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Via Electronic Submission

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

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

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

Dear Ms. Countryman and Mr. Kirkpatrick:

Cboe Global Markets, Inc. ("Cboe") respectfully submits this comment letter in response to the joint request for comment issued by the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") regarding the definitions of "swap" and "security-based swap" and alternative compliance frameworks (the "Joint Request"). This Joint Request is timely and appreciated given the rapidly increasing expansion of prediction markets that are operating as designated contract markets ("DCMs") with the CFTC and predominantly offering their products to retail customers.

At the outset, Cboe wishes to emphasize a fundamental principle that should guide the agencies' consideration of these issues: statutory definitions and Congressional intent must control. Whatever form the Commissions' broader harmonization effort ultimately takes, it should reflect the reality that event contracts are not an undifferentiated category of uncertain jurisdiction. The harmonization efforts need not, and should not, delay the SEC from exercising its exclusive jurisdiction over event contracts that are clearly securities.[1] The SEC and CFTC cannot rewrite

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

distinctions that are set forth in federal law—not only because that exceeds the agencies' authority, but also because statutory definitions have distinct and intended consequences that Congress established when enacting such legislation. Any changes that the SEC and CFTC seek to undertake should proceed through regular order notice and comment rulemaking, and only in connection with matters that truly require regulatory clarification. Matters of jurisdiction have been clearly set by Congress and need not be revisited except in the narrowest circumstances where there is a compelling need and a clearly articulated path for doing so.

As a self-regulatory organization, Cboe has deep-rooted interests in and obligations relating to ensuring investor protection and market integrity. Cboe also has a long history of developing new products and evolving ecosystems in the options space that are similar in many respects to instruments that are now being labeled as "event contracts" and categorized by prediction markets as "swaps." Indeed, although the term "event contract" is sufficiently new so that it is undefined by statute or rule, binary options are themselves the original "event contracts," and Cboe played a key role in their initial development and continues to do so with respect to the offering and evolution of such products in an SEC-regulated environment.[2] Historically, this has included filing and obtaining SEC approval for listing and trading binary index options and range options that have the fundamental characteristics shared by "event contracts," including automatic cash settlement, yes/no binary propositions, all-or-nothing payout structures, and European style exercise.[3]

Binary index options and range options trade similarly to event contracts that have recently appeared in the market, but with a critical distinction: Cboe's instruments are offered under a well-established and mature market structure and developed in strict conformance with the federal securities law. Cboe's approach emphasizes the integrity of products, predictability of processes, and investor protections, safeguarded by the SEC's comprehensive registration regime for securities and oversight of the intermediaries who offer, trade, and clear them. Whether a particular "event contract" is a "swap" as defined in the Commodity Exchange Act ("CEA") or a "security"—a term that includes "security-based swaps"—as defined in the Securities Act of 1933 ("Securities Act") or the Securities Exchange Act of 1934 ("Exchange Act") determines which

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2 *See, e.g.*, *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 Release No. 105936 (July 17, 2026), 91 FR 46205 (July 22, 2026) (SR-CBOE-2026-032).

3 The SEC approved Cboe's ability to list and trade range options and binary options in 2008. *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 Release No. 57850 (May 22, 2008), 73 FR 31169 (May 30, 2008) (SR-CBOE-2006-105); *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 Release No. 57376 (Feb. 25, 2008), 73 FR 11689 (Mar. 4, 2008) (SR-CBOE-2007-104). Range options and binary options are also both included and described in the Options Disclosure Document in ways that bear many similarities to instruments now being called "event contracts."

regulatory regime applies: the CFTC's or the SEC's. Consequently, it is essential that these terms be well understood and clearly applied so that the offering, listing, trading, and clearing of particular event contracts proceeds subject to the appropriate regulatory requirements and safeguards.

Cboe's interest in this request for comment is not merely academic. Cboe has made substantial investments in compliance infrastructure, surveillance systems, and regulatory processes to offer binary options and similar products within the SEC's oversight framework. When prediction markets offer economically equivalent products—without the registration requirements, disclosure obligations, and investor protections that are tailored to SEC-regulated markets—it creates an unlevel playing field that disadvantages market participants who have chosen to operate within the established regulatory structure. This is precisely the type of regulatory arbitrage that the Dodd-Frank Act sought to prevent. Cboe therefore has a direct stake in ensuring that definitional lines are drawn clearly and consistently, and that products with the characteristics of securities are regulated as such.

As the CFTC and the SEC consider whether to offer further guidance on these issues, they should bear in mind the significant limits on their ability to reallocate regulatory jurisdiction as established by Congress[4], given the express language of the statutes and the scrutiny to which exemptive measures that depart from statutory definitions will be subject should they come to be evaluated by courts.[5]

This caution is heightened by recent developments in administrative law. Courts no longer defer to an agency's own reading of an ambiguous statutory term such as "swap"; they determine the statute's best reading independently. And because the jurisdictional home of a rapidly growing prediction-markets industry is a question of substantial economic and political significance, any attempt to resolve it through interpretive guidance rather than through the statutory text itself invites exactly the kind of judicial scrutiny the agencies should seek to avoid.[6]

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4 *See Nat'l Ass'n of Private Fund Managers et al. v. Securities & Exchange Comm'n*, No. 4:24-cv-00250 (N.D. Tex. Nov. 21, 2024) (finding that "[t]he Exchange Act grants the Commission 'power by rules and regulations to define technical, trade, accounting, and other terms. . .consistently with the provisions and purposes of this chapter' as to 'matters within [the Commission's] respective jurisdiction[]' . . . [but that] [t]he SEC's new definition in the Dealer Rule, however, is not 'consistent[]with the provisions and purposes of' the Exchange Act."). *See also* 15 U.S.C. § 78c(b) (granting the SEC "power by rules and regulations to define technical, trade, accounting, and other terms used in this chapter, consistently with the provisions and purposes of this chapter").

5 *See, e.g.*, *Cboe Futures Exchange LLC v. Securities & Exchange Comm'n*, 77 F.4th 971, 977 (D.C. Cir. 2023) (finding an SEC exemptive order "arbitrary and capricious because the SEC failed adequately to explain its rationale and failed to consider an important aspect of the problem").

6 *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (overruling *Chevron* deference and holding that courts, not agencies, must exercise independent judgment in determining the best reading of an ambiguous statute); *see also West Virginia v. EPA*, 597 U.S. 697 (2022) (agencies must point to clear congressional authorization before asserting jurisdiction over matters of major economic and political significance). Any effort by the agencies to classify securities-based event contracts as swaps or security-based swaps by administrative interpretation, rather than by

When Congress enacted the federal securities laws and later amended them through the Commodity Futures Modernization Act and the Dodd-Frank Act, it made intentional decisions about how to define and regulate distinct categories of financial instruments. Securities, futures, and swaps each have unique characteristics, serve different economic purposes, attract different investor bases, and operate within different market structures—and Congress designed regulatory frameworks that reflect these differences. Securities are subject to robust disclosure requirements, registration obligations, and antifraud provisions enforced by the SEC because they are typically offered to retail investors who rely on issuer-provided information to make investment decisions. Futures, by contrast, developed as hedging and price discovery mechanisms for commercial participants in commodity markets, with a regulatory structure oriented toward ensuring contract integrity and market function rather than issuer disclosure. Swaps emerged as bespoke, bilateral instruments used predominantly by institutional counterparties to manage financial risk, and the Dodd-Frank Act brought them under regulatory oversight with a framework suited to their OTC nature—emphasizing clearing, reporting, and counterparty risk management. These distinctions are not arbitrary; they reflect Congress's considered judgment that different products warrant different regulatory treatment based on their features, their users, and the risks they present.

Where definitions are already clear, blurring or obviating distinctions between terms has significant downstream consequences. Related to this, some prediction markets that are operating as DCMs are seeking to apply the "swap" definition to all event contracts, regardless of the underlying "event" on which they are based. But there are clear lines that should not be crossed. In particular, event contracts that are tied to a securities index or to an individual security or its performance in a way that is "material" to a reasonable investor's decision to invest should be classified as a "security." Below, Cboe offers its views on the two general topics for which the agencies sought comment: definitional clarity and alternative compliance.

Summary of Requested Action

Cboe respectfully requests that the Commissions:

- Confirm that an event contract whose outcome would be material to a reasonable investor's decision to invest in the underlying security—such as contracts tied to earnings, revenue, clinical trials, executive departures, or M&A transactions—is a securities option subject to SEC jurisdiction, not a swap or security-based swap;
- Apply the same treatment to binary option event contracts based directly on a security index, classifying them as securities options subject to SEC jurisdiction;

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reference to the statutory text, is unlikely to receive judicial deference and independently risks running afoul of the major questions doctrine.

- Clarify that the "potential financial, economic, or commercial consequence" language in the swap definition does not override the securities option exception when an instrument is based on or relates to a security or issuer; and
- Separately, and as narrower technical matters, adjust the narrow-based security index ADTV lookback rules and confirm that single-stock perpetual contracts are security-based swaps under SEC oversight, as discussed below.

Definitional Clarity

In the wake of the financial crisis, the term "swap" was introduced in the Dodd-Frank Act to focus on certain categories of previously unregulated instruments.[7] Although the definition in the CEA was written broadly, it was not intended to swallow every type of contract or agreement, particularly those that existed already and were subject to regulatory oversight.[8] Indeed, the definition of "swap" itself includes key statutory exceptions, particularly the exception for securities options and other "securities" subject to SEC jurisdiction.[9] These exceptions demonstrate Congressional intent to retain "securities" within the SEC's jurisdiction, not to supplant the reach of the federal securities laws with a broad definition of "swap." This makes sense: Congress was trying to bring instruments such as interest rate swaps, credit default swaps, and similar derivatives in from the cold, not to interfere with extant markets or market structures that were already subject to comprehensive regulation. Congress took great care not to create conditions

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7 The definition of "swap" is in the CEA; however, the Securities Act and the Exchange Act 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 three statutes. *See* 7 U.S.C. § 1a(47) (defining "swap"); *see also* 15 U.S.C. § 77b(a)(17), 15 U.S.C. § 78c(a)(69). The definitions of "security" in the Securities Act and the Exchange Act are not identical; however, the relevant language discussed in this letter 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. *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).

8 *See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR 48208, 48211 (noting that "the definitions [of 'swap' and 'security-based swap'] could be read to include certain types of agreements, contracts, and transactions that previously have not been considered swaps or security-based swaps, and nothing in the legislative history of the Dodd-Frank Act appears to suggest that Congress intended such agreements, contracts, or transactions to be regulated as swaps or security-based swaps under Title VII").

9 "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).

for regulatory arbitrage—and had it intended to do otherwise, it would have been easy to express that intent.

Both the CFTC and the SEC have previously recognized that the definition of "swap" needs to be contained, including in the joint definitional rulemaking following Dodd-Frank.[10] Courts have recently observed the same.[11] To be considered a "swap," the instrument should first satisfy certain functional criteria in terms of how it operates. In particular, within the six standalone characteristics included in the CEA definition of "swap," there is the following description: the instrument "provides, on an executory basis for the exchange of one or more payments based on the value or level of one or more interests or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset . . . or liability that incorporates the financial risk so transferred."[12] This is a defining functional feature of almost all swaps, and if the swap or security-based swap definitions were more closely bounded by requiring that an instrument have these functional characteristics to be so defined, it would assist in more clearly establishing the boundary between swaps, security-based swaps, and other products—and the associated regulatory jurisdictions to which they are subject. By contrast, instruments that lack these functional characteristics and more closely resemble traditional securities products should operate under that regime.

Accordingly, as further described in a separate comment letter and accompanying legal analysis that Cboe has submitted regarding the Joint Request, Cboe submits that the agencies should make clear in any guidance they promulgate or any rules they propose that an "event contract" that operates as a binary option and is tied to a securities index or to a security—or an issuer—in a way that would be material to an investor in that security should itself be treated as a securities option rather than as a swap or a security-based swap. This would include, for example, event contracts tied to revenue, earnings per share, new business lines, departure of a CEO, clinical

10 *See supra* note 8.

11 *See, e.g.*, *U.S. & Commodity Futures Trading Comm'n v. Wisconsin,* Case No. 26-C-749 (E.D. Wis. July 29, 2026) (noting that "it is difficult to imagine any agreement, contract or transactions that this definition [of 'swap' in the CEA] would not cover"); *see also Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018) ("[A] statute's meaning does not always turn solely on the broadest imaginable definitions of its component words. . . . Linguistic and statutory context also matter.").

12 7 U.S.C. § 1a(47)(A)(iii). *See also KalshiEX LLC v. Cafferreli, et al.*, Case No. 25-CV-2016, at 3 (D. Conn. Aug. 10, 2026) ("Swaps generally involve 'the exchange of cash flows from financial instruments,' allowing parties to trade risky or variable returns for more certain ones and vice versa. 'For instance, parties might agree to swap future interest payments at different rates, or future payments in one currency for payments in another.' Unlike futures and options, 'which contemplate delivery of or performance related to a commodity at some future time, swaps are pure financial instruments based on the difference between two fluctuating values.'") (internal citations omitted).

trials, or M&A transactions. Although some have suggested that such instruments should be security-based swaps rather than securities options,[13] Cboe believes the better view is that these should be treated as securities options because they share the core characteristics with traditional securities options (and virtually none with traditional "swaps") save that the underlying "event" is not simply a security price (or index value). There is also precedent for treating options on certain types of events related to—but not strictly based on—a security's value as securities options. For example, in 2007 the SEC approved Cboe's ability to list and trade cash-settled, binary call options based on credit events in one or more debt securities of an issuer.[14]

The definition of "swap," though broad, contains critical exceptions that help reinforce this distinction. 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 Securities Act and the Exchange Act. In other words, even if an "event contract" would otherwise meet the "swap" definition, an instrument that fits this exception remains a security. Specifically, Section 1a(47)(A) of the CEA defines "swap" to include, among other things (emphasis added):

> *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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13 *See* Letter from John Zecca, Executive Vice President, Global Chief Legal, Risk, and Regulatory Officer, Nasdaq to Christopher Kirkpatrick, Secretary, CFTC re: RIN 3038-AF65 Prediction Markets; Public Interest Determinations (July 31, 2026) (noting that security-based event contracts are subject to exclusive SEC jurisdiction, but describing them as security-based swaps), available at https://www.sec.gov/comments/2026-08/s7202621-993799-3110066.pdf.

14 *See 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 Release No. 55871 (June 6, 2007), 72 FR 32372 (June 12, 2007) (SR-CBOE-2006-84) (order approving Cboe's proposal to adopt credit default options). The Commission has confirmed on numerous occasions that the term "security" includes options that are based on the value of securities or that are interests in securities. *Id*. at 32376-77 (concluding that credit default options "are options 'based on the value [of a security or securities]' and, therefore, securities" and that credit default options "are options on an 'interest in,' or based on the value of an interest in, a security or securities within the meaning of Section 3(a)(10) of the Act") (brackets in original); *see also In the Matter of EZTD*, Securities Exchange Act Release No. 79292 (Nov. 10, 2016) (finding that "[a]ll of the binary options that EZTD offered and sold to U.S. customers, however, are options based on the value of a security or index of securities, and thus are securities under the [definitions in the Securities Act and the Exchange Act]").

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

Subparagraph (B) following the affirmative definition is essential, as it clarifies those instruments that Congress specifically intended *not to be swaps* notwithstanding the definition's breadth. Section 1a(47)(B) carves a number of instruments out of that broad "swap" definition, including (citations omitted):

> (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; and
> >
> > (II) the Securities Exchange Act of 1934

Subparagraph (B) also excludes a "security-based swap" from being considered a swap under the CEA (unless it is a mixed swap); although, when determining whether a particular instrument is a security-based swap, it must first meet the general definition of "swap" in the CEA (ignoring the definition's exception of security-based swaps). The term "security-based swap" is defined in Section 3(a)(68) of the Exchange Act (and cross-referenced in the CEA) as, subject to certain exceptions (citations omitted):

> any agreement, contract, or transaction that—
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> (i) is a swap, as that term is defined under section 1a of the [CEA]; and
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> (ii) is based on—
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> > (I) an index that is a narrow-based security index, including any interest therein or on the value thereof;

> (II) a single security or loan, including any interest therein or on the value thereof; or
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> (III) 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.

Although the definition of "swap" in the CEA was intended to be broad, that securities options and security-based swaps should not be included—and should be treated as "securities" under the federal securities laws—is equally apparent, and courts have also made clear that the definition of "security" itself should be read broadly.[15] As indicated by the exceptions Congress built into the structure to regulate swaps and securities—that is, by excepting both securities options and security-based swaps from being treated as "swaps" under the CEA—the presumption should therefore be that, if the event contract has an outcome that relates to a security or an issuer of securities, then the event contract is a security: either because it is a securities option or a security-based swap—not the other way around. Instruments relating to securities or issuers should only be offered outside the SEC's jurisdiction when the instrument does not fall firmly within the definition of "security."

Certain prediction market platforms appear to take the view that any and all event contracts on issuers are "swaps" because they may have a "potential financial, economic, or commercial consequence," rather than there being a "direct effect" on the issuer's "financial statements, financial condition, or financial obligations" to make them fall within the definition of security-based swap. However, this is an instance of false logic. The swap definition's reference to "potential" effect need not be applied in the context of an instrument that is a security by dint of the clause for securities options in the statutory definition itself. Moreover, investors are unlikely to be making investment decisions on these types of event contracts based solely on the "event" itself—such as whether or when the departure of a CEO will occur or a merger or acquisition actually happens—but rather they are likely to be making the decision on the basis of the potential impact of that event on the value of the security with which that event is associated. In other words, these security-based or issuer-based event contracts are used to hedge on a potential price movement of a security based on a particular *event* that is likely to impact the value of the security rather than on the *price* of the security itself. Options on such events are, in substance, options on the value of a security or an interest in a security. They should be treated as securities options. In

15 *See, e.g., Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990) (noting that Congress "enacted a definition of 'security' sufficiently broad to encompass virtually any instrument that might be sold as an investment"); *see also Caiola v. Citibank, N.A. New York*, 295 F.3d 312, 325 (2d Cir. 2002).

that case, they are specifically excluded from being “swaps” as defined in the CEA (and therefore from being security-based swaps as defined in the Exchange Act and the Securities Act).

The Dodd-Frank Act not only reserves jurisdiction over securities options to the SEC, but also distinguishes security-based swaps as a sub-category of “swaps” that also reside within the jurisdiction of the SEC as “securities.” That is, security-based swaps are “swaps” that are pulled back into SEC jurisdiction and are not “swaps” under the CEA for the same reason: they are more connected to securities indices, specific securities, or issuers. As a practical matter, security-based swaps differ from securities options in fundamental economic mechanics in that security-based swaps are effectively continuous hedges on an instrument (or instruments) that are structured to allow for the exchange of payments between counterparties over time (which makes them operate similar to traditional swaps).[16] Securities options, in contrast, are more time-bounded hedges that do not result in the exchange of payments between counterparties. Due to the connection between security-based swaps and securities, Congress chose to assign security-based swaps within the SEC’s jurisdiction. Thus, regardless of whether classified as securities options or security-based swaps, securities-based event contracts should be within the SEC’s jurisdiction. Given the functional distinctions and different economic purposes between security-based swaps and securities options, Cboe believes that the security-based swap framework should be focused primarily on single-name swaps or total return swaps—products that institutional investors use, often for hedging risk, to exchange payments between counterparties—not binary options, which are more common in the retail world. Similarly, securities-based event contracts should not be considered “mixed swaps”—they should be kept solely within the SEC’s jurisdiction as binary securities options, consistent with Congressional intent to keep securities products within the scope of the federal securities laws and the SEC’s exclusive jurisdiction.

Treating event contracts based on securities indices, securities or issuers as securities options makes both practical and regulatory sense because these event contracts are closely tied to the securities and issuers to which they relate, bringing them under a well-understood and longstanding regulatory regime for listed options that is “fit for purpose” and well suited to handle these specific instruments. The listed options framework—including listing standards, trading rules, disclosure requirements, clearing, margin, and SRO oversight—is well positioned for serving and protecting the retail investor space where these event contracts trade. The swaps framework, and the security-based swap framework in particular, is not.

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16 The definition of “swap” in the CEA includes an instrument “that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level 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, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred.” *See* 7 U.S.C. § 1a(47)(A)(iii).

The swap and security-based swap regulatory frameworks (unlike the listed options framework) were not designed with retail investors in mind. The CFTC's retrofitting of the swap framework to encompass retail products through no-action letters, guidance, and rule proposals demonstrates the challenges of applying an OTC swap framework to retail products that look, feel, and trade like exchange-traded derivatives. The SEC should avoid a similar experience and instead reemphasize the importance of utilizing the existing options market structure. The Commodity Futures Modernization Act and the Dodd-Frank Act both highlight the importance of equal regulatory treatment for the same types of products to avoid regulatory arbitrage. This same concept also argues in favor of securities-based event contracts being overseen and subject to the same regulations as securities options. Although we believe the outcomes as they relate to these kinds of binary options are straightforward under the statute and longstanding practice, it would be helpful for the agencies to reinforce and clarify certain points.

First, guidance from the SEC would be useful on certain undefined terms within the securities laws to reinforce this result and to provide market participants with clear guidelines on a going-forward basis as they design new products. The securities laws do not define "option," "privilege," "put," or "call," which has led courts to parse these terms with inconsistent results.[17] Second, guidance might be provided on how best to read the parenthetical in the definition of "security" as it relates to securities options: "including any interest therein or based on the value thereof." The SEC has wrestled with this language on occasion, including in its approval of Cboe's ability to list and trade credit default options, but the analysis has been on a case-by-case basis. Consistent with numerous court opinions, this phrase should be read broadly and consistent with economic reality, which would certainly include binary options relating to key performance indicators on issuers or the performance of securities indices.[18] To that end, the persistent use of "any" within the definition should be read to broadly scope options-like products that have any relation to a security or issuer: "<u>any</u> put, call, straddle, option, or privilege on <u>any</u> security, certificate of deposit, or group or index of securities (including <u>any</u> interest therein or based on the value thereof)" (emphasis added).

Alternative Compliance

The differences between the SEC and CFTC regulatory frameworks are not merely procedural—they reflect fundamentally different policy judgments about market integrity and investor

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17 *Compare SEC v. Banc de Binary, Ltd.*, 964 F.Supp.2d 1229 (D. Nev. 2013) (all-or-nothing, automatically exercised binary options are "privileges" and therefore securities; sanctions and fine for unregistered sale to U.S. investors) *with Caiola v. Citibank, N.A.* 295 F.3d 312 (2d Cir. 2002) (cash-settled synthetic OTC options are "options" and therefore securities under Section 3(a)(10) of the Exchange Act).

18 *See, e.g., Caiola*, 295 F.3d at 325 ("The Supreme Court has cautioned that '[i]n searching for the meaning and scope of the word 'security' . . . the emphasis should be on economic reality.") (quoting *United Hous. Found. v. Forman*, 421 U.S. 837, 848 (1975)).

protection. Consider the treatment of insider trading and selective disclosure. The SEC's regime is built on the premise that securities markets should operate with informational symmetry: material nonpublic information about an issuer should not be exploited for trading advantage, and robust enforcement mechanisms exist to police violations. Indeed, the SEC adopted Regulation FD specifically to address selective disclosure by issuers and to promote full and fair disclosure to all market participants.[19] The CFTC's regime, by contrast, assumes a degree of informational asymmetry is inherent in commodity and derivatives markets, where commercial participants may have superior knowledge about supply, demand, or market conditions. Allowing securities-based event contracts to trade under the CFTC framework would create a significant gap in insider trading and disclosure protections—permitting trades based on material nonpublic information about issuers that would be prohibited if the same economic exposure were obtained through a traditional securities option. Similar distinctions exist across market manipulation rules, broker-dealer conduct standards, disclosure requirements, and customer protection rules. These are not interchangeable frameworks; each was designed for the products and participants it regulates.

Market manipulation standards present another illustration. Sections 9(a)(2) and 10(b) of the Exchange Act and SEC Rule 10b-5 establish broad antimanipulation authority over securities markets, and the SEC has developed extensive case law and enforcement precedent around market manipulation, including sophisticated surveillance mechanisms and coordination with self-regulatory organizations. The CFTC's manipulation provisions under the CEA developed in the context of physical commodity markets and carry different scienter requirements and enforcement histories. Event contracts tied to securities or issuers could be used to manipulate—or to profit from manipulation of—the underlying securities, and permitting such contracts to trade outside SEC jurisdiction would create gaps in the antimanipulation framework that protects investors and issuers alike.

The same is true of customer suitability and best interest obligations. The SEC's Regulation Best Interest requires broker-dealers to act in a retail customer's "best interest" when making recommendations, with specific obligations to disclose conflicts of interest, exercise reasonable care, and avoid placing the firm's interests ahead of the customer's.[20] This retail-focused standard reflects that securities markets have long served individual investors who rely on intermediaries for guidance. The CFTC's suitability framework for futures commission merchants (FCMs) and commodity trading advisors, by contrast, developed in markets historically dominated by commercial hedgers and institutional participants, and does not impose equivalent best interest obligations. Additionally, designated contract markets that offer event contracts directly to retail customers are not subject to suitability and advertising requirements that apply to FCMs. Allowing securities-based event contracts—which are marketed to retail investors—to trade under the

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19 *See Selective Disclosure and Insider Trading*, Securities Exchange Act Release No. 43154 (Aug. 15, 2000), 65 FR 51716 (Aug. 24, 2000).

20 *See* 17 C.F.R. § 240.15l-1.

CFTC framework would deprive those investors of the heightened conduct standards that apply to economically similar products offered through SEC-regulated intermediaries.

The Joint Request also sought comment on so-called "alternative compliance." The idea of alternative compliance sounds appealing, but as discussed above care needs to be taken not to obscure or gloss over statutory definitions, which set out Congressional intent quite clearly for many categories of instruments. There is no circumstance under which Congress has indicated an intent for "securities" to be assigned to CFTC oversight or for "futures" to be under SEC oversight. In fact, quite the opposite is true: when Congressional intent was for both regimes (or aspects of the regimes) to apply, and not one or the other, Congress provided for that approach such as with respect to mixed swaps and security futures. Each agency has spent years developing expertise, promulgating rules and regulations, and focusing examination functions and enforcement decisions to ensure it is effectively regulating products over which it has jurisdiction—neither agency has (or should have) tried to evolve to address products subject to a different set of statutes and regulatory requirements. Thus, in most instances, substituting one regulatory regime for another will be, at best, ill-fitting and, at worst, ineffective. Further, given the clarity that surrounds many categories of instruments discussed above, only the most sparing use should be made of exemptive or no-action authority by either agency. The SEC's exemptive authority is limited in the case of the Exchange Act to circumstances where the SEC can make the necessary findings to invoke that authority[21], and the SEC has no general authority under the Securities Act to act via exemptive order—rather, it requires the SEC to act "by rule or regulation" to depart from that Act's requirements.[22]

No-action relief is also an inappropriate vehicle for addressing these matters. No-action letters are only staff statements of very limited scope (speaking only to the staff's enforcement posture while expressly declining to reach any legal conclusion on the substantive questions presented) and are intended to be based on specific facts and circumstances. They carry no precedential value and, critically, do not represent the views of the Commission itself. No-action relief also offers market participants little comfort: the staff can, and has, revisited and adjusted positions reflected in prior no-action letters, and no-action relief can be modified or revoked at any time. The purpose of no-action letters is not to make wholesale changes to how products are classified and markets are regulated. Members of both Commissions have observed the limitations of the no-action process and the importance of reserving the agencies' fundamental oversight responsibilities for more formal action. It is not possible to make fundamental changes to product categorization and market structure through no-action relief, particularly when that relief is a significant departure from the law, the Congressional mandates established for the SEC and CFTC, and decades of established precedent. More to the point, the SEC does not have the

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[21] *See* 15 U.S.C. § 78mm (providing the SEC with exemptive authority "to the extent that such exemption is necessary or appropriate the public interest, and is consistent with the protection of investors").

[22] *See* 15 U.S.C. § 77z-3.

authority to abrogate its regulatory oversight of the securities markets, whether by rule, regulation, exemptive authority, no-action relief, or otherwise. The SEC's authority for regulatory oversight of the securities markets is derived from Congressional mandate in the form of the Exchange Act, and only Congress has the authority to modify or remove that mandate.

This framework that Congress has established for the regulation of securities makes sense because the securities registration requirements (and the express exemptions embedded in that regime by statute) are fundamental to how U.S. securities markets operate. To the extent there is room and regulatory appetite to make any efforts around the edges in those limited cases where the status of an instrument is in question to permit alternative compliance, any departures from or changes to the statutorily mandated regime should be taken sparingly and with care. More pointedly, this should always include a determination of which regulatory regime is better suited to provide investors—and, in particular, those investors that are most likely to buy the product at issue—with protections when trading the product in question on the basis of the perceived risks inherent in the product. Any such changes should only happen after a deliberative process that takes place by way of regular order joint rulemaking by the agencies, with appropriate opportunities to solicit and respond to industry comment. This should not be undertaken by exemptive or no-action authority, either by both agencies exercising exemptive or no-action authority or either agency exercising exemptive or no-action authority in areas that belong within the jurisdiction of the other agency. To do otherwise runs the risk of regulatory arbitrage—one of the key lessons from the financial crisis that led to the decision to create a transparent OTC swaps regulatory framework.

Substantively, given Congress's decision to divide jurisdiction between the agencies (except in specifically delineated situations such as mixed swaps and security futures), and in keeping with longstanding practice, there should be strict limits on where one agency's regulatory framework could be deemed to satisfy substantially similar requirements under another. Put directly: the CFTC cannot lawfully assume jurisdiction over instruments for which Congress has not granted it authority. Where Congress has established that securities-based instruments fall within SEC jurisdiction, no exercise of exemptive authority by either agency—or both acting in concert—should be used to override that statutory allocation. Where Congress has addressed joint jurisdiction, as with security futures, it has set forth very specific provisions and given detailed guidelines around how it must work (such as notice registration provisions) while leaving some room for the agencies around implementation. In circumstances where the status of a product does not clearly meet one of the applicable statutory definitions, there are limited situations where "alternative compliance" or a joint process by the agencies to establish the status of a particular product and the regulatory framework that should apply to the product could work in practice. But this should only be undertaken when clearly necessary and effectuated through joint rulemaking, with the distinctions between the two regulatory frameworks kept foremost in mind.

The risks of departing from the statutorily established framework are significant. If entities that are not SEC-registered broker-dealers are trading instruments that meet the definitional requirements of a security, and they do so on venues (particularly exchanges) that are not SEC-registered as well, this allows such instruments and the sellers to seek to evade the reach of the federal securities laws. It attempts to take them out of cross-market surveillance of securities conducted by exchanges, out of the SEC, FINRA, and SRO regulatory compliance programs, and out of the antifraud (including insider trading) and market manipulation laws and rules directly under the authority of the SEC. More concerningly, it also creates an incentive for entities to migrate away from the SEC regulatory regime, which has been traditionally comprised of more stringent retail investor-focused requirements. Not only do such instruments and the venues offering them run the risk that federal regulators or a court will find them out of conformance with the federal securities laws, but purchasers of "losing bets" on such instruments can also seek to avail themselves of their rescission rights. In essence, every "losing bet" on an unregistered security that is offered by an unregistered broker-dealer is susceptible to such claims through private rights of action. State regulators likewise may seek to vindicate the rights of their consumers for unlicensed sales of unregistered securities by unregistered entities.

With respect to specific questions posed by the agencies, Cboe submits the following observations. The notion of accepting a "substantially similar" regime should not work where the subject instruments meet a clear statutory definition. Trading takes place in different ways, products are distinct, and customer bases are distinct. The fact that registration under the securities laws (either of the product, the exchange, or the intermediary at issue) can be timely and/or costly cannot be a sufficient reason to avoid registration. Alternative compliance should never derogate from the integrity of U.S. securities markets—otherwise it risks the United States losing its preeminence. If there were to be an alternative compliance approach, it would have to be proposed and formulated through a shared process between the agencies, not undertaken unilaterally.

"Alternative compliance" also risks undermining cross-market surveillance, including the Consolidated Audit Trail, for instruments that fall outside of securities regulation. The Consolidated Audit Trail does not include order or trade information regarding futures or swaps, and absent such data and information, integration across the securities, futures, and swaps markets remains cumbersome and susceptible to information gaps. Allowing securities to trade within these gaps would be detrimental for investors (and, in particular, retail investors) and for markets where instruments that should be regulated as securities are concerned, making the task of surveillance and detection of manipulative trading or insider trading vastly more difficult for the SEC and the SROs. This could also have similar adverse effects on issuers whose securities trade in SEC-registered markets and could dampen interest in going public—an interest the SEC has recently highlighted. This further underscores why instruments that are securities should continue to be regulated as securities and not backdoored into the CFTC regime.

Proposed Framework

In light of the foregoing, Cboe respectfully proposes that the agencies adopt the following framework for classifying event contracts. First, any event contract where the outcome would be material to a reasonable investor's decision to invest in the underlying security—such as contracts tied to earnings, revenue, clinical trials, executive departures, or M&A transactions—should be classified as a securities option subject to SEC jurisdiction. Second, the test should focus on whether the event is one that securities investors would consider significant in making investment decisions about the issuer, not merely whether the contract is technically structured as a binary payout. Apply the same treatment to binary option event contracts based directly on a security index, classifying them as securities options subject to SEC jurisdiction. Third, the agencies should clarify that the "potential financial, economic, or commercial consequence" language in the swap definition does not override the securities option exception when the instrument is based on or relates to a security or issuer.

Importantly, while Cboe supports the development of this framework for prospective guidance, the SEC need not await the completion of this joint rulemaking process to exercise its existing authority over event contracts that clearly meet the statutory definition of a security—including the binary options on key performance indicators that Cboe has proposed for listing. This framework would preserve Congressional intent, maintain the integrity of established regulatory structures, and provide market participants with clear guidance for product development.

Cboe recognizes that some market participants may argue that regulatory flexibility is necessary to foster innovation, or that the CFTC framework provides adequate protections for certain event contracts. The latter may be true for event contracts that are genuinely unrelated to securities or issuers—such as contracts on weather, sports outcomes, or macroeconomic indicators—but it is not true for securities-based event contracts, which require the disclosure, antifraud, and investor protection regimes that Congress designed specifically for securities markets. Innovation does not require regulatory arbitrage—Cboe's own history demonstrates that novel products, including binary options and event-linked instruments, can be developed and offered successfully within the SEC's regulatory framework. The SEC's registration and disclosure regime does not stifle innovation; it channels innovation toward products that serve investors with appropriate protections. As to the adequacy of the CFTC framework for securities-based products, the examples above demonstrate that the two regulatory regimes reflect fundamentally different policy judgments about disclosure, insider trading, market manipulation, and customer protection. A framework designed for commercial hedgers in commodity markets is not "substantially similar" to one designed for retail investors in securities markets, regardless of how the comparison is framed. Finally, concerns about regulatory efficiency cannot override statutory mandates. Congress deliberately divided jurisdiction between the agencies and specified how overlapping products should be treated. Administrative convenience is not a basis for departing from that Congressional design.

Additional Definitional Topics within the RFC

The following are two more discrete items that the agencies should also address.

With respect to the definition of "narrow-based security index," although this definition is generally only relevant for determining whether a swap is a security-based swap or not (or whether a future is a "security future"), the definition was written with stock indices in mind, not other types of securities indices. Specifically, the final prong of the definition relates to dollar value of average daily trading volume ("ADTV"); however, for a security index based on security options series, ADTV is based on premium payments rather than stock price payments, so it is more difficult to reach the ADTV threshold when a trailing six-month average ADTV is used for each constituent in the bottom 25% of the index's weighting. Moreover, options also tend to trade in higher volumes as they approach expiration or may only be listed for a time period that is shorter than six months, so the test can be difficult to apply with a six-month trailing average under the standard method test for a security index in which the option series that are constituents of the index change much more frequently than in a stock index.

In 2001, the agencies issued a release and adopted rules on the narrow-based security index test allowing a day-by-day six-month lookback to be used for the ADTV calculation during the first 30 days of trading in a product.[23] This alternative test should be allowed to be used both before and after the initial 30-day trading period, in addition to being allowed during the initial 30-day trading period. This test is already recognized by the agencies as an acceptable test and should be allowed to be used at all times, not just during this limited time period. After the first 30 days of trading, the existing tolerance provision under which an index becomes a narrow-based security index if it fails for 45 business days out of a 90-day period should be permitted to be used with either the alternative method test or the standard method test.

Finally, we note that, in seeking comment on definitional challenges with emerging products, the agencies specifically requested comment on the status of certain contracts in the context of "innovative markets," and whether there was a need for greater clarity regarding whether a cash-settled "perpetual" contract referencing an equity security should be treated as a security future. With respect to single-stock perpetual contracts, Cboe submits that, if there is no intent for future delivery on a security, such contracts should be classified as security-based swaps, not security futures. The statutory definition of "security future" specifically requires "future delivery,"[24] and, as discussed above, the key feature of a traditional swap is the exchange of payments between counterparties over time with reference to a reference asset—this is precisely how a single-stock perpetual contract operates. Accordingly, single-stock "perpetual" contracts should be security-

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23 CFTC Regulation 41.12(a)(2) and SEC Regulation 3a55-2(a)(2).

24 *See* CEA Section 1a(44), Exchange Act Section 3a(55)(A), and Securities Act Section 2(a)(16). "The term 'security future' means a contract of sale for future delivery of a single security or of a narrow-based security index, including any interest therein or based on the value thereof. . . ."

based swaps and the SEC, not the CFTC, should have oversight over single-stock perpetual contracts.

Conclusion

Cboe appreciates the opportunity to comment on this important Joint Request. The agencies' careful consideration of these definitional and alternative compliance issues is essential to maintaining the integrity of U.S. capital markets and protecting investors, particularly retail investors who are increasingly participating in prediction markets. Cboe urges the agencies to remain faithful to Congressional intent as expressed in the statutory definitions and to preserve the well-established regulatory frameworks that have served investors and markets well.

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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