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July 31, 2026

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

Re: **RIN 3038-AF65: Prediction Markets; Public Interest Determinations**

Dear Mr. Kirkpatrick:

Nasdaq, Inc. ("Nasdaq")[1] appreciates the opportunity to comment on the Notice of Proposed Rulemaking on Prediction Markets; Public Interest Determinations (the "Proposal"),[2] and it applauds the Commodity Futures Trading Commission's ("CFTC" or the "Commission") efforts to bring greater clarity and predictability to the regulatory framework governing prediction markets. While prediction markets have grown in interest, particularly among individuals who enjoy the opportunity to access new types of derivatives products involving a broad range of topics, Nasdaq distinguishes between event contracts referencing non-financial outcomes — sporting events, elections, and cultural or political developments and event contracts referencing individual securities, narrow-based security indexes, or issuer-specific financial events. The latter create direct economic exposure to securities and should be regulated as investable financial products, subject to the investor protections Congress designed for the securities markets. The growing accessibility of event contracts to individuals underscores the need for a principled regulatory framework that enables individuals to make informed decisions and protects against fraud and manipulation.

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1 Nasdaq is a Fortune 500 global technology company serving the capital markets and other industries. Our diverse offering of data, analytics, software and services enables clients to optimize and execute business vision with confidence. Nasdaq owns and operates The Nasdaq Stock Market LLC, Nasdaq PHLX LLC, Nasdaq TEXAS, LLC, Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC markets, each of which is registered as a national securities exchange. To learn more about the company, technology solutions and career opportunities, visit us on LinkedIn, on Twitter @Nasdaq, or at www.nasdaq.com.

2 See Prediction Markets; Public Interest Determinations, 91 FR 35806 (June 12, 2026) (RIN 3038-AF65).

Nasdaq's views on prediction markets arise from our role at the center of U.S. equity markets, where promoting capital formation, running fair and orderly markets, and protecting investors intersect. Nasdaq operates six national securities exchanges in the U.S. and our markets list over 7,000 public companies globally, giving us direct experience with regulatory frameworks that underpin investor confidence. Millions of American households — including families saving for retirement through 401(k)s, pension funds, and direct stock ownership — depend on the integrity, transparency, and fairness of the markets in which they invest. Nasdaq's recommendations here rest on the principle that the regulatory classification of novel financial products must preserve the investor protections on which these market participants rely and the capital formation engine that drives the U.S. economy, creates jobs, and fosters innovation and U.S. exceptionalism.

Establish and Maximize Regulatory Clarity By Segregating Instruments. Nasdaq recommends maximizing regulatory clarity by clearly segregating and assigning financial instruments to a single regulator wherever possible and reducing the scope of overlapping jurisdiction wherever possible. Simply put, (1) the Commodity Exchange Act ("CEA") vests the CFTC with exclusive jurisdiction over swaps and commodity futures, subject to a savings clause that excludes securities other than security futures; (2) the Securities and Exchange Commission ("SEC") has sole jurisdiction over security-based swaps, and (3) jurisdiction over mixed swaps and security futures is shared. Financial instruments should be assigned quickly and with finality to the appropriate categories as quickly and firmly as possible.

Security-Based Event Contracts ("SBECs") Are Security-Based Swaps Subject to Exclusive SEC Jurisdiction. The law is clear that event contracts that "involve" or are indexed to individual securities, to narrow-based security indexes, and to events that materially impact an issuer's financial statements, financial condition, or financial obligations are security-based swaps under Title VII and fall outside CFTC authority. Accordingly, any event contract currently listed on a CFTC-regulated designated contract market ("DCM") that meets that definition must be de-listed unless and until the SEC approves its listing on a national securities exchange or other SEC-regulated marketplace.

Currently, most event contracts listed on DCMs relate to sporting events, elections, political developments, cultural events, and general financial indicators. Nasdaq expresses no substantive view on the regulation of these categories of event contracts, which today comprise over 95% of event contracts listed and traded on CFTC-registered DCMs. SBECs, on the other hand, include event contracts tied to events that are material to the share prices of securities, such as the release date of Apple's next iPhone, or American Airlines' quarterly passenger load factor. These instruments are fixtures on CFTC-regulated DCMs.

Rules Harmonization Will Limit Regulator Forum Shopping. Where "mixed swaps" exist and to the extent all event contracts are to be traded on a single venue, harmonized regulation is needed to establish a level playing field covering registration of platforms and participants, registration of instruments, regulation of trading, customer treatment and protection, and clearance and settlement. Importantly, that requires reconciling (1) the DCM self-certification pathway under 17 CFR 40.2 where most contracts become effective on the next business day after submission with (2) the SEC's regime for SBECs, which requires listing on a national securities exchange or a security-based swap execution facility (SB-SEF), subject to product listing standards, Title VII business-conduct and margin requirements, and — for exchange-listed instruments — the rule-filing process under Section 19(b), where agency review can extend up to 240 days. The differential is not merely procedural; it reflects Congress's judgment that instruments creating exposure to individual issuers require the securities law protections built into the SEC's regime.

In Nasdaq's view, where overlapping jurisdiction exists, a dually-registered exchange would treat regulator jurisdiction as a function of the underlying reference, not the derivative wrapper. Contracts referencing individual securities, events material to the financial condition of single issuers, or narrow-based indices are security-based swaps and would be listed only under SEC-approved rules; all other event contracts would be listed on the CFTC side pursuant to the amended Part 40 framework. If the industry ultimately consolidates onto one venue, Congress and the two agencies must first harmonize listing standards, retail-access rules, disclosure regimes, and clearing — otherwise a single venue creates opportunities for regulatory arbitrage, that harm the very investors Congress sought to protect by allowing equity-linked exposure to be marketed to retail participants without the disclosure, suitability, best-execution, and anti-manipulation safeguards that apply when the same economic risk is taken through the securities markets.

I. Security-Based Event Contracts are Subject to Exclusive SEC Jurisdiction

The statutory framework governing swaps and security-based swaps is clear: event contracts that satisfy the definition of a "security-based swap" under Section 3(a)(68)(A) of the Securities Exchange Act of 1934[3] ("Exchange Act") are subject to the SEC's exclusive jurisdiction as a matter of law. This conclusion flows directly from the text of Title VII of the Dodd-Frank Act, the Commodity Exchange Act, and the regulatory framework Congress established.[4]

The jurisdictional boundary between the CFTC and the SEC for these instruments is drawn expressly by statute. Section 1a(47)(B)(x) of the Commodity Exchange Act excludes security-based swaps from the definition of "swap," and Section 2(a)(1)(A) of the same Act confines the CFTC's exclusive jurisdiction to swaps and enumerated futures and commodity contracts. Because security-based swaps are not "swaps" under the CEA, they fall outside the CFTC's general regulatory perimeter. Correspondingly, Section 3(a)(68)(A) of the Securities

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3 Except as provided in subparagraph (B), the term "security-based swap" means any agreement, contract, or transaction that— (i) is a swap, as that term is defined under section 1a of the Commodity Exchange Act (without regard to paragraph (47)(B)(x) of such section); and (ii) is based on— (I) an index that is a narrow-based security index, including any interest therein or on the value thereof; (II) a single security or loan, including any interest therein or on the value thereof; or (III) the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer. See 15 U.S.C. § 78c(a)(68).

4 See infra note 5. Title VII established a comprehensive regulatory framework for over-the-counter derivatives, dividing jurisdiction between the CFTC (for swaps) and the SEC (for security-based swaps). See also 15 U.S.C. § 78c(a)(68)(A) (defining "security-based swap").

Exchange Act of 1934 defines a "security-based swap" as any swap based on (i) a narrow-based security index, (ii) a single security or loan, or (iii) the occurrence or nonoccurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided the event directly affects the financial statements, financial condition, or financial obligations of the issuer. This statutory framework has significant implications for contracts currently trading on CFTC-regulated platforms.

Congress's treatment of security-based swaps under Title VII of the Dodd-Frank Act compels Nasdaq's position. Congress created the statutory category of "security-based swap" in Section 3(a)(68) of the Exchange Act[5] and Congress then amended the definition of "security" under Section 3(a)(10) of the Exchange Act to include "security-based swap" alongside other enumerated securities.[6] This is not merely a jurisdictional assignment — it is a *classification*: by placing security-based swaps within the statutory definition of "security," Congress determined that instruments referencing single securities, narrow-based security indices, or events affecting individual issuers are, by their nature, securities, subject to the full panoply of Exchange Act protections.[7] Further, Congress repealed the Gramm-Leach-Bliley Act provisions that had defined and structured the pre-2010 exclusion of swap-related instruments from securities regulation, and correspondingly amended Section 3A of the Exchange Act to eliminate the prior statutory carve-out for non-security-based swap agreements.[8] Accordingly, Congress did not merely permit SEC oversight of security-based swaps; it deliberately reversed a prior legislative decision to withhold it and placed these instruments squarely within the SEC's jurisdiction.

For example, an event contract that references the likelihood that an issuer will meet analyst estimates for quarterly earnings is unambiguously a security-based swap because the outcome is directly tied to the issuer's financial performance. Likewise, an event contract tied to the likelihood that the chief executive officer of an issuer will use a certain term or phrase during an earnings call is also a security-based swap (provided that the term or phrase is material to, and its use would reasonably be expected to, affect the issuer's stock price and market perception of its financial condition). Any DCM-listed event contract meeting this definition must be de-listed

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5 See Dodd-Frank Act § 761(a)(6), Pub. L. No. 111-203, 124 Stat. 1376, 1756-57 (2010) (adding 15 U.S.C. § 78c(a)(68)). Each category of the definition targets instruments that create exposure to specific issuers or narrow groups of issuers — precisely the domain where SEC expertise and investor protections are most relevant.

6 See Dodd-Frank Act § 761(a)(2), 124 Stat. at 1754 (amending 15 U.S.C. § 78c(a)(10) to insert "security-based swap" among the enumerated categories of "security").

7 See 15 U.S.C. § 78c(a)(10) (defining "security" to include, among other instruments, "any note, stock, treasury stock, security future, security-based swap, bond, debenture . . . [or] investment contract"); See §78c(a)(68)(A) (defining "security-based swap"). Together, these provisions treat security-based swaps as securities for all purposes of the Exchange Act.

8 See Dodd-Frank Act § 762(a), 124 Stat. at 1759 (repealing GLBA §§ 206B and 206C, 15 U.S.C. § 78c note, which had defined "security-based swap agreement" and "non-security-based swap agreement" and structured the pre-2010 exclusions from securities regulation); Dodd-Frank Act § 762(d)(1), 124 Stat. at 1760 (amending 15 U.S.C. § 78c-1(a) to strike the prior blanket exclusion of non-security-based swap agreements from the definition of "security" and amending § 78c-1(b) to remove the GLBA cross-references).

unless and until the SEC approves its listing on a national securities exchange or another SEC-regulated marketplace.

Section 3(a)(68)(A)(ii),[9] reaches any event contract whose settlement depends on a metric or occurrence disclosed in the issuer's securities filings or is otherwise disclosed by an issuer in a Regulation Fair Disclosure ("Reg FD")-compliant manner. Such a contract cannot be priced, hedged, or settled without the information the issuer has placed in the federal disclosure regime — on its face, an interest in that issuer's securities. That fact alone brings the contract within Section 3(a)(68)(A)(ii), and it can be verified at listing by inspecting the issuer's filings and disclosures. Nasdaq urges the Commission, in coordination with the SEC, to confirm that the statute's "any interest" language reaches event contracts of this kind.

Section 3(a)(68)(A)(iii)[10] should serve as a narrower, alternative ground. Where a contract is not readily resolved under Section 3(a)(68)(A)(ii), the "directly affects" inquiry should proceed issuer by issuer. An issuer's voluntary inclusion of a metric in its earnings-related filings, or its voluntary disclosure in a Reg FD-compliant manner — where regulation does not otherwise require it — is strong evidence that the metric directly affects the issuer's financial statements, financial condition, or financial obligations. That standard is more principled than one keyed to aggregate, market-wide correlations.

To avoid unintended consequences, Nasdaq respectfully suggests that any guidance under Section 3(a)(68)(A)(iii) confirm that the issuer's disclosure choice is being used as an administrable proxy for the Title VII classification inquiry only. It is not, and should not be treated as, a determination of materiality for purposes of the antifraud provisions of the Exchange Act, Item 303 of Regulation S-K, Regulation FD, or any other regime in which materiality is the governing standard. Materiality in those contexts remains the fact-specific inquiry the case law requires.

In determining whether an event directly affects the financial statements, financial condition, or financial obligations of the issuer, it is important to consider the impact on the underlying instrument. Nasdaq further recommends that the Commission, in coordination with the SEC, issue guidance identifying the categories of transactions that meet this standard, so that market participants and platforms can classify instruments ex ante rather than through contract-by-contract review. Cash-settled instruments can replicate the economic exposure of owning the underlying stock — yet they do so with less transparency, reduced price discovery, and greater counterparty risk than direct securities transactions. Event contracts referencing individual issuers or narrow-based indices sharpen these concerns further. Because event contracts are cash-settled by design, and often pay out on a binary or scalar basis tied to whether an underlying security crosses a defined threshold or level, holders can capture the full contract payoff without ever acquiring, holding, or unwinding actual shares. That structure creates powerful incentives to influence the underlying security's price at the reference moment, without the natural check that

9 See 15 U.S.C. § 78c(a)(68)(A) (defining "security-based swap" to include any swap based on "a single security or loan, including any interest therein or on the value thereof").

10 See 15 U.S.C. § 78c(a)(68)(A) (defining "security-based swap" to include any swap based on "the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer").

a delivery obligation or holding requirement would impose, and without the disclosure, best-execution, and surveillance mechanisms that apply when investors take a position in the security itself. These characteristics underscore the importance of SEC oversight to protect investors. The regulatory framework Congress built around the securities markets exists, first and foremost, to protect investors. Nearly 60% of American households now own equities, whether directly or through retirement vehicles, and these investors depend on the integrity of equity prices, the reliability of issuer disclosures, and the enforcement of rules against fraud and manipulation.

Any regulatory classification that permits equity-linked instruments that are classified as security-based swaps to trade outside this framework exposes these investors to risks Congress specifically sought to prevent: it opens a parallel channel for equity exposure that operates without the disclosure, best-execution, surveillance, and anti-manipulation protections Congress built into the securities law. Because the value of these derivatives is tied directly to the underlying equity, positions taken and unwound in that parallel channel can influence the prices investors rely on. Exchange-established prices serve as the benchmarks on which retail investors' portfolio valuations, retirement account balances, margin calculations, and index fund holdings are based. Permitting parallel, differently-regulated channels for equity exposure threatens the reliability of those benchmarks, directly harming the millions of Americans whose financial security depends on their accuracy.

The SEC serves as the principal guardian of investor protection in the U.S. securities markets, a mandate reinforced by a comprehensive and time-tested ecosystem of safeguards—including FINRA's oversight of broker-dealer conduct, suitability and best-interest obligations under Regulation Best Interest, the Options Disclosure Document and associated due diligence requirements, and the robust disclosure framework that governs the offering and trading of securities and security-based products.[11] These layered protections exist precisely because the securities markets are where retail investors—Main Street Americans saving for retirement, education, and long-term financial security—participate most directly and most consequentially.

Nasdaq already has the authority and ability to list and trade securities products representing the same risk profile as certain event contracts currently listed on CFTC-registered platforms. Recently, Nasdaq received SEC approval to list and trade standardized, cash-settled, European-style binary options on broad-based security indexes, including the Nasdaq-100 Index and the Nasdaq-100 Micro Index.[12] These binary options are securities that provide investors with the benefits of a centralized forum for price discovery, pre- and post-trade transparency, standardized contract specifications, real-time surveillance, and clearing guaranteed by The Options Clearing Corporation. The availability of these SEC-regulated instruments underscores that market participants seeking equity-linked event exposure can and should access it through platforms subject to the comprehensive set of securities law protections. Congress's differential treatment of single-stock futures and security-based swaps further confirms that security-based event contracts belong exclusively within the SEC's jurisdiction.

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11 See, e.g., FINRA Rule 2111 (Suitability); Regulation Best Interest, 17 C.F.R. § 240.15l-1; Options Disclosure Document at https://www.theocc.com/company-information/documents-and-archives/options-disclosure-document, 17 C.F.R. § 240.9b-1.

12 See Securities Exchange Act Release No. 105342 (April 30, 2026), 91 FR 24299 (May 5, 2026) (SR-MRX-2026-05).

Under the Commodity Futures Modernization Act of 2000,[13] Congress established joint SEC/CFTC jurisdiction over single-stock futures, requiring both agencies to approve listing standards, set customer margin requirements, and coordinate enforcement.[14] Congress did not extend that joint-jurisdiction model to security-based swaps. Instead, when Congress enacted Title VII of the Dodd-Frank Act a decade later, it assigned security-based swaps exclusively to the SEC by excluding them from the CEA's definition of "swap",[15] and by preserving SEC jurisdiction under the savings clause.[16] This distinction was deliberate: whereas single-stock futures are standardized, exchange-traded contracts subject to both agencies' oversight from inception, security-based swaps can be structured to replicate any equity exposure — total return swaps, contracts for differences, event-based payoffs — without the standardization or dual-agency transparency that the joint-jurisdiction model presupposes. Had Congress believed that the CFTC's regulatory framework could adequately protect investors in equity-linked derivatives, it would not have carved security-based swaps out of the CFTC's jurisdiction entirely — it would have extended the joint-jurisdiction model it had already established for single-stock futures.

Accordingly, with respect to security-based event contracts, Nasdaq recommends the following:

- That CFTC rules acknowledge that event contracts referencing individual securities, underlying events that materially impact securities of individual issuers, or narrow-based security indexes satisfy the definition of "security-based swap" under Exchange Act Section 3(a)(68)(A) and are therefore subject to the SEC's exclusive jurisdiction under CEA Section 2(a)(1)(G)(i).

- That the Commission clarify that, as security-based swaps, SBECs are statutorily excluded from the CFTC's jurisdiction as a class, and are accordingly not subject to the Special Rule.

- Any event contract currently listed on a CFTC-regulated DCM that meets the statutory definition of a security-based swap should be required to be de-listed unless and until the SEC approves its listing on an SEC-regulated marketplace.

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13 See Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, § 1(a)(5), 114 Stat. 2763, 2763A-365 (codified in scattered sections of 7 U.S.C. and 15 U.S.C.).

14 See Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, § 1(a)(5), 114 Stat. 2763, 2763A-365 (repealing the Shad-Johnson prohibition on single-stock futures and establishing dual SEC/CFTC oversight); see also 7 U.S.C. § 2(a)(1)(D) (allocating jurisdiction over security futures between the SEC and CFTC); 15 U.S.C. § 78f(h) (requiring listing standards for security futures products, jointly modifiable by the SEC and CFTC); 15 U.S.C. § 78g(c)(2)(B) (providing that margin requirements for security futures products shall be prescribed by the Federal Reserve Board or, upon delegation, jointly by the SEC and the CFTC).

15 See 7 U.S.C. § 1a(47)(B)(x).

16 See 7 U.S.C. § 2(a)(1)(G)(i).

II. **The Proposed Public Interest Factors Provide a Principled Framework That Can Properly Accommodate Security-Based Contracts**

Nasdaq supports the Commission's proposed multifactor framework for evaluating whether event contracts involving Enumerated Activities are contrary to the public interest. Nasdaq particularly supports the Commission's attention to manipulation susceptibility, settlement integrity, and the risk of information leakage. These concerns are at the core of Nasdaq's experience operating regulated securities exchanges, and they assume meaningful urgency for event contracts that reference the performance of individual securities, individual issuers of securities, or narrow-based security indexes. An event contract settling on whether an issuer will meet analyst estimates for quarterly earnings, or on whether a chief executive officer will use a certain term during an earnings call, implicates all three prongs of the market integrity factor with acute force: such contracts are susceptible to manipulation through trading in the underlying security, present settlement integrity challenges tied to corporate disclosures, and create powerful incentives for the leakage and exploitation of material non-public information. The harm that ambiguous or misallocated jurisdiction inflicts on public companies is neither theoretical nor remote. The resulting pattern is clear: when equity-linked derivatives operate outside the SEC's transparency and disclosure framework, corporate governance is distorted, shareholders are deprived of material information, and issuers lose visibility into positions that can reshape their ownership and control.[17]

Beyond these market integrity risks, the Commission's proposed factor addressing whether event contracts would challenge a prediction market's compliance infrastructure is directly relevant. For SBECs, effective compliance requires statutory tools that Congress assigned exclusively to the SEC. Insider trading enforcement for individual securities relies on Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934,[18], and on Regulation FD.[19] Market surveillance requires the Consolidated Audit Trail mandated by Exchange Act Rule 613.[20] Position-level transparency for security-based swaps is governed by the SEC's regulatory reporting and public dissemination regime under Regulation SBSR,[21] and by the large trader

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17 See *CSX Corp. v. The Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511, 547–52 (S.D.N.Y. 2008), *aff'd in part, vacated in part*, 654 F.3d 276 (2d Cir. 2011) (TCI, a hedge fund, used cash-settled total return swaps deliberately spread across eight counterparties to prevent any single counterparty from crossing the 5% ownership threshold, thereby evading the Section 13(d) disclosure requirements while secretly amassing a substantial economic position in a publicly listed company). See also *SEC v. Hwang*, No. 22-cv-3402 (S.D.N.Y. filed Apr. 27, 2022) (Archegos Capital Management used total return security-based swaps referencing individual equities to build over $160 billion in gross exposures while concealing its positions from the market, misleading its counterparties, and engaging in manipulative trading to artificially inflate stock prices, a scheme that resulted in billions of dollars in counterparty credit losses and significant harm to investors).

18 15 U.S.C. § 78j(b).

19 17 C.F.R. §§ 243.100–243.103.

20 17 C.F.R. § 242.613.

21 17 C.F.R. §§ 242.900–242.909.

reporting[22] framework under Exchange Act Rule 13h-1. These authorities are vested in the SEC by statute and administered through the SEC's self-regulatory framework, including FINRA.

Nasdaq recognizes and respects the CFTC's essential role in overseeing the nation's commodity futures and derivatives markets. The CFTC's regulatory framework is well-suited to its core mission: ensuring the integrity of price discovery and the management of risk in markets for agricultural commodities, energy, metals, interest rates, and foreign exchange — markets that serve critical hedging and capital-formation functions for the U.S. economy. The Commission's oversight of designated contract markets has provided a sound regulatory foundation for these markets for decades. However, Congress determined in Title VII of the Dodd-Frank Act that instruments creating exposure to individual equity securities or narrow groups of issuers require a different regulatory architecture — the investor-protection architecture the SEC is uniquely positioned to provide. This was not a judgment about the CFTC's institutional competence; it was a recognition that the protection of retail investors in equity markets[23] demands specialized tools: FINRA's oversight of broker-dealer conduct, Regulation Best Interest, the Options Disclosure Document, SIPC coverage, the Consolidated Audit Trail, and the enforcement framework of Exchange Act Sections 9(a)(2) and 10(b) and Rule 10b-5. The CFTC's regulatory framework does not include these equity-specific safeguards — not because of any institutional deficiency, but because Congress designed the two regimes to serve different investor populations and different market functions. Channeling retail equity exposure through CFTC-regulated venues would place investors outside the protective framework Congress built specifically for them. Notably, even where Congress has permitted CFTC involvement in equity-linked derivatives, as with single-stock futures under the Commodity Futures Modernization Act, it did so only through a joint-oversight model that requires SEC approval of listing standards, joint prescription of margin requirements, and coordinated enforcement. Congress has never authorized CFTC-only oversight of an equity-linked derivatives product, and Title VII confirms that for security-based swaps the exclusive authority lies with the SEC.

Nasdaq recommends that the Commission's public interest framework reflect the jurisdictional and investor-protection reality that no DCM currently possesses the statutory authority, institutional architecture, or enforcement tools necessary to provide adequate compliance oversight for SBECs — such contracts should not be listed on CFTC-regulated

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22 17 C.F.R. § 240.13h-1.

23 The SEC enforces manipulation under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, which capture a broader range of deceptive conduct — including omissions and scheme liability — and benefit from decades of interpretive case law tied to equity markets. See *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101–04 (2019) (scheme liability under Rule 10b-5(a) and (c)); and *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153–54 (1972) (omissions and course-of-business liability). The CFTC's traditional anti-manipulation authority under CEA Sections 6(c) and 9(a)(2) — preserved post-Dodd-Frank as CEA § 9(3) — requires proof of specific intent to cause an artificial price under a four-element test. See *In re Amaranth Natural Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013). Although CFTC Rule 180.1 was modeled on Rule 10b-5, see Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices, 76 Fed. Reg. 41398, 41399, 41401 (July 14, 2011), the jurisprudence applying it to equity-specific manipulative schemes remains limited. If equity-linked instruments trade under CFTC jurisdiction, enforcement of manipulation targeting the same underlying security would be governed by a different standard, potentially creating gaps in deterrence and prosecution.

venues absent the full range of investor protections Congress assigned to the SEC under Title VII.

III. Rule Harmonization is Critical to Avoid Regulatory Arbitrage

Regulatory clarity and rule harmonization are critical because retail access to security-based swaps is legally constrained. Under Title VII, security-based swaps are securities; retail access to them is tightly limited under SEC rules and, more broadly, retail swap transactions under the CEA must occur on a DCM. The CFTC acknowledges that the Dodd-Frank Act requires retail swap transactions (i.e., transactions not between eligible contract participants) to be entered into on a DCM, and that "eligible contract participant" is defined in CEA § 1a(18) to generally include only institutional investors. In practice, retail investors cannot access security-based swaps through the same open-account model as listed equities and options; the SEC-side pathway for retail equity-linked binary exposure runs through registered options exchanges, as Nasdaq's binary options on the Nasdaq-100 and Nasdaq-100 Micro Index (cleared by OCC) illustrate.

Self-certification of SBECs by current DCMs is itself a form of regulatory arbitrage. Under the DCM regime, CEA § 5c (added by the CFMA in 2000) allows a DCM to list a contract for trading by simply providing the Commission with a self-certification that the contract complies with the CEA and Commission regulations — the Commission must receive the certification at least one business day before listing, and DCM listings become effective one business day after submission; new products are presumed compliant absent a stay issued by the CFTC. If a DCM self-certifies an equity-linked contract as a non-security (i.e., a "swap" or "future" rather than a security-based swap), it can begin retail trading the next business day — bypassing both the SEC's Section 19(b) rule-filing process (up to 240 days) and the Title VII retail restrictions.

To close the loophole, Nasdaq recommends three concrete moves: (i) adopt the event-focused "involves" formulation to identify which event contracts are SBECs — an event contract "involves" a security or narrow-based security index if its settlement is determined by an occurrence, extent of an occurrence, or contingency related to that security or narrow-based security index, and any such contract should be excluded from CFTC jurisdiction; (ii) affirm that SBECs are statutorily excluded from CFTC jurisdiction, as Congress established that instruments referencing single securities, narrow-based security indexes, or events affecting individual issuers' financial condition are securities, subject to the Exchange Act's full protections as a matter of law; and (iii) coordinate with the SEC to develop a joint interpretation of the Title VII definitions applicable to event contracts, consistent with CFTC Chairman Selig's direction that CFTC staff work with their SEC counterparts. A statutory backstop, closing any residual ambiguity in the § 1a(47) "swap"/§ 3(a)(68) "security-based swap" line, would be the belt-and-suspenders fix.

The recommendations above follow directly from the statutory framework Congress established in Title VII and the investor-protection concerns that framework was designed to address. Nasdaq respectfully submits the following additional recommendations for the Commission's consideration:

- Nasdaq recommends applying the proposed "involves" interpretation from CEA Section 5c(c)(5)(C) to the identification of security-based event contracts: any event contract whose settlement turns on an occurrence, extent, or contingency that is reasonably likely to affect, or is otherwise materially related to, a security or narrow-based security index, including events that materially affect the issuer's financial statements, financial condition, or financial obligations, is a security-based swap and is excluded from the CFTC's jurisdiction.

- To the extent that market participants seek to trade all event contracts on a single venue, the Commission should ensure that harmonized regulation establishes and maintains a level playing field for regulated platforms. Such harmonization must address registration of platforms and participants, registration of instruments, regulation of trading, treatment and protection of investors, and clearance and settlement of instruments.

- The CFTC and SEC coordinate to develop a joint interpretation of the Title VII definitions applicable to event contracts, consistent with CFTC Chairman Selig's direction that CFTC staff work with their SEC counterparts. This coordination presents a timely opportunity to resolve the jurisdictional questions identified above and to ensure that investors trading equity-linked instruments receive the protections Congress mandated for securities-related products.

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Nasdaq appreciates the opportunity to respond to the Proposal and commends the Commission's efforts to establish a clear, principled, and predictable framework for prediction markets. Nasdaq respectfully urges the Commission to ensure that this framework properly accounts for the distinct jurisdictional and investor-protection concerns raised by security-based event contracts.

Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,

John A. Zecca