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" To Exclude Casino-Style Gambling Products; Interim Final Rule and Request for Comments (RIN 3038-AF81; Docket No. CFTC-2026-2214) (the "Interim Final Rule")

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 Interim Final Rule,[2] which codifies the longstanding position of the Commodity Futures Trading Commission (the "Commission") that casino-style gambling products offered by licensed gaming operators such as casinos and sportsbooks are not swaps. HPC supports the Interim Final Rule without qualification and urges the Commission to adopt it as a final rule with the rule text unchanged. HPC is submitting a separate comment in the docket for the companion proposal to further define "swap" to include event contracts.[3] The two letters naturally develop several of the same points.

This letter has four parts. Part I shows that the Interim Final Rule excludes casino-style gambling products from the swap definition using the same method the Commission and the Securities and Exchange Commission ("SEC") (together, the "Commissions") used in 2012 to confirm that insurance and ordinary consumer and commercial agreements are not swaps. Part II shows that the rule restates a division of authority that federal and state authorities, and the gaming industry, have observed for decades, which also supports the Commission's findings that the rule imposes no new compliance costs and that good cause existed to adopt it without prior notice and comment. Part III explains why a clear boundary is necessary and why the Commission, rather than the legislatures and courts of fifty states, is the body Congress chose to

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

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

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

draw that boundary. Part IV responds to the Commission's three questions and recommends clarifications for the preamble to the final rule.

I. The Interim Final Rule Is Consistent with the 2012 Product Definitions

In 2012, the Commission and the SEC confronted, in a different setting, the problem the Interim Final Rule now addresses. The statutory definition of "swap" is, as the Commissions then observed, "detailed and comprehensive," but it "could be read to include" agreements that had never been considered swaps, and nothing in the legislative history of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") suggested that Congress intended that result.[4]

The Commissions identified an insurance policy as a prominent example of an agreement that the statutory text could be read to cover. A typical policy provides for a 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."[5] So do many other ordinary consumer and commercial agreements, including: (1) a fixed-price agreement to buy home heating fuel; (2) an employment contract; and (3) a product warranty.

The Commissions distinguished insurance from swaps through an exclusion built on the status of the provider and the structure of the product, without comparing payoffs. The insurance safe harbor asks whether the product is provided by a person subject to state or federal insurance supervision and is regulated as insurance (the "Insurance Provider Test") and whether the product has the structural attributes of insurance, including that it is not traded, separately from the insured interest, on an organized market or over the counter (the "Insurance Product Test").[6]

The Commissions listed the traditional insurance products the safe harbor covers, confirmed that the safe harbor is nonexclusive, and explained that a product outside it would be analyzed on its facts rather than presumed to be a swap.[7] They also rejected the argument that instruments with similar economics must be regulated alike; financial guaranty insurance and credit default swaps can provide the same protection, yet one is insurance and the other is a swap.[8] The Commissions' interpretation excluding customary consumer and commercial agreements from the swap definition followed the same logic—agreements are not swaps because they: (1) are entered into by individuals for personal, family, or household purposes or by commercial parties in the ordinary course of business; (2) are not traded on an organized market or over the counter; and (3) do not contain payment obligations that are severable from the agreement itself.[9]

---

4 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").

5 CEA Section 1a(47)(A)(ii), 7 U.S.C. § 1a(47)(A)(ii); *see* 2012 Release, 77 FR at 48212.

6 2012 Release, 77 FR at 48212-13; Regulation 1.3 (definition of "swap," paragraph (4)).

7 2012 Release, 77 FR at 48213-14.

8 2012 Release, 77 FR at 48215, 48220.

9 2012 Release, 77 FR at 48246-48.

The Interim Final Rule applies each element of the 2012 framework to gambling. Its Provider Test asks whether the product is offered by a person licensed or authorized under state or Tribal law that is acting within the scope of its license and whether the product is regulated as gaming or gambling under that law (the "Provider Test"). Its Product Test asks whether the product is traded on (1) a board of trade; (2) an organized exchange; (3) a swap execution facility; or (4) any other market in which trades are executed multilaterally or subject to individual negotiation (the "Product Test").[10] The rule lists the traditional products covered, including sports wagers and casino games, and states that the list is nonexclusive, so that a product outside it is not presumed to be a swap.[11] The preamble, like the 2012 Release, acknowledges that similar economic exposure can be obtained through a wager or an event contract and correctly explains why that does not make them the same product or require that they be regulated by the same agency.[12]

A retail wager also fits the characteristics the Commissions identified for consumer transactions in 2012. It is: (1) entered into by an individual for personal purposes; (2) the purchase of a service from a licensed provider; (3) not severable in its payment obligations; and (4) not traded on any market. The 2012 Release had little reason to address gambling contracts. When the Commissions adopted it, the Professional and Amateur Sports Protection Act generally prohibited states from authorizing or licensing sports wagering, a prohibition that remained in place until the Supreme Court held it unconstitutional in *Murphy* v. *National Collegiate Athletic Ass'n* in 2018.[13] It was also impractical to list every excluded retail product, and no one asked the question until opponents of event contract markets argued in litigation that, if event contracts are swaps, every sportsbook is operating an unlawful swap market.[14] The Interim Final Rule applies the logic of the 2012 Release to gambling products, which have gained national prominence as states have legalized sports wagering since *Murphy*, and in any event a licensed wager would have fallen outside the swap definition under the 2012 interpretation of consumer transactions.

II. The Rule Confirms a Division of Authority That Has Existed for Decades

The Interim Final Rule describes itself as a codification of the Commission's longstanding position,[15] and the history bears that out.

The statutory definitions that bring event contracts within the Commodity Exchange Act (the "CEA" or the "Act") 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."[16] In 2000, the Commodity Futures

---

10 Interim Final Rule, 91 FR at 65975, 65979 (new paragraph (7)(i) of the definition of "swap" in Regulation 1.3).

11 Interim Final Rule, 91 FR at 65973 n.43, 65975–76.

12 Interim Final Rule, 91 FR at 65975.

13 28 U.S.C. § 3702; *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453 (2018).

14 *See KalshiEX, LLC v. Assad*, No. 25-7516, 2026 WL 2543846, at *11 (9th Cir. Aug. 28, 2026) (reasoning that on that premise "every person placing a sports bet at Caesar's Sportsbook (or anywhere else for that matter) is violating the CEA"); Interim Final Rule, 91 FR at 65971 (describing the arguments of the states and the American Gaming Association).

15 Interim Final Rule, 91 FR at 65969, 65971.

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

Modernization Act ("CFMA") added the definition of "excluded commodity," which includes "an occurrence, extent of an occurrence, or contingency" that is beyond the control of the parties and "associated with a financial, commercial, or economic consequence,"[17] and preempted state gaming and bucket shop laws for the over-the-counter transactions in excluded commodities that it placed outside most of the Act.[18]

The word "excluded" in the 2000 definition is regularly misread, in commentary and by some courts, as if it removed contracts based on events from the Act. It did the opposite. It described the exempt regulatory treatment Congress gave certain transactions in those commodities, principally bilateral swap transactions between eligible contract participants and transactions on electronic trading facilities, and it said nothing to limit the Act's coverage of contracts based on those occurrences. Including event-based contingencies in the definition confirmed, rather than narrowed, the scope of the Act, as the court recognized in the Commission's enforcement action against Intrade[19] and as the Interim Final Rule itself observes.[20]

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.[21] 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.[22]

Congress's later statutes drew the same kind of line between derivatives and the neighboring regimes for gambling and insurance. In 2006, the Unlawful Internet Gambling Enforcement Act ("UIGEA") defined "bet or wager" to exclude, 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.[23] In 2010, the Dodd-Frank Act added Section 5c(c)(5)(C) of the CEA (the "Special Rule"), which authorizes the Commission

---

17 CEA Section 1a(19)(iv), 7 U.S.C. § 1a(19)(iv).

18 CEA Section 12(e)(2), 7 U.S.C. § 16(e)(2).

19 *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 Act and instead confirmed the scope of the Act's definition of "commodity").

20 Interim Final Rule, 91 FR at 65970 n.6.

21 *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).

22 *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.

23 31 U.S.C. § 5362(1)(E).

to prohibit the listing of event contracts, including swaps, that involve gaming, four other enumerated categories of activity, or similar activity the Commission determines by rule to be contrary to the public interest,[24] and provided that a swap "shall not be considered to be insurance" and "may not be regulated as an insurance contract under the law of any State."[25] In UIGEA and again in the Dodd-Frank Act, Congress recognized that products offering similar economic exposure can be structured as different instruments and assigned to different regulatory regimes, the same principle that underlies the Interim Final Rule and our comments.

None of the statutes Congress enacted between 1974 and 2010, and nothing in the Commission's administration of them, brought licensed wagers within the Act or derivatives exchanges within state gaming law. None required a sportsbook to register with the Commission, and none required a designated contract market to register with a state gaming regulator. Through every one of them, sportsbooks were regulated as sportsbooks and exchanges as exchanges. That history supports two findings in the Interim Final Rule. First, because the rule changes no legal rights or obligations, it imposes no new or incremental compliance costs, as the Commission's consideration of costs and benefits concludes.[26] Second, because the rule restates existing law, no one relied on a contrary reading, and prior notice and comment would have served no purpose. The confusion the Commission documents arose from litigation rather than from any change in the Commission's position, and the harm it threatened was and remains immediate.[27] These facts support the Commission's finding of good cause under Section 553(b)(B) of the Administrative Procedure Act,[28] and HPC urges the Commission to reaffirm the finding when it adopts the final rule.

III. There Is an Established Means of Clarifying Boundaries

A wager and an event contract can pay out based on the same event and still be different instruments, and the law has long accommodated that kind of economic resemblance across regulatory regimes. Without a clear boundary, the classification of a contract depends on which court or state is asked to decide it. Congress gave the Commissions the authority to draw that boundary by further defining "swap," and the Interim Final Rule appropriately exercises that authority.

A. 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 that the Interim Final Rule discusses, is that a sports event contract and a sportsbook wager are, in effect, the same instrument because both depend on the same game.[29] They are not.

---

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

25 CEA Section 12(h), 7 U.S.C. § 16(h).

26 Interim Final Rule, 91 FR at 65978.

27 Interim Final Rule, 91 FR at 65976-77 (describing pending state enforcement actions and the consequences of closing federally regulated markets state by state).

28 5 U.S.C. § 553(b)(B).

29 *See KalshiEX LLC v. Schuler*, Nos. 26-3196, 26-5235, 2026 WL 2884087 (6th Cir. Sept. 25, 2026); *Assad*, 2026 WL 2543846; Interim Final Rule, 91 FR at 65971.

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.[30] It has no value that can be realized until the event resolves. An event contract traded on a designated contract market is standardized and priced by competing bids and offers; the exchange is neutral and earns a transaction fee however the contract settles. An event contract is cleared through a registered clearinghouse. It can be sold or closed at any time before the event.[31] It is traded in exactly the kind of market the CEA exists to govern.[32]

The CEA regulates instruments and markets, not underlyings.[33] 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. Justice Holmes made this point in *Christie*, which distinguished trading on the Chicago Board of Trade from the bucket shops that offered bets on the same prices; what mattered was the form of the market and the instrument rather than the fact that participants in both were speculating on the price of grain.[34]

B. 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; and (4) forwards and futures. In the United Kingdom, for an international illustration of the same principle, a spread bet on a soccer match, which pays an amount that varies with the margin of the result and can be closed out before the match ends, is regulated as a financial product, while a conventional fixed-odds bet on the same match is regulated as gambling.

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:

---

30 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.

31 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.

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

33 When Congress has judged a particular underlying unsuited to derivatives trading, it has written that judgment into the Act 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.

34 *Bd. of Trade of City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 247–50 (1905).

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;[35]

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 Interim Final Rule applies that principle to the division between Commission-regulated event contracts and state-regulated wagers. The preamble makes the same point with crypto assets and with insurance and credit default swaps.[36]

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

State gambling statutes are written broadly, and the statutes of the states that have brought the pending enforcement actions are no exception. New Jersey 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."[37] In Nevada, a "wager" is a sum of money or representative of value "risked on an occurrence for which the outcome is uncertain," and a "sports pool" is the business of accepting wagers "on sporting events or other events by any system or method of wagering."[38] Ohio defines a "bet" as "the hazarding of anything of value upon the result of an event, undertaking, or contingency."[39] Tennessee defines gambling as "risking

---

35 2012 Release, 77 FR at 48246-47.

36 Interim Final Rule, 91 FR at 65975.

37 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.

38 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.

39 Ohio Rev. Code § 2915.01(B).

anything of value for a profit whose return is to any degree contingent on chance."[40] Washington uses the same "future contingent event" formulation as New Jersey.[41]

Read literally, each of these statutes covers every event contract and much of the derivatives market. Several of them contain exceptions for bona fide business transactions, including "contracts for the purchase or sale at a future date of securities or commodities,"[42] 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.

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.[43] 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.[44] 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.[45] And the Third Circuit held that the same contracts are swaps.[46] 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,

---

40 Tenn. Code Ann. § 39-17-501(2).

41 Wash. Rev. Code § 9.46.0237.

42 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").

43 *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.

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

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

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

whether the parties intended delivery.[47] Under that test, as a Commodity Exchange 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."[48] 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."[49] The 1921 debate drew the same line the Interim Final Rule codifies, 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."[50]

Congress has preserved the division between exchanges and bucket shops ever since.[51] When it enlarged the states' role in policing off-exchange operators in 1978, it left enforcement

---

47 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 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 in *Christie* looked instead at how the market functioned. *See Christie*, 198 U.S. at 247–50. 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).

48 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.

49 61 Cong. Rec. 1313 (1921) (statement of Rep. Tincher) (describing a Minnesota statute whose author intended "to absolutely prohibit all dealing in futures").

50 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.").

51 *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 the 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

of the Act against the exchanges "solely with the Commission" and refused to let the states sue in their own courts under state statutes identical to the Act because "separate bodies of State court decisions among the various States" would "cause confusion and disruption among the regulated persons."[52] Where the states' theory would bring back the case-by-case uncertainty that preceded federal regulation, the Interim Final Rule supplies an objective test that depends on who offers the product and where it trades rather than on the subject matter of the event.

D. The Commission Is Exercising Authority Congress Deliberately Conferred

The breadth of the swap definition was deliberate, and it was necessary. Before 2010, the CFMA's exclusions and exemptions left the institutional over-the-counter derivatives market outside the Commission's and the SEC's authority.[53] Congress responded with a functional definition that applies to: (1) any option; (2) any event contingent payment; (3) any exchange of payments based on the value of a commodity or financial interest; and (4) anything "commonly known to the trade" as a swap, followed by enumerated exclusions.[54]

Congress also knew that a definition broad enough to prevent evasion would capture products it did not mean to regulate, and it assigned the line-drawing 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";[55] (2) Section 712(d)(2)(A), which authorizes such other joint rules regarding the definitions as the Commissions determine are necessary and appropriate;[56] (3) Section 721(b), which authorizes the Commission to define any term in the Title VII amendments to the CEA;[57] (4) Section 718, which creates a process for determining the status of "novel derivative products," with review in the D.C. Circuit;[58] and (5) Section 719(d), which directed a joint study of whether stable value contracts are swaps, with authority to exempt them.[59] Congress, in other words, identified boundary products itself and named the Commissions as the bodies to resolve them.[60] The 2012 rulemaking exercised that authority to exclude: (1) insurance; (2) forward contracts; and (3) consumer and commercial agreements. The

---

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).

52 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.

53 Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report xxiv-xxv (2011); *see* former CEA Sections 2(d), 2(e), 2(g), and 2(h) (repealed 2010).

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

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

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

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

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

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

60 This has an antecedent in Section 4(c) of the CEA, enacted in 1992 to resolve legal uncertainty about swaps. *See* CEA Section 4(c), 7 U.S.C. § 6(c); Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 502, 106 Stat. 3590, 3629.

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.[61] Section 712(d)(1) is such a delegation, and the Third Circuit has already said so in substance. The court responded to the argument that bingo games and ping pong matches would become federal matters if event contracts are swaps, observing that Congress's express delegation to the Commissions to "further define" swaps would prove useful in such cases and citing the 2012 exclusions.[62] The Interim Final Rule does what the Third Circuit described.

Finally, the Interim Final Rule confirms a pre-existing boundary. As Part II shows, federal and state authorities and the gaming industry have always treated licensed wagers as outside the Act, and the rule simply gives that understanding formal expression.

IV. Responses to the Commission's Questions and Suggested Clarifications

A. The Provider Test Should Remain as Drafted (Question 1)

Question 1 asks whether the Provider Test should cover additional categories of providers beyond state-regulated gaming companies and Tribes.[63] HPC recommends keeping the test as drafted. The Provider Test mirrors the Insurance Provider Test; it ties the exclusion to a provider that is subject to supervision by a gaming regulator and to a product that is regulated as gaming under that regulator's law. That is what distinguishes a licensed wager from an unlicensed one, and the Commission has correctly noted that products outside the exclusion, such as a casual bet between friends or a sportsbook operating without a license, are not thereby presumed to be swaps.[64]

B. The Meaning of "Regulated as Gaming or Gambling" and the Over-the-Counter Market (Question 2)

Question 2 asks whether it is clear which "agreements, contracts, or transactions" are "regulated as gaming or gambling under applicable State or Tribal law" and whether there are better ways to define how state or Tribal gaming regulation should apply to products covered by the exclusion.[65] HPC recommends three clarifications in the preamble to the final rule.

---

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

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

63 Interim Final Rule, 91 FR at 65976.

64 Interim Final Rule, 91 FR at 65973 n.43, 65975–76.

65 Interim Final Rule, 91 FR at 65976.

First, the Commission should confirm that "applicable State or Tribal law" means the law of the jurisdiction that licensed the operator, as applied to the operator's own products. Gaming law is not uniform. A product that one state licenses may be prohibited in another, including a state that bans wagering altogether, and because a state gaming license does not extend beyond that state's borders, a multistate operator holds a separate license, with its own list of permitted products, in each state in which it does business. A wager that is lawful in several states may therefore be subject to different requirements in each. The Provider Test already requires the operator to act within the scope of its license, and the law that defines that scope should also be the law that determines whether the product is "regulated as gaming or gambling." Without that confirmation, the phrase could be read to make the exclusion depend on the law of a state that has not licensed the operator at all or on the most restrictive gaming law in the country, and an operator would have no way to know from the face of the rule whether it was offering an excluded wager or a swap. The insurance safe harbor is built the same way; it looks to supervision by the insurance regulator "of any State" and to regulation as insurance "under applicable State law."[66]

Second, the Commission should confirm that a state's label for a contract traded on a Commission-registered platform cannot bring that contract within the exclusion. The Provider Test and the Product Test are conjunctive. A contract traded on a designated contract market fails the Product Test whatever a state calls it. The final rule should explicitly say so, because several states have already asserted that event contracts listed on designated contract markets are wagers under their law.[67]

Third, the Commission should make clear that the exclusion does not extend to over-the-counter swaps, so that no state can treat the rule as a basis for regulating a bilateral swap between eligible contract participants merely because the swap references an event. This point has not arisen in the current litigation, because the event contracts trade on designated contract markets. But the Commission should not leave the over-the-counter market exposed to the argument that a definitional exclusion for licensed wagers implicitly acknowledges states' authority over over-the-counter swaps. A sentence in the preamble would resolve the issue if it stated that the exclusion is limited to products offered by licensed gaming operators outside any market and that a state's characterization of a swap as gaming cannot bring the swap into the state's jurisdiction.

C. The Product Test and Indicia for Novel Products (Question 3)

Question 3 asks whether there are better ways to draw an objective, functional distinction between swaps and traditional gambling products consistent with the CEA, "including the definitions of 'swap,' 'commodity,' and 'excluded commodity' and the Special Rule."[68] HPC supports the Product Test as drafted. It is a bright line that works for the two kinds of market that exist today, the sportsbook and the designated contract market, and it is consistent with the statute.

---

66 Regulation 1.3 (definition of "swap," paragraph (4)(i)(B)(1)); 2012 Release, 77 FR at 48213.

67 *See, e.g.*, Nev. Gaming Control Bd., Notice to Licensees No. 2025-77, Sports Event Contracts Are Wagers (Oct. 15, 2025); *State of Washington v. KalshiEX LLC*, *supra*.

68 Interim Final Rule, 91 FR at 65976.

What the Product Test may not resolve, however, is the classification of novel products, and HPC recommends that the preamble to the final rule supplement the test with a short, nonexclusive list of indicia drawn from the 2012 Release's "characteristics and factors." The indicia would describe a gambling product as one in which: (1) the operator is the counterparty to every transaction and sets the price unilaterally; (2) there is no secondary market and no right of assignment or offset; (3) no payment obligation is severable from the wager; (4) the economics are realized only when the event resolves; and (5) the operator earns the spread between the odds it offers and the payout rather than a transaction fee. Prior regulation of the product as a wager under a state or Tribal license would be a further factor, as prior regulation as an insurance contract is under the 2012 Release.[69]

The insurance safe harbor shows why indicia are useful. In 2012, the Commissions declined to classify "complex, novel or still evolving" products in a general definitional rule and left them to a facts-and-circumstances analysis; the products included: (1) industry loss warranties; (2) guaranteed investment contracts; and (3) catastrophe bonds.[70] Congress itself directed a separate study of stable value contracts.[71]

Parametric insurance, which pays a fixed amount on an index or trigger without proof of loss, is the clearest example of a novel product to have emerged since 2012. It does not satisfy the Insurance Product Test's requirements that a loss occur and be proved and that payment be limited to the insurable interest.[72] Yet state insurance regulators treat it as insurance, and the market has relied on the nonexclusive character of the safe harbor and the Commissions' facts-and-circumstances framework to offer it. In 2024, New York added parametric insurance to the kinds of insurance its insurers may write.[73] Service contracts and extended warranties, regulated as insurance in some states, were addressed through the consumer and commercial agreements interpretation rather than the safe harbor.[74] Indicia in the preamble would give the Commission and market participants a disciplined way to analyze the gambling equivalents of those products when they appear, without changing the rule text.

* * *

---

69 2012 Release, 77 FR at 48214 n.46.

70 2012 Release, 77 FR at 48218 & n.99.

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

72 *See* Regulation 1.3 (definition of "swap," paragraph (4)(i)(A)); 2012 Release, 77 FR at 48214.

73 It was defined as insurance against a weather-related event "where the indemnification is based on the proximity and magnitude of the event as measured and reported by a state or federal government agency." *See* N.Y. Ins. Law § 1113(a)(34) (as added by 2024 N.Y. Laws ch. 569); *see also* N.Y. Ins. Law § 3416 (requiring the insurer to disclose that a parametric policy "is not a substitute for property insurance or flood insurance").

74 2012 Release, 77 FR at 48218 n.96.

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. HPC urges the Commission to adopt the rule as final with the rule text unchanged and with the clarifications described in Part IV and would welcome the opportunity to discuss these comments with the Commission or its staff.

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

Sincerely,

/s/ Jake Chervinsky
Jake Chervinsky
Chief Executive Officer
Hyperliquid Policy Center

/s/ Brad Bourque
Brad Bourque
Senior Counsel
Hyperliquid Policy Center

cc: Gary E. Kalbaugh, Cahill Gordon & Reindel LLP