbitrage and Investor Protection Concerns

Authorizing the Tesla Contract or other similar Rothera products to begin trading on CFTC-registered venues creates worrisome investor-protection gaps. First, there is the matter of surveillance. Trades in the Tesla Contract would fall outside the cross-market securities surveillance mechanisms to which SEC-registered listed options exchanges and equity exchanges are subject, and, thus, outside the scope of trading that is reported to the Consolidated Audit Trail and closely surveilled by the SEC and self-regulatory organizations. At the same time, hedges consisting of Tesla stock or listed securities options would be part of that otherwise comprehensive reporting and surveillance regime. This outcome leaves the issuer's stock open to manipulation, insider trading, and other fraudulent activity for which there will be no integrated and comprehensive surveillance approach.

Second, Rothera itself recognizes the risk its product creates, as it bars Tesla insiders, auditors, and family members from trading the contract. This restriction is an indirect acknowledgment that the Tesla Contract is vulnerable to the same broad insider trading risk that the securities laws are designed to address. The prohibition to trade on material non-public information under securities laws extends beyond the individuals Rothera bars from trading the Tesla Contract (e.g., a tippee), and the regulatory framework to which the Tesla Contract is subject is not designed to surveil for such trading beyond these individuals. As a result, trading in the Tesla Contract on material non-public information may occur without regulatory intervention, to the detriment of investors. To the contrary, the comprehensive and integrated insider trading regulatory framework that exists in the securities markets, which includes cross-market surveillances and information-sharing tools, is designed to detect the broader scope of prohibited trading on material non-public information.

Finally, Regulation Best Interest and other broker-dealer protections would not apply to retail customers trading such a contract if offered in the CFTC space in derogation of important investor protections that have served U.S. markets well for decades.

Sincerely,

s/Patrick Sexton

Patrick Sexton
EVP, General Counsel, and Corporate Secretary
Cboe Global Markets, Inc.

CC: CFTC Division of Market Oversight
SEC Division of Trading and Markets