

SEC and CFTC consider updating derivatives classification rules for innovative financial products

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The SEC and CFTC have jointly requested public comment as they consider updating classification rules for innovative financial products, including event contracts and perpetual contracts.

The SEC and CFTC (the “Commissions”) have [jointly requested public comment](#) on how to draw clearer regulatory boundaries for classifying, within statutory bounds, innovative derivatives and related products that implicate the jurisdiction of the Commissions and whether there are opportunities to simplify compliance for products subject to joint regulation by the Commissions (the “RFC”).¹ The RFC is no doubt motivated by timely questions about the proper classification of event contracts and perpetual contracts, which has effects on how, where, and by whom these increasingly important products can trade. More generally, the RFC reflects the need to update certain elements of the [2012 joint SEC/CFTC swap definitional rules](#) (the “2012 Rules”)² to take into account the significant convergence of financial markets and the proliferation of novel products that raise issues that could not have been predicted at the time of the 2012 Rules.

Background

The creation and growth of the derivatives markets over the past several decades has led to ongoing debates regarding the areas of exclusive and overlapping jurisdiction between the Commissions. Most recently, Title VII of the Dodd-Frank Act allocated regulatory authority to the CFTC over swaps, to the SEC over security-based swaps (“SBS”), and to the Commissions jointly over mixed swaps. Title VII further required the Commissions to jointly adopt rules further defining these and other relevant terms, which the Commissions did in the 2012 Rules. Those product definitions have remained largely unchanged since, even as financial markets have continued to evolve substantially.

An important function of the 2012 Rules was to analyze specific products under these complex definitions, providing market participants with meaningful certainty regarding the Commissions’ views of how those products should be classified, and thus the applicable regulatory regime. However, many derivatives products popularized over the intervening 14 years differ enough from those analyzed under the 2012 Rules that they do not fit neatly into the categories of specific products considered in the 2012 Rules, leading to questions as to the characterization of a material portion of newly developing markets. This issue is particularly significant for novel products that implicate parts of the Title VII definitions that have not, until recently, been widely relevant, including, most notably, the SBS Event Contract Prong, described below.

The key definitional questions

The RFC’s most consequential questions concern (1) the boundary between swaps, SBS, and mixed swaps, and (2) the boundary between those instruments and instruments excluded from the “swap” definition, including futures, notes and options on securities. Depending on the classification, economically similar products can have materially different regulatory treatment.

The SBS Event Contract Prong. The definition of SBS in Section 3 of the Exchange Act captures instruments that would otherwise be swaps, but have specific connections to loans, securities, or issuers of securities. One of these connections (which the RFC defines as the “SBS Event Contract Prong,” itself an indication of the Commissions’ mindset) provides that an instrument that is otherwise a swap is an SBS if it is based on “the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.”

Prior to the popularization of prediction markets, the meaning of the SBS Event Contract Prong had not been frequently debated, as many typical traditional finance SBS, such as single-name credit default swaps and total return swaps on a single security or loan, reference the price or credit of a single loan, single security, or narrow-based index of securities. The rapid growth of event contracts has changed this: the SBS Event Contract Prong has become the most hotly debated provision in the derivatives rules. This is because event contracts may reference an issuer or the activity of an issuer in ways that raise the question of whether an underlying event “directly affects” the financial statements, financial condition, or financial obligations of the issuer, such as the volume of a product an issuer of public securities might sell in a given period. For example, is an event contract based on “will car company X deliver Y vehicles in Q2 2026” a swap or an SBS? Greater clarity on this question could have significant consequences for how event contracts are structured and regulated. If an event contract is a swap, it can be traded by retail persons on a prediction market registered with the CFTC as a designated contract market, as many are today. If it is an SBS, it may not be offered or sold to retail investors other than pursuant to a registration statement and on a national securities exchange.

Options on securities versus SBS. Unlike on the CFTC side—where options and swaps on non-agricultural commodities receive materially the same regulatory treatment as each other—there are important regulatory differences between SBS and options on securities under the SEC’s framework. Options on securities subject to the federal securities laws are excluded from the “swap” definition and can technically be sold to retail investors off-exchange, although the registration requirements of the Securities Act still apply. In addition, a person dealing in event contracts referencing securities may need to register as a broker-dealer if the event contract is an option on a security, rather than registering as a security-based swap dealer if the event contracts are SBS. The RFC asks what characteristics distinguish event contracts that are SBS from those that are options on securities, with particular attention to binary options that already trade on national securities exchanges.³

Other example products noted for further guidance

Many of the questions in the RFC appear to be motivated by particular products that have become popular, or have changed significantly since, the original 2012 Rules. Beyond event contracts, these include (among others):

- **Perpetual contracts on securities.** The CFTC recently addressed certain perpetual contracts in the digital asset context. It issued a [policy statement](#) indicating a view that such perpetual contracts could be appropriately regulated as futures contracts (rather than swaps),⁴ [approved](#) the first listing of a bitcoin perpetual futures contract,⁵ and (in a [staff letter](#)) confirmed that certain crypto-asset perpetuals may be categorized as foreign futures under CFTC Regulation 30.1.⁶ The RFC asks a similar question on the SEC side: whether a cash-settled perpetual contract referencing an equity security should be treated as a security future.⁷ Given the complexity of the single-name security futures regulatory regime, which involves joint SEC/CFTC oversight and is not widely used, the answer has significant practical consequences for how perpetual contracts on securities would be structured and traded in the United States.
- **Notes (including structured notes).** The RFC asks whether further clarity is needed to distinguish notes, bonds, and other evidences of indebtedness that are securities from swaps and SBS with similar economic effects.⁸ This question often arises in certain bespoke hybrid securities that have economic characteristics of a security but also of a commodity option or futures contract. As a result, this question may also implicate the CEA’s hybrid instrument provisions and related exemptions, depending on the instrument’s terms. The RFC raises relevant considerations, including whether the instrument is issued under a Trust Indenture Act-qualified indenture and whether its terms reflect a lender-borrower relationship. Market participants will need to consider the benefits of greater certainty against the possibility of a too-rigid analytical framework.
- **Swaps on indexes of indexes.** The indexes underlying total return swaps and other instruments have grown increasingly complex, with an underlying index sometimes itself composed of multiple sub-indexes that may have different regulatory classifications, such as narrow-based versus broad-based. The RFC asks whether there is a need for greater clarity regarding when a swap is based on a “narrow-based security index,” including with respect to contracts that reference potential changes to the composition of a narrow-based security index, and whether existing tolerance and grace period rules should be revised or supplemented with safe harbors for products that transition between narrow-based and broad-based status.⁹

Alternative compliance

In addition to the definitional questions, the RFC solicits comment on whether, where products or structures touch on the regulatory interests of the Commissions, compliance with one agency's framework could satisfy substantially similar requirements of the other. The RFC asks how "substantially similar" should be assessed, including by scope, objectives, outcomes, or other measures, and what role joint registration, tailored trade reporting rules, deemed filing, and coordinated examination and enforcement might play in a workable alternative compliance regime. It also asks how the Commissions could best address manipulation and trading on material non-public information in an alternative compliance context. All of these questions have material implications for event contracts, perpetual contracts, and other innovative financial products, including in the digital asset ecosystem.

Looking ahead

The RFC is an important first step toward resolving product classification ambiguities that have existed since Dodd-Frank but have become increasingly significant as derivatives markets have evolved, and could have a significant impact on shaping the regulatory landscape for growing markets in event contracts, perpetual futures, and other instruments that have become increasingly popular. Comments are due 60 days after publication in the Federal Register, which is expected shortly.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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- ¹ Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance, Release No. 33-11424, 34-105735, File No. S7-2026-21 (June 18, 2026).
- ² Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208 (Aug. 13, 2012).
- ³ RFC at 11, Question 8.
- ⁴ Policy Statement Concerning the Listing of Perpetual Contracts (May 29, 2026).
- ⁵ Order Approving BTCPERP Futures Contract (May 29, 2026).
- ⁶ CFTC Staff Letter No. 26-17, Staff Interpretation Regarding the Categorization of Deribit Perpetuals as Foreign Futures and No-Action Position Regarding Digital Commodities and Payment Stablecoins Deposited to Margin Customer Positions with a Foreign Broker Under a Right of Re-Use (May 29, 2026).
- ⁷ RFC at 13, Question 11.

8 RFC at 12, Question 9.

9 RFC at 9-10, Question 5.