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August 24, 2026

VIA ELECTRONIC SUBMISSION

Ms. Vanessa Countryman
Secretary, Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

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

Re: Joint Request for Comment on Further Definition of “Swap” and “Security-Based Swap” and on Alternative Compliance (SEC File No. S7-2026-21; CFTC RIN 3038-AF71)

Dear Ms. Countryman and Mr. Kirkpatrick:

Cboe Global Markets ("Cboe") submits this comment in response to the Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance (the "Joint Request"). Cboe welcomes efforts of the Securities and Exchange Commission (“SEC”) and the Commodity Futures Trading Commission ("CFTC", and together with the SEC, the "Commissions") to collaborate to enhance regulatory effectiveness and market integrity. The Joint Request raises a number of distinct issues, many of which Cboe has addressed in a separate comment letter regarding the Joint Request. The substance of this current letter is limited to the product and regulatory classification of event contracts (“ECs”) and the related jurisdictional question applicable to ECs on securities indices and issuer key performance indicators (“KPIs”).

The growth of ECs, the wide range of "events" underlying them, and the lawsuits and media attention surrounding them have all contributed to genuine confusion about how these instruments should be classified and who should regulate them. While Cboe supports the Commissions in their efforts to provide greater regulatory clarity in support of innovation, it is important to recognize that not every EC is novel or presents an as-yet unresolved jurisdictional question. As the accompanying legal memorandum outlines, ECs that are based on the value of a security, a group or index of securities, or an interest in a security are securities under the federal securities laws, and they should only be offered for trading on an SEC-registered national securities exchange. Whatever form the Commissions' broader harmonization effort ultimately takes, it should reflect this reality rather than treat all ECs as an undifferentiated category with uncertain jurisdiction. The harmonization efforts need not, and should not, delay the SEC from exercising its exclusive jurisdiction over those ECs that are securities. Stated simply, ECs tied directly to a securities index or to issuer KPIs that are listed for trading on CFTC-regulated designated contract markets ("DCMs") should be de-listed since those platforms are not legally permitted to offer trading in securities.

Event Contracts as Securities

ECs are a subject of increasing attention and are growing in use and popularity with retail investors. Although the term "event contracts" is not defined in relevant federal securities or commodity statutes, ECs are essentially structured as options that investors can purchase based on a binary yes/no contract that is automatically exercised and paid out on an all-or-nothing basis.

Many ECs relate to events involving U.S. politics, international relations, or sporting events – matters that have little direct relation to the securities markets. There are, however, certain categories of ECs that are tied directly to securities, securities indices (like the S&P 500 or the Nasdaq 100), or specific issuers (like Meta, Netflix, or Tesla). For these kinds of ECs, there is little room for debate that they should be overseen by securities regulators; however, there is a growing amount of trading that is being conducted without that oversight and without due regard to the Congressionally mandated market and regulatory regime to which it should be subject. Where ECs relate to the value of securities or securities indices, federal law is clear: these instruments are securities and thus should be offered and traded exclusively within the oversight of the SEC, FINRA and securities exchange self-regulatory organizations ("SROs"), not the CFTC.

Two types of ECs deserve particular attention:

- ECs directly on the S&P 500 or other security indices; and
- ECs focusing on issuer KPIs.

As described more fully in the accompanying legal memorandum,[1] the federal laws that establish the basis for commodities and securities regulation demonstrate that these types of ECs should be within the SEC's jurisdiction and accordingly, should only be offered by SEC-registered intermediaries (such as licensed broker-dealers) and traded on SEC-registered exchanges. In particular, the functional and economic structure of these categories of ECs take the form of binary options. That is, they operate just like exchange-listed securities options products, instruments that have long been regulated by the SEC. As a result, they should be listed and traded exclusively on SEC-registered exchanges.

1 Appendix I.

When securities-related ECs are bought and sold outside this framework, it undermines the long-established and well-settled regulatory regime mandated by Congress to which they – like all securities – should be exclusively subject. It also poses potential harms to the wider securities market ecosystem that the securities laws, regulations and market structure are designed to safeguard. This regulatory arbitrage puts at risk investors (including retail participants) and issuers who rely on that ecosystem to provide clear guardrails and protections. Trading outside that market structure also prevents the SEC and other securities regulators from performing important venue-specific and market-wide surveillance and oversight that serves to protect participants (buyers, sellers, and issuers) against acts of manipulation and other harms. In effect, it creates a shadow securities market that sits outside of the SEC's oversight and is not subject to the same market standards and investor protections.

Following is a summary of key issues relating to ECs on securities indices and issuer KPIs, as further described in the accompanying legal memorandum, that provides a more detailed analysis relating to the appropriate regulation of these types of instruments. Put simply, ECs based on the value of a securities index or an individual security (including instruments based on issuer KPIs) should only be offered within the clearly defined, and well-understood, securities market structure and regulatory regime.

Event Contracts Referencing Securities Indices and Issuer KPIs

A growing number of ECs are based on the value of a security or a securities index, or on KPIs relating to individual issuers. These ECs are being offered on CFTC-registered venues. These venues take the view that these instruments are "swaps", subject to CFTC jurisdiction, rather than "securities", subject to SEC jurisdiction. This position is incorrect as a matter of law.

The Securities Exchange Act of 1934 ("Exchange Act") defines "security" broadly so that it includes (but is not limited to) "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)". An EC is a cash-settled binary option. It represents an all-or-nothing payout that is dependent on the result of a yes/no proposition. Like ECs, binary options that have already received SEC approval to trade on national securities exchanges generally work in the following manner: the holder has the right to receive the exercise settlement amount, and the writer has the obligation to pay it. This payout occurs if the exercise settlement value meets the automatic exercise criteria specified in the listing options market's rules. If those criteria are not met, the option expires worthless. Thus, ECs that relate to securities and securities indices, whether directly or where based on the value of such securities or securities indices, are securities – specifically, binary securities options.

When Congress added the regulation of "swaps" into the Commodity Exchange Act ("CEA"), it defined "swap" broadly to capture a wide range of previously unregulated financial instruments.

However, the definition of "swap" that was added to the CEA expressly <u>excludes</u> any put, call, option or privilege on a security, or on a group or index of securities (including any interest therein or based on the value thereof) that is subject to the federal securities laws.[2] Thus, for example, if an EC pays out based on the closing value of a securities index, it is an option (or, alternatively, a privilege, put or call) that is "based on the value" of that index and therefore a "security" subject to the federal securities laws, thereby excepting that instrument from the definition of "swap."

ECs based on issuer KPIs are instruments that reflect how individual securities are valued, a characteristic that places them squarely within the SEC's jurisdiction as they relate directly to the value of an interest in a security. The test used to determine materiality under the federal securities laws – would a reasonable investor take the information into account when deciding to invest – is essentially what KPI outcomes are designed to capture. KPIs influence how investors and markets value a security.[3]

Entities that offer ECs that are unregistered securities run not only the risk that federal regulators will take action, but that state regulators and private litigants can also do so. That is, if someone has purchased an EC that is an unregistered security from an entity that is not SEC-registered, such a transaction entitles the purchaser to seek rescission rights. So, for every "losing bet" that relates to an unregistered securities transaction bought from an unregistered broker-dealer, that purchaser may have a put right over the transaction. If federal regulators decline to take action in respect of such activity, this does not preclude state securities regulators or private litigants from seeking to do so – after all, investors will have purchased something that the vendor was not authorized to sell them, as evidenced by underlying federal law. It would be surprising not to see litigation focused firms turning their attention to this topic if illicit trading continues to grow without federal regulators drawing clear lines around the activity at issue.

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[2] "There are several exclusions from the definition of 'swap' relating to securities. To the extent a financial instrument falls into one of these exclusions, it is not a swap and, therefore, is not a security-based swap. For example, any note, bond, or evidence of indebtedness that is a security, as defined in Section 2(a)(1) of the Securities Act, is excluded from the definition of swap. Similarly, 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, is excluded from the definition of swap." Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets, SEC, *Statement on Tokenized Securities* (Jan. 28, 2026) (internal citations omitted).

[3] See Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Rel. No. 8350 (Dec. 19, 2003), 68 FR 75056, 75057 (Dec. 29, 2003) (stating that "companies should identify and discuss key performance indicators, including non-financial performance indicators, that their management uses to manage the business and that would be material to investors"); Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Rel. No. 10751 (Jan. 30, 2020), 85 FR 10568, 10569 (Feb. 25, 2020) (stating that "companies should identify and address those key variables and other qualitative and quantitative factors that are peculiar to and necessary for an understanding and evaluation of the individual company[, and that] [s]uch information could constitute key performance indicators and other metrics") (footnotes omitted).

The SEC Has Reviewed and Approved the Listing and Trading of Binary Options on Registered National Securities Exchanges

Both issuer KPI ECs and securities index-related ECs share characteristics of cash-settled binary options that the SEC has previously reviewed and approved for listing and trading on SEC-registered options exchanges. As approved by the SEC, binary securities options generally have the following characteristics:

- The underlying reference value is a securities index (or an individual security) itself, and not a derivative;
- Expirations are as of a specific date and time;
- Cash-settled;
- Fixed settlement value; and
- Automatic payout if the settlement value is above/below a specific value (or within a specific range) and no payout if above/below the value (or outside the specific range) depending on which contract is purchased.

Policy Reasons Support Treating These Types of Event Contracts as Securities

Not only is SEC jurisdiction over these two categories of ECs clearly the better reading under the law, this approach also makes sense as a matter of policy and is consistent with the statutory framework that Congress assigned exclusively to the SEC. Listing and trading these kinds of ECs as listed options subject to SEC jurisdiction (rather than as "swaps" subject to CFTC jurisdiction) means that:

- Investors buy or sell these instruments through SEC-registered and regulated broker-dealers that are subject to SEC, FINRA, and other SRO (i.e., exchange) oversight.
- Instruments are listed and traded on SEC-registered and regulated options exchanges, which means trading activity is subject to the rules and practices of the applicable options exchanges and is under comprehensive market and cross-market surveillance, which in turn, subjects those instruments (alongside other securities products) to the scrutiny of the SEC as well as the exchange SROs.
- Clearance and settlement happens through securities clearing agencies registered with and overseen by the SEC, which brings additional oversight and market stability to the transactions in the securities markets.
- Retail investors can rely on clear rules of the road, including protections against insider trading and market manipulation spanning the securities markets and in keeping with clear disclosures that govern all listed options trading as set forth in SEC-filed disclosure documents which every options investor receives.
- Issuers can take comfort in these same assurances. Without these safeguards, issuers face greater risk that their material non-public information will be leaked and exploited and instruments tied to their securities will be subject to manipulation.

The Imperative to Take Action Continues to Grow

Financial prediction markets – a distinct and rapidly growing subset of the broader ECs market – illustrate the scale and urgency of this activity. Year-to-date (YTD) through July 2026, trading volume in financial prediction markets has grown approximately 8-fold, surpassing $5 billion. Within that category, ECs referencing the S&P 500 Index grew approximately 150% from YTD July 2025 to YTD July 2026. In addition, the company news and KPI-related EC category grew 17-fold YTD. Although issuer KPIs remain a comparatively nascent category, they too are expanding rapidly: as of August 18, 2026, there were more than 300 active KPI-related events trading on venues outside the securities market and regulatory frameworks with multiple distinct markets available per event.

Taken together, it is critical that the CFTC and SEC take steps to ensure future activity is undertaken in conformance with the law.

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Thank you for the opportunity to share our perspective. We welcome any questions or further discussion.

Sincerely,

s/Patrick Sexton

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

CC: The Honorable Paul Atkins, Chairman, Securities and Exchange Commission
The Honorable Hester Peirce, Commissioner, Securities and Exchange Commission
The Honorable Mark Uyeda, Commissioner, Securities and Exchange Commission
The Honorable Michael S. Selig, Chairman, Commodity Futures Trading Commission
Mr. Jamie Selway, Director, Division of Trading and Markets, Securities and Exchange Commission

O'Melveny

MEMORANDUM

To: Patrick Sexton
Executive Vice President, General Counsel and Corporate Secretary
Cboe Global Markets, Inc.
From: James R. Burns and Brant K. Brown
Date: 08/24/26
Re: Event Contract Regulatory Analysis

You have asked for our views on how certain "event contracts" should be classified under the federal securities laws—the Securities Act of 1933, as amended (the "Securities Act"), and the Securities Exchange Act of 1934, as amended (the "Exchange Act" and, together with the Securities Act, the "Federal Securities Laws")—and the Commodity Exchange Act, as amended (the "CEA" and, together with the Federal Securities Laws, the "Relevant Acts").[1] In particular, you have asked how to determine whether an event contract is a "security," a "swap," a "security-based swap," or some other instrument, and how event contracts tied to securities indices or to specific issuer metrics such as Key Performance Indicators ("KPIs") should be assessed.[2]

Short Answer

In short, the proper classification of an event contract turns on its underlying "event." An event contract whose payout is based on the value of a security, a group or index of securities, or an interest in a security is a "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)" and is therefore a "security" within the

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1 The term "event contract" is not defined in the Relevant Acts. For purposes of this Memorandum, we use the term to mean the binary "yes/no" contracts listed and traded on certain platforms (often described as "prediction markets") that are cash settled on an all-or-nothing basis depending upon the outcome of a particular, defined event. Event contracts in the U.S. are typically traded on a designated contract market (a "DCM") registered with the Commodity Futures Trading Commission ("CFTC").

2 This Memorandum solely addresses definitional issues under the Federal Securities Laws and the CEA. It does not cover the application of other provisions of the federal securities laws, including the Investment Company Act of 1940 or the Investment Advisers Act of 1940, or obligations arising in other jurisdictions, including with respect to requirements in any jurisdictions outside the United States. We have not discussed our views with the SEC, the CFTC, or their staffs, or any other regulatory or self-regulatory organization. Our analysis is provided as of the date set forth above, and is based exclusively on the facts and assumptions set forth herein. This Memorandum is provided exclusively to Cboe and its affiliates and may not be relied upon by any other person.

meaning of the Federal Securities Laws.[3] As such, the event contract is therefore subject to the jurisdiction of the Securities and Exchange Commission ("SEC"), and it is expressly excepted from the definition of "swap" under the CEA and outside the CFTC's jurisdiction. The same reasoning applies to event contracts based on an issuer's KPIs disclosed in its SEC filings when those KPIs are "based on the value of" the issuer's security. This interpretation is reinforced by the SEC's disclosure framework, which requires issuers to report information material to investors' investment determinations as part of the former's SEC-mandated public-reporting obligations. By contrast, event contracts tied to non-securities outcomes—such as sporting events, elections, or the weather—generally remain "swaps" subject to the CFTC's jurisdiction provided the event or contingency on which the event contract is based is "associated with a potential financial, economic, or commercial consequence."[4]

I. Background: Prediction Markets and the Classification Question

Prediction markets and event contracts are drawing growing attention from investors and from both the CFTC and the SEC.[5] Prediction market platforms operate as CFTC-registered DCMs, offering cash-settled "event contracts" that pay out based on the "yes/no" outcome of a future event. Most of these contracts traded on DCMs—covering sporting events, elections, weather, or world events—are treated as "swaps" under the CEA rather than as "securities" under the Federal Securities Laws.[6] DCMs typically file them with the CFTC as "binary options," which can be a subset of "swaps."[7]

II. How Event Contracts and Comparable Securities Products Work

DCM Event Contracts

A typical DCM event contract pays a fixed amount—generally $1.00—if the customer correctly predicts the outcome of the underlying event. A customer can buy or

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[3] *See* 15 U.S.C. § 78c(a)(10).

[4] *See* 7 U.S.C. § 1a(47)(A)(ii).

[5] *See Prediction Markets; Public Interest Determinations*, 91 FR 35806, 35807 (June 12, 2026) ("Prediction markets, on which 'event contract' derivatives are traded, are rapidly increasing in popularity with the American public both as a financial asset class and as a source of reliable information for news media, sports leagues, financial institutions, and everyday Americans."); *see also infra* notes [30-31].

[6] The definitions of "security" are located in the Federal Securities Laws while the definition of "swap" is in the CEA; however, the Federal Securities Laws cross-reference the definition of "swap" in the CEA and, consequently, the definition of "swap," while located in the CEA, is the same across the Relevant Statutes. *See* 15 U.S.C. § 77b(a)(1) (defining "security" under the Securities Act), 15 U.S.C. § 78c(a)(10) (defining "security" under the Exchange Act); 7 U.S.C. § 1a(41) (defining "security" by cross-reference to the Federal Securities Laws), (47) (defining "swap"). The definitions of "security" in the Securities Act and the Exchange Act are not identical; however, the relevant language discussed in this Memorandum is the same in both statutes, and the CEA definition of "security" refers to a security as defined in either the Securities Act or the Exchange Act.

[7] *See* 17 CFR 38.4.

sell a “yes” or “no” contract, which functions much like a call or a put. For a contract on a securities index, for instance, the “yes” and “no” positions are effectively calls and puts on the price (or price range) of the index. On August 3, 2026, for example, one prediction market listed a contract on the “S&P price tomorrow at 10am EDT.” A customer buying “yes” received $1.00 if the S&P closed at 7,605 or above, and nothing if it closed below; a customer buying “no” received $1.00 if it closed below 7,605.

For each contract, the DCM publishes “rules” specifying the underlying (for the above S&P 500 contracts, “the price of the S&P 500 Index <on/before> <time> on <date>”), the issuance terms, the minimum tick size, the last trading date, the settlement and expiration dates, the settlement value (generally $1.00), and any contingencies. A registered DCM must file the product’s terms and conditions with the CFTC, typically through a self-certification process.[8] At expiration the contracts are automatically exercised, and customers who chose the correct outcome receive the fixed settlement amount. As with ordinary puts and calls, customers can buy and sell “yes” and “no” contracts before expiration; in the case of event contracts traded on prediction markets, “the contract prices will reflect the market participants’ aggregate beliefs regarding whether the events will occur.”[9]

Exchange-Traded Binary Options

The SEC has long authorized self-regulatory organizations (“SROs”)—including options exchanges and registered clearing agencies—to list, trade, or clear binary options that closely resemble event contracts, especially those tied to the closing value of a securities index. Consistent with longstanding positions of the SEC, the exchanges, and market participants such as the Options Clearing Corporation (“OCC”), these binary options are treated as securities and trade on registered securities exchanges under the Federal Securities Laws. Because they are securities, the SROs must file proposed rule changes with the SEC and obtain approval under Section 19 and Rule 19b-4 of the Exchange Act before they may list and trade (in the case of exchanges) or clear (in the case of an SEC registered clearing agency) binary options.

Exchange-traded binary options generally share four features: (i) they are cash-settled, with two possible payoffs (a fixed amount or nothing); (ii) they are automatically exercised; (iii) the holder receives the fixed amount only if the value of the underlying meets the specified criteria at the exercise time, and otherwise the option expires worthless; and (iv) they are exercised only at a set time or date, making them effectively European-style options.[10]

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[8] *Id.*

[9] *See Prediction Markets*, 91 FR 12516, 12517 (Mar. 16, 2026) (CFTC advance notice of proposed rulemaking and request for comment on event contracts traded on prediction markets) (“*Prediction Markets*”).

[10] *See Characteristics and Risks of Standardized Options*, at 8 (updated June 2024) (the “ODD”).

Broker-dealers must generally give customers the Options Disclosure Document ("ODD") before accepting any options order.[11] The ODD is "written to meet the requirements of an SEC rule that requires the U.S. options markets to prepare, and brokerage firms to distribute, a document that briefly and generally describes the characteristics of options and the risks to investors of maintaining positions in options."[12] The ODD illustrates a binary option this way: an investor holds a binary call on XYZ with an $80 exercise price and a $100 fixed cash settlement. If XYZ settles at $81—or at $90—the investor receives $100. If XYZ settles below $80, the investor receives nothing and the option expires worthless.[13]

The SEC has treated these exchange-traded binary options as securities for years, and Cboe, other exchanges, and the OCC have obtained SEC approval of rules governing them. In May 2008, for example, the SEC approved Cboe's proposal to list and trade binary options on broad-based security indices.[14] That approval followed an extended review, including formal notice-and-comment rulemaking under Section 19(b) of the Exchange Act and Rule 19b-4, that lasted almost seventeen months. Cboe described the new products as follows:

> CBOE Binary Options are contracts that have an "all-or-nothing" payout depending on the settlement value of the underlying broad-based index relative to the strike price of the binary option. In the case of S&P 500 Binary Options, the final settlement value used to determine the cash payout at expiration - either $100 or $0 - will be the same as the settlement value for standard S&P 500 options ("SET").[15]

The SEC's approval order summarized the mechanism the same way:

> Cboe proposes to list and trade certain cash-settled, European-style binary options on broad-based security indexes. At expiration, [the option] . . . will pay a fixed sum at expiration regardless of the magnitude of the difference between the settlement value and the option's exercise price. A call binary index option would pay out if the settlement value of the

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11 *See* 17 CFR 240.9b-1; *see also* FINRA Rule 2360(b)(11) (requiring every FINRA member to deliver the current ODD to each customer at or prior to the time the customer's account is approved for trading options issued by the OCC, other than an OCC Cleared OTC Option).

12 ODD, at 4.

13 *Id*. at 10.

14 *See Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, Regarding the Listing and Trading of Binary Options on Broad-Based Security Indexes*, Securities Exchange Act Rel. No. 57850 (May 22, 2008), 73 FR 31169 (May 30, 2008) (SR-CBOE-2006-105) ("Binary Option Order").

15 Cboe Reg. Circular RG 08-074 (https://cdn.cboe.com/resources/regulation/circulars/regulatory/RG08-074.pdf).

underlying index were at or above the option's exercise price at expiration, and a put binary index option would pay out if the underlying index were below the option's exercise price at expiration.[16]

The Binary Option Order expanded Cboe's listing standards to cover binary options with the following characteristics:

- The options are cash-settled options with two possible payoff outcomes (fixed amount or nothing)
- The options are subject to automatic exercise
- The holder of the option has the right to receive the settlement amount if the value of the underlying at the specific time meets criteria for automatic exercise and, if not met, the option is worthless
- The options are European style.

The SEC's approval necessarily rested on the premise that these binary options are "securities." Although the order did not say so in as many words, the SEC made formal findings—on listing standards, clearance obligations, position and exercise limits, reporting, and margin—that it could make only for instruments subject to the Exchange Act, and it stressed the benefits of trading binary options on an SEC-registered national securities exchange.[17]

In addition to the Cboe rule filing to list and trade binary options, the OCC engaged in related rulemaking, and the ODD was updated to reflect these products.[18] The SEC has also approved more recent filings by Cboe to amend its rules related to binary options to permit it to list binary options on any index upon which it may list traditional, non-binary options.[19] Similarly, OCC has continued to adjust its rules,

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16 Binary Option Order, at 31169 (internal citations omitted).

17 *Id*. at 31171. Throughout the Binary Option Order, the SEC refers to these instruments interchangeably as "binary options on broad-based indexes," "binary options," or "options."

18 *See Order Granting Approval of a Proposed Rule Change Relating to Binary Options*, Securities Exchange Act Rel. No. 56875 (Nov. 30, 2007), 72 FR 69274 (Dec. 7, 2007) (SR-OCC-2007-08). ("OCC… intends to clear only binary options that are within the definition of a 'security' as determined by the [SEC]."); *Order Granting Approval of Accelerated Delivery of Supplement to the Options Disclosure Document Reflecting Changes to Disclosure Regarding Certain Binary Stock and Index Options, Range Options and Delayed Start Options*, Securities Exchange Act Rel. No. 58043 (June 26, 2008), 73 FR 38260 (July 3, 2008) (SR-ODD-2008-02) ("ODD Supplement Order").

19 Cboe initially submitted this rule filing on April 2, 2026, and the Commission granted accelerated approval on July 17, 2026. *See Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified and Superseded by Amendment No. 1, To Amend Its Rules Related to Binary Options*, Securities Exchange Act Rel. No. 105936 (July 17, 2026), 91 FR 46205 (July 22, 2026) (SR–CBOE–2026–032). As the Commission noted in approving the proposed rule change, other exchanges—including NYSE American and Nasdaq MRX—also permit the listing and

including its margin and risk management methodology, to address the clearing of binary options.[20]

Range Options

Shortly before its binary-options approval, Cboe obtained SEC approval to list and trade range options. Range options are also based on securities indices, but—unlike binary options—they pay *different* amounts depending on where the index closes.[21]

The Range Options Order covered cash-settled, European-style range options on a securities index. A range option pays out if the index settles within a specified range at expiration. The range is divided into three segments—low, middle, and high—and the payout depends on which segment the settlement value falls in. Like binary options, range options are automatically exercised, but they pay a variable cash amount rather than a fixed one.

As with the Binary Option Order, the SEC expressly found that the range-options proposal was consistent with the requirements of the Exchange Act and the obligations of a national securities exchange. The OCC again adopted related clearance and settlement rules, and the ODD was updated before trading began.[22] Cboe also published a Regulatory Circular describing the product and its regulatory treatment.[23]

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trading of binary broad-based index options. *See id*. at 46217, n.87.

[20] *See Order Approving Proposed Rule Change by the Options Clearing Corporation Concerning Amendments to OCC's STANS Methodology Description To Enable OCC To Accept Binary Options for Clearing and Appropriately Manage the Risk Created by Binary Options*, Securities Exchange Act Rel. No. 105537 (May 21, 2026), 91 FR 31513 (May 27, 2026) (SR-OCC-2026-003) (amending OCC's STANS methodology description to enable OCC to accept for clearing and manage the risk created by binary options).

[21] *See Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To List and Trade Range Options and Designating Range Options as Standardized Options Pursuant to Rule 9b-1 of the Exchange Act*, Securities Exchange Act Rel. No. 57376 (Feb. 25, 2008), 73 FR 11689 (Mar. 4, 2008) (SR-CBOE-2007-104) ("Range Options Order").

[22] *See, e.g., Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Range Options*, Securities Exchange Act Rel. No. 58003 (June 23, 2008), 73 FR 36934 (June 30, 2008) (SR-OCC-2008-11); ODD Supplement Order; *see also* ODD, at 8 (describing range options).

[23] *See* Cboe Regulatory Circular RG12-117.

Credit Default Options

In 2007, the SEC approved a Cboe rule change to list and trade credit default options ("CD options").[24] A CD option is a cash-settled, binary option referenced to the debt securities of a specified public company. It is automatically exercised if a defined credit event occurs during the option's life, paying the holder a fixed $100,000 per contract; if no credit event occurs, the option expires worthless and settles at $0.[25]

In approving Cboe to list and trade CD options, the SEC gave close attention to whether they are "securities" under the Exchange Act. It concluded that they are—as options "based on the value [of a security or securities]" and on an "interest in" a security within the meaning of Section 3(a)(10). Cboe began trading CD options in June 2007 and issued a Regulatory Circular describing the product.[26]

III. The "Swap" Definition and Its Securities Exceptions

Whether an instrument falls under the jurisdiction of the SEC, the CFTC, both, or neither depends on how it is classified, and that classification carries important legal and jurisdictional consequences. As a general matter, the SEC regulates securities, while the CFTC regulates futures and most (but not all) swaps.[27] The SEC also regulates security-based swaps, which are a subset of swaps. The two agencies share jurisdiction over mixed swaps and security futures.

Event contracts are a relatively new product, and the term is not defined in the Relevant Statutes. Because of how they are structured, they usually fall within the broad statutory definition of "swap."[28] As explained below, however, the definition of "swap" contains critical exceptions. One exception removes from the definition of "swap" any instrument that is a "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 Federal Securities Laws. In other words, even if an event contract would otherwise meet the "swap" definition, an instrument that fits this exception remains a security subject to the Federal Securities Laws and the SEC's

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24 *Notice of Filing of Amendment No. 5 to a Proposed Rule Change To List and Trade Credit Default Options; and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment Nos. 3, 4, and 5, and Designating Credit Default Options as Standardized Options Under Rule 9b-1 of the Securities Exchange Act of 1934*, Securities Exchange Act Rel. No. 55871 (June 6, 2007), 72 FR 32372 (June 12, 2007) (SR-CBOE-2006-84) ("CD Options Order").

25 *Id*. at 32375-77.

26 *See* Cboe Regulatory Circular RG07-73.

27 The CEA provides that the CFTC's jurisdiction does not apply to securities (other than security futures). *See* 7 U.S.C. § 2(a)(1)(A), (H).

28 The CFTC has noted that "[w]hile the term 'event contract' is not defined in the CEA or the CFTC's regulations, event contracts are generally understood to be a type of derivative contract, typically with a binary payoff structure, based on the outcome of an underlying occurrence or event." *Event Contracts*, 89 FR 48968, at 48969 n.5 (Jun. 10, 2024).

exclusive jurisdiction—rather than falling into the CFTC's "swap" regime.[29]

Both agencies have recognized that some event contracts may be "securities" and that, even though the line between a "swap" and a "security" is not always obvious, products that are "securities" are subject to the SEC's jurisdiction. In September 2025, the SEC Chairman and the then-acting CFTC Chairman issued a joint release identifying event contracts as an area for coordination, stating that the agencies "should work together to provide clarity for innovators that want to list event contracts on prediction markets responsibly, including those based on securities."[30]

The SEC and the CFTC later published a joint request for comment on the definitions of "swap" and "security-based swap," asking, among other things, whether clearer "principled, objective criteria" are needed to distinguish swaps, mixed swaps, security-based swaps, and other securities excluded from the "swap" definition.[31]

Statutory Provisions Relevant to Defining the Term "Swap"

The CEA gives the CFTC exclusive jurisdiction over futures (and options on futures) on a group or index of securities, subject to certain conditions.[32] But Section

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29 *See Prediction Markets*, at 12517 ("Although the event contracts listed on CFTC-registered DCMs and SEFs are swaps or futures contracts subject to the jurisdiction of the CFTC, other event contracts referencing events associated with potential financial, economic or commercial consequences may be security-based swaps or other instruments subject to the jurisdiction of the SEC.") (footnotes omitted).

30 Paul S. Atkins, Chairman, SEC, and Caroline D. Pham, Acting Chairman, CFTC, *Joint Statement from the Chairman of the SEC and Acting Chairman of the CFTC* (Sept. 5, 2025). More recently, SEC Chairman Atkins stated that "[I]t is past time that the Commission work with the CFTC to provide clarity on a range of Title VII definitional issues, including whether certain event contracts may be security-based swaps or other types of securities, such as options on securities." Paul S. Atkins, Chairman, SEC, *Fostering Regulatory Harmony Between the SEC and CFTC* (statement at FIA Global Cleared Markets Conference) (Mar. 10, 2026).

31 *Joint Request for Comment on Further Definition of ''Swap'' and ''Security- Based Swap'' and on Alternative Compliance*, 91 FR 37873 (June 24, 2026) ("Joint Request"). The staffs of the SEC's Divisions of Corporation Finance, Investment Management, and Trading and Markets described the interplay between the various definitions in their recent statement on tokenized securities as follows: "The assessment of whether a financial instrument is a security-based swap or a linked security depends, in part, on the exclusions from the definition of 'swap.' There are several exclusions from the definition of 'swap' relating to securities. To the extent a financial instrument falls into one of these exclusions, it is not a swap and, therefore, is not a security-based swap. For example, any note, bond, or evidence of indebtedness that is a security, as defined in Section 2(a)(1) of the Securities Act, is excluded from the definition of swap. Similarly, 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, is excluded from the definition of swap." Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets, SEC, *Statement on Tokenized Securities* (Jan. 28, 2026) (internal citations omitted).

32 Section 2(a)(1)(A) of the CEA provides that the CFTC shall have exclusive jurisdiction, subject to certain important exceptions (discussed below), with respect to transactions (including options) involving contracts of sale of a commodity for future delivery.

2(a)(1)(C)(i)(I) of the CEA—the “Securities Options Savings Clause”—provides that the CFTC has *no* jurisdiction over, and the CEA does *not* apply to:

> any transaction whereby any party to such transaction acquires any put, call, or other option on one or more securities . . . including any group or index of securities, or any interest therein or based on the value thereof.[33]

This Securities Options Savings Clause closely tracks—though it does not exactly match—the options language in the definition of “security.” Section 3(a)(10) of the Exchange Act defines a “security” to include “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).”[34] The Securities Options Savings Clause does not, on its face, list a “privilege” on a securities index, but the CEA’s definition of “option” includes “privileges,” so the clause reaches them as well.[35]

The Seventh Circuit’s decision in *Chicago Mercantile Exchange v. SEC* shows how these provisions interact.[36] There, the court held that if an instrument is both a security and a futures contract, the CFTC is the exclusive regulator; if an instrument is both a futures contract (or commodity option) and an option on a security, the Securities Options Savings Clause takes it out of the CFTC’s jurisdiction. The court found that index participations (“IPs”) were not options on securities—because they lacked option features such as a strike price and expiration date—and so remained within the CFTC’s exclusive jurisdiction.

The CEA mirrors this approach in its “swap” definition, which excepts the same “put, call, straddle, option, or privilege” on securities that are subject to the Federal Securities Laws. Section 1a(47)(A) of the CEA first defines “swap” broadly to include, among other things (emphasis added):

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[33] Such contracts are not permitted unless (1) the contract is cash-settled, (2) trading in such contract is not readily susceptible to manipulation nor to being used to manipulate related instruments, and (3) the group or index of securities does not constitute a narrow-based security index. *See* 7 U.S.C. § 2(a)(1)(C)(ii). Under the Commodity Futures Modernization Act of 2000, the CFTC and the SEC have concurrent jurisdiction over futures on a “narrow-based security index” as defined in Section 1a(25) of the CEA and Section 3(a)(55) of the Exchange Act.

[34] Section 2(a)(1) of the Securities Act defines the term “security” to mean, among other things, “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) . . .”

[35] The CEA defines “option” as “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’.” 7 U.S.C. § 1a(36). The term “option,” while defined in the CEA, is not separately defined in the Exchange Act; however, an “option” typically gives its owner the right, but not the obligation, either to buy (a call option) or to sell (a put option) a specified amount or value of a particular underlying interest at a fixed exercise price by exercising the option on or before its specified expiration date. *See* ODD, at 3.

[36] *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, 539, 546-47 (7th Cir. 1989).

> *Except as provided in subparagraph (B)*, . . . any agreement, contract, or transaction:
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> (i) that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind;
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> * * * * *
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> (iii) that provides on an executory basis for the exchange of 1 or more payments based on the value or level of 1 or more . . . indices, . . . or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers the financial risk of a future change in that value without conveying a current or future ownership interest in an asset or liability, including any transaction commonly known as—
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> * * * * *
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> (X) an equity index swap;
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> * * * * *
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> (vi) that is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v).[37]

Section 1a(47)(B) then carves a number of instruments out of that broad definition, including:

> (iii) 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—
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> > (I) the Securities Act of 1933 (15 U.S.C. 77a et seq.); and
> >
> > (II) the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)[38]

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[37] The definition of "swap" in the CEA is incorporated by reference into both the Securities Act and the Exchange Act; thus, by operation of law the definition and exclusions in the CEA apply equally to the Federal Securities Laws. *See* 15 U.S.C. § 77b(a)(17); 15 U.S.C. § 78c(a)(69).

[38] The Joint Request includes questions specifically focused on this exception. *See* Joint Request, at 37876 ("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

In keeping with this statutory language, an event contract is within the CFTC's jurisdiction if it is a "swap" (but not a "security-based swap"). But it falls outside that jurisdiction if it is a put, call, 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)" and is subject to the Federal Securities Laws. The CEA's "swap" definition contains parallel exceptions for other instruments as well, reflecting Congress's intent to keep "securities" within the SEC's exclusive jurisdiction rather than sweeping them into the CFTC's "swap" regime. The definition, for instance, also excludes any note, bond, or evidence of indebtedness that is a security.[39]

One consequence is worth noting. Security-based swaps are "securities" subject to SEC jurisdiction, but they must first meet the definition of "swap."[40] This means that if an instrument is excepted from the "swap" definition, it cannot be a security-based swap. Section 3(a)(68) of the Exchange Act defines a security-based swap as an agreement that "is a swap" under Section 1a of the CEA and is based on (among other things) "an index that is a narrow-based security index, including any interest therein or on the value thereof."[41] A "narrow-based security index" generally has nine or fewer components, a single component weighted above 30%, or its five largest components weighted above 60% in the aggregate.[42]

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?").

[39] *See* 7 U.S.C. § 1a(47)(B)(vii). Multiple other provisions similarly exclude specific instruments subject to the Federal Securities Laws from being a "swap." *See*, *e.g.*, 7 U.S.C. § 1a(47)(B)(iv), (vi).

[40] *See* 15 U.S.C. § 78c(a)(10) (defining "security" to include "security-based swap"); 15 U.S.C. § 78c(a)(68) (defining "security-based swap" as a subset of "swaps" as defined in the CEA).

[41] The term "security-based swaps" also includes agreements that are swaps under the CEA and are based on either a single security or loan, including any interest therein or on the value thereof, or "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." 15 U.S.C. § 78c(a)(68)(A)(ii).

[42] *See*, *e.g.*, 15 U.S.C. § 78c(a)(55)(B); 7 U.S.C. § 1a(35). Although the S&P 500 and the Nasdaq 100, for example, are not "narrow-based securities indexes," and therefore swaps based on these indexes would not qualify as "security-based swaps," this distinction is relevant only for determining whether a particular swap is a security-based swap. If the instrument is excluded from the definition of "swap," the distinction between a broad-based and narrow-based index is not relevant. In other words, an instrument that is not a "swap" within the meaning of the CEA and the Federal Securities Laws can never be a "security-based swap" as it fails the first prong of the definition (i.e., 15 U.S.C. § 78c(a)(68)(A)(i)).

Attribute	"Swap" (CFTC jurisdiction)	"Security Option" (SEC jurisdiction)
Typical underlying / trigger	Outcome of a non-securities event — sporting events, elections, weather, world events – that is "associated with a potential financial, economic, or commercial consequence"	Value of a security, a group or index of securities, or an interest in a security
Primary regulator	CFTC, which has exclusive jurisdiction over futures and most swaps	SEC, which has jurisdiction over securities, including security options and security-based swaps
Statutory basis	"Swap" defined broadly in CEA § 1a(47)(A)	"Security" defined in Exchange Act § 3(a)(10) / Securities Act § 2(a)(1); excepted from "swap" by CEA § 1a(47)(B)(iii)
Key operative test	Falls within the broad "swap" definition and no exception applies	Is a "put, call, straddle, option, or privilege" on a security or index, "based on the value thereof," subject to the Federal Securities Laws
Example instruments	Event contracts on elections, weather, sports	Cboe binary options on the S&P 500, range options
Regulatory consequences	DCM self-certification of product terms under CFTC rules	SRO rule filings and SEC approval under Exchange Act § 19(b) / Rule 19b-4; broker-dealer, FINRA, ODD disclosure, and cross-market surveillance for manipulation/insider-trading; underlying securities and KPIs subject to mandatory disclosure requirements under the Federal Securities Laws
Security-based swap note	A subset of "swaps" that is outside CFTC jurisdiction (unless it is a mixed swap)	An instrument excepted from "swap" cannot be a security-based swap; broad-vs-narrow index distinction is then irrelevant

Judicial Interpretations

Courts have repeatedly analyzed whether binary options are "puts," "calls," "privileges," or "options." Although none of these terms is defined in the Federal Securities Laws and some lower courts have differed on the exact label to attach to binary options, every decision we are aware of has concluded that binary options related to securities fall within at least one of these categories—and that they are themselves securities.

The Second Circuit has held that an instrument need not be physically deliverable to qualify as an "option" on a security. In *Caiola v. Citibank, N.A.,* the court held that cash-settled, over-the-counter "synthetic options" were "securities" subject to Section 10(b) of the Exchange Act.[43] Citibank had argued that the statute covers only

[43] 295 F.3d 312 (2d.Cir. 2002).

an option to take possession of a security, not "an option based on the value of a security" that merely requires cash payments.[44] The court rejected that reading.[45]

There is, the court explained, "no textual basis" for limiting the definition of "security" in Section 3(a)(10) to options that give the holder a right to receive the underlying security; rather, the definition "covers options that can be physically delivered as well as those that cannot."[46] Under this precedent, then, the right to take physical possession of the underlying security is not required for an instrument to be an "option" on a security—and thus a "security"—under the Exchange Act.

A federal district court reached the same result for binary options, even while declining to call them "options." In *SEC v. Banc de Binary Ltd*, [47] the court addressed the issue when the SEC sued an online platform that sold "binary options" with "only two possible outcomes," some tied to stock prices, for violating Section 5 of the Securities Act and Section 15(a) of the Exchange Act.[48] Citing *Caiola*, the court "simply [could not] agree that a contract under which the purchaser has no putative right to obtain the security is an 'option,'" noting that the buyer "receives neither the stock itself nor the right to purchase the stock in the future" and that these instruments "do not require exercise by the owner."[49]

Even so, the court held that the binary options were securities, explaining that "Congress has empowered the SEC to regulate wagering contracts turning upon the value of securities."[50] It reasoned that options based on the value of securities are "privileges" because they "give the purchaser a contractual right to the payment of money based upon the value of securities," and that they were "probably also 'puts' or 'calls' because they are bets that the price of the security will rise or fall."[51]

Other courts have treated binary options as "options" under the CEA itself where the instrument was not related to a security. In *CFTC v. Trade Exchange Network Ltd*.[52] —a case involving binary options on commodities rather than securities—the defendants argued that the instruments are not options since they do not have certain characteristics of options under the above definition [from the CEA], including a "strike price," a "mechanism for delivery of an underlying asset," and a "contractual right for the

44 *Id*. at 325.

45 *Id*. at 326-27.

46 *Id*.

47 964 F.Supp.2d 1229 (D.Nev. 2013).

48 *Id*. at 1231.

49 *Id*. at 1234-37.

50 *Id*. at 1237.

51 *Id*.

52 117 F.Supp.3d 29 (D.D.C. 2015).

buyer to buy or sell a specified quantity of a commodity at a specific price within a specific period of time."[53]

The court disagreed. The CEA, it held, "does not limit the scope of CFTC's regulation solely to the specific definition suggested by the defendants."[54] Relying on *Caiola*, the court noted that the CEA does not distinguish between cash-settled and physically settled options. The relevant term was "option" under the CEA, which reaches instruments "commonly known to the trade" as options—so courts should look to how the term is commonly used. Other courts have likewise concluded that binary options are "options" under the CEA.[55]

Regulatory Treatment by the SEC and the CFTC

As early as 1993, the CFTC's Division of Trading and Markets recognized that certain event contracts can implicate the securities laws. In a June 18, 1993 no-action letter to the Iowa Electronic Markets ("IEM")—a university-operated prediction market offering contracts on political, economic, and corporate earnings outcomes—the Division addressed whether IEM's "Earnings Market" contracts fell within CFTC jurisdiction.[56] The Earnings Market permitted trading in contracts on the projected earnings of several publicly traded companies, including American Airlines, Delta Air Lines, United Airlines, Apple Computer, and IBM. The Division concluded that "the Earnings Market contracts could be viewed as in the nature of options on securities, which may be excluded from the [CFTC's] jurisdiction pursuant to Section 2(a)(1)(B)(i) of the [CEA], but which may be subject to the jurisdiction of the Securities and Exchange Commission."[57] The Division accordingly forwarded the matter to the SEC and suggested that the IEM operators consult the SEC's Division of Market Regulation.[58]

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53 *Id*. at 35.

54 *Id*.

55 *See CFTC v. Vision Financial Partners, LLC*, 190 F.Supp.3d 1126, 1130 (S.D.Fla. 2016) ("Close scrutiny of the relevant provisions of the [Commodity Exchange] Act, identified above, reveals that a financial instrument's 'essence' is only one of two ways that it can qualify under the Act's definition of an option. The definition also includes any instrument that is 'commonly known to the trade' as an option. These allegations permit the Court to plausibly infer that binary options are 'known to the trade as an option' as the Commodity Exchange Act requires."); *see also CFTC v. Scharf*, 2019 WL 3139980 (M.D. Fla. Apr. 25, 2019).

56 *See* Letter from Andrea M. Corcoran, Director, Division of Trading and Markets, CFTC, to George R. Neumann, Professor of Economics, University of Iowa (June 18, 1993).

57 *Id*.

58 *See* Letter from Andrea M. Corcoran, Director, Division of Trading and Markets, CFTC, to Brandon C. Becker, Deputy Director, Division of Market Regulation, SEC (June 18, 1993).

In 2008, the SEC's Division of Trading and Markets submitted a comment letter to the CFTC on its concept release on event contracts.[59] In his 2008 letter, Director Sirri noted the 1993 letter and referral to the SEC from the CFTC regarding the IEM request and stated that "event contracts that relate to corporate events, such as mergers or earnings per share announcements, raise even more difficult issues and policy considerations. For instance, there is potential for this type of contract to create a potential for insider trading and an incentive for management to manipulate such accounting measures as earnings per share. Accordingly, the Division is concerned about the effects that trading such contracts may have on securities markets."[60]

This early guidance confirms that both agencies have long recognized that event contracts based on securities-related metrics—such as corporate earnings—may fall outside the CFTC's jurisdiction as securities options subject to the Federal Securities Laws.

The SEC's enforcement practice points the same way. In numerous actions the SEC has treated binary options on securities and securities indices as "securities" and has sued unregistered platforms that let customers trade them.[61] The SEC's settlements and complaints rarely specify whether a given instrument is a put, call, option, or privilege, but its language consistently treats binary options as "options" under the federal securities laws.

The 2016 *EZTD* order is illustrative. The SEC brought administrative cease-and-desist proceedings against EZTD under Sections 5(a), 5(c), and 17(a)(2) of the Securities Act and Section 15(a)(1) of the Exchange Act for its binary-options activities.[62] It described binary options as "over-the-counter, cash-settled option contracts" that "did not give the holder the right to purchase or sell the underlying assets," and, more generally, as "a security that expires at a predetermined time where the payout is contingent on the outcome of a yes/no proposition" about whether an asset's price will rise above or fall below a specified level.

EZTD's platform let U.S. customers buy binary options "based on the future value of individual stocks . . . and broad-based, published stock indices, such as the Dow Jones Industrial Average." The SEC concluded that "[a]ll of the binary options that EZTD offered . . . are options based on the value of a security or index of securities, and

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59 *See* Letter from Eric R. Sirri, Director, Division of Trading and Markets, SEC to David Stawick, Secretary, CFTC (Sept. 3, 2008).

60 *Id.*

61 The SEC and CFTC have also jointly issued investor alerts describing binary options on securities as implicating the federal securities laws. *See, e.g.*, SEC Investor Alert, *Binary Options and Fraud*, SEC Pub. No. 148 (6/13) (including warnings that certain binary options are securities and that platform operators may be operating in violation of the Exchange Act, including Sections 5 and 15, and the Securities Act).

62 *In the Matter of EZTD Inc.*, Securities Exchange Act Rel. No. 79292 (Nov. 10, 2016), available at https://www.sec.gov/files/litigation/admin/2016/33-10251.pdf

thus are securities" under the Federal Securities Laws, and that EZTD had violated both statutes. Notably, the order reached options based on individual securities, not just securities indices.

The SEC has since charged other firms and individuals on similar facts.[63] And, as noted above, in the SRO rule-filing context the SEC has consistently viewed binary options, range options, and CD options as "options" and "securities" under the Exchange Act.

Summary of Key Authorities		
Authority	**Type**	**Holding / Relevance**
Chicago Mercantile Exchange v. SEC, 883 F.2d 537 (7th Cir. 1989).	Seventh Circuit	An instrument that is an option on a security falls outside CFTC jurisdiction under the Securities Options Savings Clause; index participations that lacked option features remained within the CFTC's jurisdiction.
Caiola v. Citibank, N.A., 295 F.3d 312 (2d Cir. 2002).	Second Circuit	A cash-settled synthetic option is a "security" under the Exchange Act; the right to take physical delivery of the underlying is not required.
SEC v. Banc de Binary Ltd., 964 F. Supp. 2d 1229 (D. Nev. 2013).	District of Nevada	Binary options tied to the value of securities are "securities"—as "privileges," and probably "puts" or "calls"—even where the court declined to treat them as classic "options."
CFTC v. Trade Exchange Network Ltd., 117 F. Supp. 3d 29 (D.D.C. 2015).	District of D.C.	Binary options are "options" under the CEA as instruments "commonly known to the trade" as options, without regard to cash versus physical settlement.
In re EZTD, Inc., Securities Exchange Act Rel. No. 79292 (Nov. 10, 2016).	SEC Administrative Proceeding	The SEC treated binary options based on the value of individual stocks and indices as securities under the Securities Act and the Exchange Act.
SEC approval orders, including Binary Option Order (2008), Range Options Order (2008), CD Options approval (2007), and more recent approvals of rule filings by Cboe, Nasdaq MRX, and NYSE American.	SEC Approval Orders	The SEC approved SRO listing and trading of binary options on securities indices, range options, and credit default options as securities under the Exchange Act, treating CD options as options "based on the value" of, and on an "interest in," a security under Section 3(a)(10).

[63] *See, e.g.*, *SEC v. Jonathan Mimum (a/k/a Jonathan Maymon) & Ronn Benharav* (D.Nev. Case No. 2:21-cv-1314) (July 12, 2021); *SEC v. Anton Senderov & Lior Babazara a/k/a Lior Bar* (E.D.Wash. Case No. 19-cv-5242) (Oct. 9, 2019); *SEC v. Jared Jeffrey Davis & Dale Burke Pinchot* (N.D.Ohio Case No. 3:18-cv-02829) (Dec. 10, 2018).

IV. Analysis of Index- and KPI-Referenced Contracts As Securities

To classify an event contract with a payout that is based on a securities index or issuer KPI, the contract must be measured against the statutory definitions described above. It is worth noting what factors regarding the instrument do *not* matter: that an event contract is cash-settled, is automatically exercised and pays all-or-nothing at a set time are not determinative. Courts and the SEC have made clear that instruments with exactly these features can be "securities." The Exchange Act defines "security" broadly to include "*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)."[64] And, as discussed, the SEC has approved SRO rules for binary options on securities indices and ODD disclosure for binary and range options—each involving cash-settled options with two payoffs that are automatically exercised at a set time.

The decisive question, then, is the underlying: is the contract based "on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof)" within the Federal Securities Laws? An event contract tied directly to the closing value of a securities index answers that question. Such a contract is an option (or, equally, a privilege, put, or call) "based on the value" of that index—and is therefore a "security" excepted from the "swap" definition and subject to the SEC's exclusive jurisdiction. The same is true of a contract based on the value of an individual security or an interest in one. As the cases and enforcement actions above show, this conclusion follows from the plain words of the Relevant Acts.

Binary KPI options work like other binary options but with a different underlying, so whether a binary KPI option is "based on the value" of a security turns on the KPI that it references. Issuers can develop a variety of KPIs tied to different goals or metrics; however, as a general matter, a KPI related to a metric that an issuer itself publicly reports as part of its financial disclosure should be presumed material to the value of its stock.[65] As Cboe explained in its proposed rule change for binary KPI

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64 15 U.S.C. § 78c(a)(10) (emphasis added). The Securities Act definition of "security" is identical as it relates to these types of instruments. *See* 15 U.S.C. § 77b(a)(1).

65 The SEC's disclosure framework for KPIs has developed over several decades. *See, e.g., Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, Securities Act Rel. No. 8350 (Dec. 19, 2003), 68 FR 75056, 75057 (Dec. 29, 2003) (stating that "companies should identify and discuss key performance indicators, including non-financial performance indicators, that their management uses to manage the business and that would be material to investors"); *Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations*, Securities Act Rel. No. 10751 (Jan. 30, 2020), 85 FR 10568, 10569 (Feb. 25, 2020) (stating that "companies should identify and address those key variables and other qualitative and quantitative factors that are peculiar to and necessary for an understanding and evaluation of the individual company[, and that] [s]uch information could constitute key performance indicators and other metrics") (footnotes omitted). The SEC has also brought enforcement actions against issuers for materially misleading disclosures involving operating and financial metrics under the antifraud provisions of the Federal Securities Laws*. See, e.g., SEC v. Nikola Co*rp., No. 2:21-cv-01594 (D. Ariz. Dec. 21, 2021) ($125 million settlement based on misleading statements about products, technical capabilities,

options (the "KPI PRC"), analysts and investors routinely treat financial metrics such as net income, net sales, and net interest income as among the most important inputs into an issuer's valuation.[66]

That presumption is reinforced by the SEC's disclosure regime. KPIs are not merely permitted disclosures; the SEC has stressed the importance to issuers to report them when necessary. Item 303(a) of Regulation S-K requires disclosure of information that a company believes is "necessary to an understanding of its financial condition, changes in financial condition and results of operations," which can include KPIs. In its 2003 guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"), the SEC further emphasized that companies "should consider whether disclosure of all key variables and other factors that management uses to manage the business would be material to investors, and therefore required."[67] In 2020, the SEC noted that, to meet its Item 303 disclosure obligations, a company "should identify and address those key variables and other qualitative and quantitative factors that are peculiar to and necessary for an understanding and evaluation of the individual company."[68] These statements reflect the SEC's long-held view that KPIs referencing material aspects of an issuer's actual reported financial or operating performance can be material to the value of the issuer's securities. A binary KPI option based on one or more of an issuer's KPIs disclosed in required SEC reports should therefore be presumed to be "based on the value of" that issuer's security under the Exchange Act.

The SEC's analysis in approving CD options supports the same conclusion. In approving CD options, the SEC found them to be "securities" even though they "do not share every feature of a classic option."[69] What mattered to the SEC in reaching this conclusion was that CD options "expressly reference in their payout conditions a term of

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and business metrics); *SEC v. Luckin Coffee I*nc., No. 1:20-cv-10980 (S.D.N.Y. Dec. 16, 2020) ($180 million settlement based on fabricated sales and overstated revenue metrics).

66 *See Notice of Filing of a Proposed Rule Change To Amend its Rules To Permit the Listing of Binary Options Overlying Key Performance Indicators ("KPIs") Reported by Certain Issuers of Stock ("Binary KPI Options"*), Securities Exchange Act Rel. No. 105887 (July 10, 2026), 91 FR 43418, 43428 (July 15, 2026) (SR-CBOE-2026-061). As Cboe described in the KPI PRC: "Issuers frequently include KPIs and metrics material to the financial condition and results of operations of the company in reports and registration statements filed under both the Act and the Securities Act as part of the disclosure requirement in Management's Discussion and Analysis of Financial Condition and Results of Operations ('MD&A'). The relevant obligation 'requires disclosure of information not specifically referenced in the item that the company believes is necessary to an understanding of its financial condition, changes in financial condition and results of operations,' which can include KPIs. In providing guidance to issuers on the use of KPIs in their MD&A disclosure, the SEC observed that '[w]hen proposing the current MD&A framework, the [SEC] noted that "[f]or each business, there is a limited set of critical variables which presents the pulse of the business."'" (internal citations omitted*). Id*. at 43428-29.

67 68 FR 75056, 75060.

68 Securities Act Rel. No. 10751 (Jan. 30, 2020), 85 FR 10568, 10569 (Feb. 25, 2020).

69 CD Options Order at 32375, n.34.

an underlying security that is material to the value of that security."[70] The same logic applies to binary KPI options: as discussed above, KPIs disclosed in SEC filings are material and are disclosed by issuers to enable investors to understand and evaluate the issuer's financial condition and results of operations in periodic reports (Forms 10-K and 10-Q), current reports (Form 8-K), and registration statements. If the KPI underlying a binary KPI option is a material component in determining the value of the security, as for example where the binary KPI option—like a CD option—expressly references in its payout condition an event that is material to the value of the reference security, the same logic would support treating that binary KPI option itself as a "security" under the Exchange Act.[71]

In approving CD options, the SEC added that it did not matter that the option "does not transfer ownership of the interest or right in a security"; what mattered was that it "becomes in-the-money and provides a cash payment if certain security rights are triggered."[72] A binary KPI option tied to a pecuniary interest in a security should be viewed the same way—as an option "on any security . . . or group or index of securities (including any interest therein or based on the value thereof)."

Practical and policy reasons also support treating binary KPI options as securities. Listing binary KPI options on a registered national securities exchange brings their trading within SEC and SRO cross-market oversight—including surveillance for manipulation and insider trading—and gives investors the full protections of the Federal Securities Laws. Listing would also let SEC-registered broker-dealers, subject to FINRA and exchange oversight, offer these contracts to the same retail customers who trade binary options today.

Finally, the SEC's enforcement practice further confirms that KPIs can be material. The SEC has brought numerous fraud actions against issuers for misrepresenting financial and operating metrics in their public disclosures on the theory that such misstatements are material to investors.[73]

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70 *Id*. at 32376.

71 Even if the binary KPI option were not considered a securities option, it could qualify as a "security-based swap" (and therefore a "security") if it is 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." 15 U.S.C. § 78c(a)(68)(A)(ii)(III).

72 CD Options Order at 32376 n.46.

73 *See, e.g.*, *In re ADT Inc.*, Securities Exchange Act Rel. No. 93205 (Sept. 30, 2021) (settlement based on elevation of non-GAAP metrics over GAAP metrics); *In re Kraft Heinz Co.*, Securities Exchange Act Rel. No. 92666 (Aug. 13, 2021) (settlement based on misleading cost savings KPI metrics); *In re Mylan N.V.*, Securities Act Rel. No. 10413 (July 27, 2017) (settlement based on misleading loss disclosures).