Hyperliquid Policy Center

November 16, 2026

Submitted via Regulations.gov

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

Re: Further Definition of "Swap"—Inclusions; Notice of Proposed Rulemaking (RIN 3038-AF82; Docket No. CFTC-2026-2213) (the "Proposal")

Dear Secretary Kirkpatrick,

Hyperliquid Policy Center ("HPC") is an independent research and advocacy organization dedicated to advancing a clear, regulated path for Americans to access onchain markets, including those available on Hyperliquid.[1] HPC appreciates the opportunity to comment on the Proposal,[2] which would further define the term "swap" to include "[e]vent contracts, including those based on sports-, politics-, cultural, and weather-related events," by adding a new paragraph (2)(i)(G) to the definition of "swap" in Regulation 1.3.[3] HPC supports the Proposal and urges the Commodity Futures Trading Commission (the "Commission") to adopt it with one drafting addition, a cross-reference in the rule text to the exclusion for casino-style gambling products that the Commission adopted the same day in its companion interim final rule.[4] HPC is submitting a separate comment in the docket for the Interim Final Rule. The two letters naturally develop several of the same points.

This letter has four parts. Part I explains why the Proposal is correct as a matter of statutory text. Congress described event-based contingencies in the Commodity Exchange Act (the "CEA") in 2000 and, in 2010, both wrote them into the definition of "swap" and referred to contracts based on them as swaps. Part II explains that the Proposal and the Interim Final Rule together enunciate an objective line, using the method the Commission and the Securities and Exchange Commission ("SEC") (together, the "Commissions") adopted in 2012, and why that line is preferable to leaving the classification of event contracts, as swaps or as wagers, to litigation. Part III addresses the Commission's authority to adopt the Proposal. Part IV sets out the drafting suggestion and one related recommendation for the preamble.

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1 See Hyperliquid Policy Center, About, https://hyperliquidpolicy.org/about.

2 Further Definition of "Swap"–Inclusions, 91 FR 66022 (Oct. 19, 2026) (RIN 3038-AF82), available at https://www.federalregister.gov/d/2026-21377.

3 Proposal, 91 FR at 66033.

4 Further Definition of "Swap" To Exclude Casino-Style Gambling Products, 91 FR 65969 (Oct. 19, 2026) (RIN 3038-AF81) (the "Interim Final Rule"), available at https://www.federalregister.gov/d/2026-21376.

I. The CEA's Text Brings Event Contracts Within the Swap Definition

The Proposal relies on four clauses of the statutory definition of "swap": (1) the first, which covers binary and other options; (2) the second, which covers any payment "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"; (3) the fourth, which covers any instrument "commonly known to the trade" as a swap; and (4) the sixth, which covers combinations and permutations of the foregoing.[5] HPC agrees with the Commission's reading of each. This letter adds a point that unifies them and that answers the principal argument against the Proposal.

The statutory definitions that bring event contracts within the CEA predate the current litigation by decades. In 1974, Congress broadened the definition of "commodity" to include "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."[6] The Commission and its staff have dealt with event contracts since the early 1990s, first through staff no-action letters permitting the Iowa Electronic Markets to list contracts on election outcomes and then, in 2004, through the designation of HedgeStreet, a contract market that listed binary event contracts.[7] In 2000, the Commodity Futures Modernization Act ("CFMA") added the definition of "excluded commodity." Clause (iv) of that definition covers "an occurrence, extent of an occurrence, or contingency," other than a change in the "price, rate, value, or level" of a commodity, that is beyond the control of the parties and "associated with a financial, commercial, or economic consequence."[8] Congress confirmed the same understanding from the other direction in 2006, when the Unlawful Internet Gambling Enforcement Act excluded from the definition of "bet or wager," among other things, (1) any transaction conducted on or subject to the rules of a registered entity under the CEA; (2) over-the-counter derivatives; (3) insurance; and (4) contracts of indemnity.[9]

The word "excluded" in the 2000 definition is regularly misread, in commentary on the recent litigation and by some courts, as if it removed contracts based on events from the CEA. It did the opposite. It described the treatment the CFMA gave certain transactions in those commodities, principally bilateral swap transactions between eligible contract participants, which Congress placed outside most of the CEA in the exclusions then set out in Section 2,[10] and it said nothing to otherwise limit the CEA's application to contracts based on those occurrences.

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5 Proposal, 91 FR at 66024–27; CEA Section 1a(47)(A)(i), (ii), (iv), (vi), 7 U.S.C. § 1a(47)(A)(i), (ii), (iv), (vi).

6 CEA Section 1a(9), 7 U.S.C. § 1a(9).

7 *See* Interim Final Rule, 91 FR at 65974 & nn.70–72; Concept Release on the Appropriate Regulatory Treatment of Event Contracts, 73 FR 25669, 25669–70 & n.5 (May 7, 2008) (noting that the 1993 no-action letter to the Iowa Electronic Markets superseded a more limited letter issued in 1992).

8 CEA Section 1a(19)(iv), 7 U.S.C. § 1a(19)(iv). The statute has described contracts based on events as within the CEA since 2000, and since 2010 it has defined a swap to include any payment that depends on an event, without requiring that a commodity underlie the contract. The definition of "swap" differs from the definition of a futures contract in that respect. A futures contract is a contract for the purchase or sale of a commodity for future delivery; a swap under the second clause of Section 1a(47)(A) is defined by the event on which payment depends, whatever the event. The Commission therefore has jurisdiction over a swap whether or not a commodity underlies it.

9 31 U.S.C. § 5362(1)(E).

10 *See* CEA Sections 2(d), 2(e), and 2(g) as in effect before 2010, repealed by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") § 723(a)(1).

Including event-based contingencies in the definition confirmed the scope of the CEA, as the court recognized in the Commission's enforcement action against Intrade [11] and as the Commission observes in both releases.[12]

When the Dodd-Frank Act repealed the CFMA's exclusions and brought swaps within the CEA, it left the definition of "excluded commodity" in place and incorporated its concept into the swap definition. The second clause of Section 1a(47)(A) covers payments 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," language that closely tracks clause (iv) of the excluded commodity definition.[13] Section 5c(c)(5)(C) of the CEA (the "Special Rule"), enacted at the same time, provides for Commission review of "agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency" and lists "gaming" among the categories the Commission may determine to be contrary to the public interest.[14] Congress thus said, in 2000 and again in 2010, that a contract whose payment depends on such an event is within the CEA, and in the Special Rule it used the word "swaps" to describe such contracts. The Proposal writes into the rule text what the statute already provides.

The "commonly known to the trade" clause confirms that event contracts are swaps. Since 1992, Commission-regulated exchanges have listed contracts the payout of which depends on occurrences as varied as insured property losses, bankruptcy counts, and corporate credit events,[15] and since 2004 a designated contract market has existed for binary event contracts. Those contracts were structured as binary options, which are swaps under the first clause of the definition, and since 2010 both the Commission and the markets that list them have treated them as swaps.[16] In 2005, the Commission entered a consent order against Trade Exchange Network Limited, the Dublin-based operator of the TradeSports and Intrade platforms, for offering U.S. residents commodity option contracts outside the Commission's ban on off-exchange options, and in 2012 it sued the company and its affiliate Intrade over binary contracts on weather, economic statistics, and other events that a federal court later held to be commodity options.[17] The Commission is right that "the trade" in this clause means participants in the derivatives markets rather than the general public and right that the Sixth and Ninth Circuits' contrary

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11 *CFTC v. Trade Exch. Network Ltd.*, 117 F. Supp. 3d 29, 38 (D.D.C. 2015) (concluding that the "excluded commodity" category did not remove the event contracts at issue from the CEA and instead confirmed the scope of the CEA's definition of "commodity").

12 Interim Final Rule, 91 FR at 65970 n.6; Proposal, 91 FR at 66024, 66027.

13 *Compare* CEA Section 1a(47)(A)(ii) *with* CEA Section 1a(19)(iv).

14 CEA Section 5c(c)(5)(C)(i), 7 U.S.C. § 7a-2(c)(5)(C)(i).

15 Concept Release on the Appropriate Regulatory Treatment of Event Contracts, 73 FR at 25670-71 & n.12; *see* Interim Final Rule, 91 FR at 65974 & n.70.

16 Proposal, 91 FR at 66025-27.

17 *See* Press Release No. 5124-05, CFTC, U.S. Commodity Futures Trading Commission Assesses Penalties Against Irish Company Trade Exchange Network Limited for Offering Illegal Commodity Option Contracts (Oct. 4, 2005), https://www.cftc.gov/sites/default/files/opa/enf05/opa5124-05.htm; *Trade Exch. Network*, 117 F. Supp. 3d at 31-32.

conclusions required them to read into the statute a limitation, that an event be "inherently" economic, that the text does not contain.[18]

II. The Proposal and the Interim Final Rule Draw a Single Objective Line

A. The Line Follows the Method of the 2012 Product Definitions

The Proposal is one half of a pair. The Interim Final Rule confirms that wagers offered by licensed gaming operators outside any market are not swaps; the Proposal confirms that event contracts traded on a designated contract market are. Both are predicated on who offers the product and where it trades, and that is the method the Commission and the SEC used in 2012. The statutory definition, as the Commissions then observed, is "detailed and comprehensive," but it "could be read to include" agreements that had never been considered swaps.[19] The Commissions resolved that problem by building exclusions on the status of the provider and the structure of the product, not by comparing payoffs. They adopted: (1) the insurance safe harbor, with its own provider and product tests; (2) a nonexclusive list of traditional insurance products; and (3) an interpretation of consumer and commercial agreements that depended on who entered into them, whether they were traded on an organized market or over the counter, and whether their payment obligations were severable from the agreement itself.[20] The Commissions expressly rejected the argument that instruments with similar economics must be regulated alike.[21] The Interim Final Rule applies that method to wagers; the Proposal states the corresponding rule for the instruments on the other side of the line.

B. A Wager and an Event Contract Are Different Instruments in Different Markets Subject to Different Regulatory Regimes

The premise of the state enforcement actions, and of the decisions of the Sixth and Ninth Circuits, is that a sports event contract and a sportsbook wager are, in effect, the same instrument because both depend on the same game.[22] They are not. A wager is placed against the house, which: (1) sets the price; (2) is principal to every transaction; and (3) profits when its customers lose. The wager is not transferable.[23] It has no value that can be realized until the event resolves. The peer-to-peer betting exchanges that New Jersey has authorized, for horse racing from 2011

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18 Proposal, 91 FR at 66025, 66027; *KalshiEX LLC v. Schuler*, Nos. 26-3196, 26-5235, 2026 WL 2884087, at *11 (6th Cir. Sept. 25, 2026); *KalshiEX, LLC v. Assad*, No. 25-7516, 2026 WL 2543846, at *9-15 (9th Cir. Aug. 28, 2026).

19 Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208, 48211 (Aug. 13, 2012) (the "2012 Release").

20 2012 Release, 77 FR at 48212-14, 48246-48.

21 2012 Release, 77 FR at 48215, 48220 (financial guaranty insurance and credit default swaps).

22 *See Schuler*, 2026 WL 2884087; *Assad*, 2026 WL 2543846; Interim Final Rule, 91 FR at 65971.

23 Licensed sportsbooks settle each wager as principal under their house rules. Some operators offer a "cash out" feature that lets a customer settle an open bet before the event at a value the sportsbook alone determines, which is an early repurchase by the house and does not transfer the bet to anyone else. *See, e.g.*, DraftKings Massachusetts Sportsbook House Rules § L (Oct. 7, 2026); FanDuel Sportsbook House Rules pt. B (Mich.). The fact that some transactions involving paper betting slips may assign the bettor's right to be paid does not create a market in the house's obligation, much as the Commissions concluded in 2012 that the assignment of an insurance contract is not "trading" separately from the insured interest. *See* 2012 Release, 77 FR at 48214-15 & n.55.

and for sports from 2022, matched one customer's wager against another's rather than against the house, but none survived as a gambling product. The racing exchange closed in 2020, and the two sports exchanges have closed and both operators have since obtained designation as contract markets, the result the Interim Final Rule's product test (the "Product Test"), which withholds the exclusion from any product traded in a market "in which trades are executed multilaterally," is designed to produce.[24]

An event contract traded on a designated contract market is different in each respect.[25] It is: (1) standardized and priced by competing bids and offers on a central order book operated by a neutral exchange that earns a transaction fee however the contract settles; (2) cleared through a registered clearinghouse; (3) transferable, so that it can be sold or closed at any time before the event; and (4) traded in exactly the kind of market the CEA exists to govern.[26] The CEA regulates instruments and markets, not underlyings.[27] The same event can underlie both a wager and an event contract, just as the same issuer default can underlie both bond insurance and a credit default swap.

C. Economic Resemblance Across Regulatory Regimes Is an Everyday Reality

Each of the following pairs offers similar exposure under a different regulator, and the law has never required the two products in a pair to be treated alike: (1) bond insurance and credit default swaps; (2) crop insurance and agricultural options; (3) catastrophe insurance and weather derivatives; (4) forwards and futures; and (5) in the United Kingdom, spread bets and fixed-odds bets on the same sporting event.

Home heating oil shows how a single price exposure can be obtained through several differently regulated products. A homeowner or an investor can take exposure to the price of heating oil in at least five ways:

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[24] N.J.S.A. 5:5-170 (defining "exchange wagering" as "a form of parimutuel wagering in which two or more persons place identically opposing wagers in a given market"); Interim Final Rule, 91 FR at 65975 (observing that "there is not currently a practical overlap" between state-regulated gambling products, which are "bilateral and non-tradable," and the swaps offered by Commission-registered entities, which are "multilateral and tradable," and that the Product Test "ensures that State and Tribal-regulated entities do not, in the future, begin offering products properly within the Commission's jurisdiction"); *id.* at 65979 (paragraph (7)(i)(B)). Betfair operated an exchange on horse races at Monmouth Park from 2016 until 2020. Prophet Exchange operated a peer-to-peer sports betting exchange in New Jersey from August 2022 until May 2024, and Sporttrade operated one in New Jersey, and later in four other states, from September 2022 until May 25, 2026. ProphetX LLC was designated as a contract market on June 11, 2026, and Sporttrade DCM LLC on October 30, 2026. *See* CFTC, Trading Organizations, https://www.cftc.gov/IndustryOversight/IndustryFilings/TradingOrganizations; Order of Designation, Sporttrade DCM LLC (Oct. 30, 2026), https://www.cftc.gov/filings/documents/2026/orgdcmstorderofdesignsi261102.pdf.

[25] The distinction is in the name itself. Designated contract markets are federal marketplaces for trading fungible contracts (hence designated *contract market*) readily assignable to any of the other market participants.

[26] Interim Final Rule, 91 FR at 65973–74; CEA Section 3(a), 7 U.S.C. § 5(a).

[27] When Congress has judged a particular underlying unsuited to derivatives trading, it has written that judgment into the CEA itself. The definition of "commodity" excludes onions and motion picture box office receipts. CEA Section 1a(9), 7 U.S.C. § 1a(9); *see* 7 U.S.C. § 13-1.

1. Buying oil from a local distributor for delivery today, which is a spot transaction outside the CEA;

2. Agreeing with that distributor on a fixed or capped price for the heating season, which is a forward contract and a type of agreement the 2012 Release identified as a "consumer transaction" outside the swap definition;[28]

3. Buying NY Harbor ULSD futures on a designated contract market, which is a futures transaction regulated by the Commission;

4. If the investor is an eligible contract participant, entering into a heating oil swap with a dealer, which is a swap regulated by the Commission; and

5. Buying shares of an oil distributor, which is a securities transaction regulated by the SEC.

The regulatory treatment of each of these transactions, which provide similar exposure to the same commodity price, depends on: (1) who provides the product; (2) how it is structured; and (3) where it trades, not on the exposure. That assignment reflects the risks inherent in each market. Spot, forward, futures, swap, and securities markets present different risks to the people who use them, and the regime that governs each is designed for the risks of that market, so the regime that matches a product's risk profile attaches to it regardless of the economic exposure the product provides. The Proposal and the Interim Final Rule apply that principle to the division between Commission-regulated event contracts and state-regulated wagers. The Interim Final Rule makes the same point with crypto assets and with insurance and credit default swaps.[29]

D. Without a Clear Boundary, Classification Is Left to the Eye of the Beholder

State gambling statutes are written broadly. New Jersey, whose petition for certiorari is pending, defines gambling as "staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence."[30] Nevada, from whose Ninth Circuit litigation two petitions are also pending, defines a "wager" as value "risked on an occurrence for which the outcome is uncertain" and a "sports pool" as the business of accepting wagers "on sporting events or other events by any system or method of wagering."[31] Ohio, one of the two Sixth Circuit states, defines a "bet" as "the hazarding of anything of value upon the result of an event, undertaking, or contingency."[32] Tennessee, the other, defines gambling as "risking anything of value for a profit whose return is to any degree contingent on

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[28] 2012 Release, 77 FR at 48246-47.

[29] Interim Final Rule, 91 FR at 65975.

[30] N.J.S.A. 2C:37-1(b). New Jersey's petition for certiorari from the Third Circuit's decision in *KalshiEX, LLC v. Flaherty*, 172 F.4th 220 (3d Cir. 2026), is pending as No. 26-299.

[31] Nev. Rev. Stat. §§ 463.01962, 463.0193. Petitions for certiorari from the Ninth Circuit's companion decisions of August 28, 2026, are pending as *Robinhood Derivatives, LLC v. Dreitzer*, No. 26-338, and *North American Derivatives Exchange, Inc. v. Nevada*, No. 26-344, and the Ninth Circuit denied rehearing in *Assad* on November 4, 2026.

[32] Ohio Rev. Code § 2915.01(B).

chance."[33] Washington uses New Jersey's "future contingent event" formulation.[34] Read literally, each covers every event contract and much of the derivatives market. Several of these statutes except bona fide business transactions, including "contracts for the purchase or sale at a future date of securities or commodities,"[35] but the exceptions make the problem worse rather than solving it. Applying the statute to an event contract requires a state court to decide, product by product, whether a contract listed on a designated contract market falls within an exception for commodity contracts. That is a question of federal classification.

The litigation over event contracts now pending in federal and state courts across the country shows what happens when the question is left to the courts. A Washington trial court enjoined one exchange from offering or accepting transactions in event contracts in seven categories, among them sports, elections, and technology and science, while permitting its contracts in, among others, economics and climate.[36] Nothing in the CEA supports that division; the statute treats every event with a potential economic consequence the same way. The Sixth and Ninth Circuits read the statute to require that the event be "inherently" associated with an economic consequence, a limitation the text does not contain.[37] The Ninth Circuit additionally asserts that the outcome of a game is not an "event" at all, a position the Sixth Circuit did not adopt.[38] And the Third Circuit held that the same contracts are swaps.[39] The line each court draws is its own, and that is just in federal court. There is a potentially different answer in each state.

The theory behind the state enforcement actions has no limiting principle. The states' current focus on sports contracts reflects their interest in protecting licensed sports wagering and the tax revenue it produces, but the theory of the enforcement actions, that a state may regulate a derivative as gambling because of the nature of its underlier, is not confined to sports. The same reasoning would allow any state to assert authority over derivatives on any commodity in which it claims an interest, such as agricultural products in farm states or energy production in producing states. It would threaten derivatives markets in asset classes such as interest rates and currencies as much as it now threatens sports event contracts.

The states' theory would also revive disputes that federal futures regulation was enacted to end. In the 1880s, several states enacted statutes equating futures contracts with gambling contracts, and courts applying state gambling and bucket shop laws asked, contract by contract, whether the parties intended delivery.[40] Under that test, as a Commodity Exchange

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33 Tenn. Code Ann. § 39-17-501(2).

34 Wash. Rev. Code § 9.46.0237.

35 Wash. Rev. Code § 9.46.0237; *see* Tenn. Code Ann. § 39-17-501(2)(A), (5) (excepting "any futures or commodities trading"); Ohio Rev. Code § 2915.01(B) (excepting a "bona fide business risk").

36 *State of Washington v. KalshiEX LLC*, No. 26-2-10264-3 SEA (King Cnty. Super. Ct.) (amended preliminary injunction entered Aug. 2026). The enjoined categories are (1) sports; (2) elections; (3) politics; (4) entertainment; (5) culture; (6) technology and science; and (7) "mentions." The permitted categories are (1) economics; (2) finance; (3) commodities; and (4) climate.

37 *Schuler*, 2026 WL 2884087, at *11; *Assad*, 2026 WL 2543846, at *9–15.

38 *Compare Assad*, 2026 WL 2543846, at *9–15, *with Schuler*, 2026 WL 2884087, at *11.

39 *Flaherty*, 172 F.4th at 228.

40 The test turned on what the parties privately intended when they made the contract. *See Irwin v. Williar*, 110 U.S. 499, 508 (1884) ("[S]uch a contract is only valid when the parties really intend and agree that the goods

Administration economist observed in 1937, most exchange contracts "would be considered as gambling contracts, and hence invalid if they were brought, individually, before the courts of almost any state."[41] The sponsor of the Future Trading Act of 1921 told the House that under one such state law a grain dealer "would not know, until there was a construction of that law by some court, as to whether he was an outlaw or not" and that a federal statute "would have a tendency to settle that thing and create uniformity."[42] The 1921 debate drew the same line the two rules codify, between a house that takes the other side of its customers' bets and an exchange on which customers trade with one another. The bill's supporters: (1) distinguished the bucket shop, "a place wherein men speculate or gamble and the owner assumes the risk of the trades, like the keeper of a gambling house or a bookmaker at a race track," from the federally designated contract market; (2) noted that most states already prohibited bucket shops; and (3) explained that the committee had acted "from a practical standpoint" rather than "to legislate against gambling from a moral standpoint," a matter that "may well be left to State legislation."[43]

Congress has preserved the division between exchanges and bucket shops ever since.[44] When it enlarged the states' role in policing off-exchange operators in 1978, it left enforcement of the CEA against the exchanges "solely with the Commission" and refused to let the states sue in their own courts under state statutes identical to the CEA because "separate bodies of State court decisions among the various States" would "cause confusion and disruption among the

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are to be delivered by the seller and the price to be paid by the buyer . . . ."); Jonathan Ira Levy, *Contemplating Delivery: Futures Trading and the Problem of Commodity Exchange in the United States, 1875–1905*, 111 Am. Hist. Rev. 307 (2006). On an exchange, where nearly every contract calls for delivery and most are offset before delivery is due, an inquiry into the mental state of each pair of traders could not be applied consistently, and the Supreme Court looked instead at how the market functioned. *See Bd. of Trade of City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 247–50 (1905). The Seventh Circuit has since rejected any approach that "asks what the parties 'intended.'" *CFTC v. Zelener*, 373 F.3d 861, 866 (7th Cir. 2004).

41 H. S. Irwin, *Legal Status of Trading in Futures*, 32 Ill. L. Rev. 155, 155 (1937). Irwin described the result as a legal "no man's land" in which the outcome of a case depended on "the variations in the statutes from state to state" and "the attitudes of the individual judges toward trading in futures." *Id.* at 155, 163. On the state statutes of the 1880s, see John V. Rainbolt II, *Regulating the Grain Gambler and His Successors*, 6 Hofstra L. Rev. 1 (1977), *reprinted in part in* H.R. Rep. No. 95-1181, at 80, 82 (1978). *Christie*, which upheld the Chicago Board of Trade's contracts against the charge that they were wagers, was the first judicial appraisal of exchange trading as an institution rather than as a series of individual bets. *See Christie*, 198 U.S. at 247–50; Irwin, *supra*, at 166.

42 61 Cong. Rec. 1313 (1921) (statement of Rep. Tincher) (describing a Minnesota statute whose author intended "to absolutely prohibit all dealing in futures").

43 61 Cong. Rec. 1324 (1921) (statement of Rep. Voigt) ("The bill puts the bucket shops out of business, because a bucket shop is not a contract market and can not operate on a contract market."); *id.* at 1318 (statement of Rep. Purnell) ("I think most of the States have laws prohibiting bucket shops now."); *id.* (statement of Rep. Voigt) ("The bucket shop is wiped out in this bill, because a bucket shop is not a contract market."); *id.* at 1323 (statement of Rep. Voigt) ("The committee has dealt with the subject from a practical standpoint in an endeavor to help producer and consumer rather than to legislate against gambling from a moral standpoint. That feature may well be left to State legislation.").

44 *See* Grain Futures Act of 1922, ch. 369, § 4, 42 Stat. 998, 999–1000 (making futures contracts unlawful unless made through a member of a designated contract market); Commodity Exchange Act, ch. 545, § 5, 49 Stat. 1491, 1496 (1936) (adding Section 4h of that Act, which prohibits the operation of an office that solicits or accepts futures orders unless they are executed through a member of a contract market); Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (conferring exclusive jurisdiction); Futures Trading Act of 1982, Pub. L. No. 97-444, § 229, 96 Stat. 2294, 2318 (adding the savings clause now in CEA Section 12(e)(1)); CFMA, Pub. L. No. 106-554, § 1(a)(5) [title I, § 117], 114 Stat. 2763, 2763A-402 (preempting state gaming and bucket shop laws for excluded and exempt transactions).

regulated persons."[45] Where the states' theory would bring back the case-by-case uncertainty that preceded federal regulation, the Proposal and the Interim Final Rule supply an objective test that depends on who offers the product and where it trades rather than on the subject matter of the event.

III. The Commission Has the Authority to Adopt the Proposal

The breadth of the swap definition was deliberate. Before 2010, the CFMA's exclusions and exemptions left the over-the-counter derivatives market, including credit default swaps, outside the Commission's and the SEC's authority, a gap the Financial Crisis Inquiry Commission claimed was a key contributor to the 2008 crisis.[46] Congress responded with a functional definition followed by enumerated exclusions,[47] and, knowing that a definition broad enough to prevent evasion would require administration, it assigned that task to the Commissions. It did so in five provisions of the Dodd-Frank Act: (1) Section 712(d)(1), which requires the Commission and the SEC to "further define" the term "swap";[48] (2) Section 712(d)(2)(A), which authorizes such other joint rules regarding the definitions as the Commissions determine are necessary and appropriate;[49] (3) Section 721(b), which authorizes the Commission to define any term in the Title VII amendments to the CEA;[50] (4) Section 718, which creates a process for determining the status of "novel derivative products," with review in the D.C. Circuit;[51] and (5) Section 719(d), which directed a joint study of whether stable value contracts are swaps, with authority to exempt them.[52] The 2012 rulemaking exercised that authority to exclude: (1) insurance; (2) forward contracts; and (3) consumer and commercial agreements. The markets have relied on those exclusions for fourteen years, and no court has questioned the Commissions' authority to adopt them.

Courts have recognized Congress's delegation of line-drawing authority to the Commissions. *Loper Bright* ended *Chevron* deference, but it reaffirmed that where a statute "expressly delegate[s]" to an agency the authority to give meaning to a statutory term, the reviewing court's role is to: (1) recognize the delegation; (2) fix its boundaries; and (3) ensure that the agency has engaged in reasoned decisionmaking within them.[53] Section 712(d)(1) is such a delegation, and the Third Circuit has already said so in substance. Responding to the argument that bingo games and ping pong matches would become federal matters if event contracts are

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45 H.R. Rep. No. 95-1181, at 15–16 (1978). The Committee explained that the Commission "should continue to have sole authority for the creation of a nationally uniform body of standards governing activities relating to commodity futures trading" and that the states "have an important role to play in protecting their citizens against fraudulent and illegal conduct," but it did not extend the states' new enforcement authority to suits against "a designated contract market, licensed Board of Trade or clearing organization thereof." *Id.* at 15.

46 Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report xxiv–xxv (2011).

47 CEA Section 1a(47)(A)–(B), 7 U.S.C. § 1a(47)(A)–(B).

48 Dodd-Frank Act § 712(d)(1), 15 U.S.C. § 8302(d)(1).

49 Dodd-Frank Act § 712(d)(2)(A), 15 U.S.C. § 8302(d)(2)(A).

50 Dodd-Frank Act § 721(b), 15 U.S.C. § 8321(a).

51 Dodd-Frank Act § 718, 15 U.S.C. § 8306.

52 Dodd-Frank Act § 719(d), 15 U.S.C. § 8307(d).

53 *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394–95 (2024) (citing *Batterton v. Francis*, 432 U.S. 416 (1977)).

swaps, the court observed that Congress's express delegation to the Commissions to "further define" swaps would prove useful in such cases and cited the 2012 exclusions.[54]

The Proposal, moreover, confirms a boundary rather than moving one. It restates what the swap definition and the Special Rule already provide, which is why a court exercising its own judgment on the text would arrive at the same result without deference to anyone; the delegation in Section 712(d)(1) is the additional reason the rule text is entitled to respect. The alternative is the one the circuit split illustrates. Without a rule of general application, the boundary is drawn case by case, by different courts, on the subject matter of the event.

IV. Drafting Suggestion and Related Recommendation

A. Add a Cross-Reference to the Gambling Exclusion

The Proposal would list "[e]vent contracts, including those based on sports-, politics-, cultural, and weather-related events" as swaps.[55] The Interim Final Rule excludes from the definition sports wagers, which in ordinary language are also contracts based on sports events. The preamble to the Proposal says that the new paragraph would not apply to casino-style gambling products and that the Commission "does not intrude upon existing regulation" of them,[56] but the rule text does not say so.

For consistency, HPC recommends that the new paragraph be revised to read "Event contracts, including those based on sports-, politics-, cultural-, and weather-related events, other than agreements, contracts, or transactions described in paragraph (7) of this definition." Paragraph (7) is where the Interim Final Rule inserts the gambling exclusion, and the cross-reference would make the two provisions read as the single, two-sided rule the Commission intends. Because the provider test of paragraph (7) (the "Provider Test") and the Product Test are conjunctive, the cross-reference would not remove any contract traded on a designated contract market from the new paragraph; it would confirm only that a licensed wager offered outside any market is not an event contract for purposes of the rule.

B. Describe "Event Contract" in the Language of the CEA

Neither the Proposal nor the CEA defines "event contract," and the term's meaning should not be left to inference from the examples in the rule text. HPC recommends that the preamble to the final rule, or the rule text if the Commission prefers, describe an event contract in the statute's language, as a contract whose payment is based on "the occurrence, extent of an occurrence, or contingency" other than a change in the "price, rate, value, or level" of a commodity.[57] That description would: (1) anchor the rule in the excluded commodity definition and the Special Rule; and (2) distinguish event contracts from price-based derivatives while recognizing that both are within the scope of the CEA.

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54 *Flaherty*, 172 F.4th at 228; *see* Interim Final Rule, 91 FR at 65971.

55 Proposal, 91 FR at 66033.

56 Proposal, 91 FR at 66029; *see also id.* at 66025 n.41.

57 CEA Sections 1a(19)(iv) and 5c(c)(5)(C)(i), 7 U.S.C. §§ 1a(19)(iv), 7a-2(c)(5)(C)(i).

* * *

HPC appreciates the Commission's decision to resolve this question by a rule of general application rather than leaving it to be answered one court, one state, and one product at a time. The Proposal does not expand the Commission's jurisdiction; it records a conclusion that the text of the CEA has compelled since 2000 and that Commission-regulated markets have acted on since the early 1990s. Adopted with the cross-reference recommended above, the Proposal and the Interim Final Rule will draw, in the rule text, the single objective line between the markets the Commission regulates and the wagers the states regulate that the courts have so far failed to draw consistently. HPC urges the Commission to adopt the Proposal with that addition and would welcome the opportunity to discuss these comments with the Commission or its staff.

If you wish to discuss our comments on the Proposal or if there is anything further we can provide, you can contact us at Brad@hyperliquidpolicy.org.

Sincerely,

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Jake Chervinsky
Chief Executive Officer
Hyperliquid Policy Center

/s/ Brad Bourque
Brad Bourque
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cc: Gary E. Kalbaugh, Cahill Gordon & Reindel LLP