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Lowenstein Sandler

PERP WALK: A ROVING DISCUSSION OF PRODUCT CHARACTERIZATION, JURISDICTIONAL AND OTHER ISSUES RELATED TO PERPS, OPTIONS, EVENT CONTRACTS AND SECURITY FORWARDS

October 29, 2026

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PRE-IPO FORWARDS, SWAPS, AND FINANCING STRUCTURES

PRE-IPO MARKET OVERVIEW

Private-company liquidity has expanded beyond traditional employee tender offers and negotiated secondary share transfers to include forward contracts, prepaid structures and indirect exposure through SPVs.

Demand for exposure to companies such as SpaceX and Anthropic has increased the importance of transfer restrictions, price discovery, counterparty credit and the timing of an eventual liquidity event.

Unlike exchange-traded securities, private shares have limited price transparency; quoted SPV interests and derivative exposure may trade at premiums or discounts to direct-share transactions.

SECURITY FORWARDS: ESTABLISHED STRUCTURES

Type 1:

A conventional (vanilla) security forward commits a seller to deliver a specified number of shares at a future date in exchange for an agreed purchase price; payment typically occurs up front, and delivery ordinarily occur at settlement, upon a liquidity event (e.g., IPO, M&A activity, etc.).

Type 2:

A variable prepaid forward (VPFC) typically pays the shareholder upfront and requires future delivery of a variable number of shares (or cash equivalent) determined by a formula tied to, among other things, the reference security's price.

Whereas a conventional forward shifts the benefits and burdens of ownership from the seller to the buyer, and provides the buyer with 100% economic exposure to the underlying shares, VPFCs contain variable delivery (or cash settlement) formulas. VPFCs provide downside protection or preserve a defined portion of upside, depending on the collar, floor, cap and settlement provisions.

- SEC/CFTC, Product Definitions Release, 77 Fed. Reg. 48208, 48246–48 (2012), https://www.govinfo.gov/app/details/FR-2012-08-13/2012-18003
- Rev. Rul. 2003-7, 2003-1 C.B. 363 (variable prepaid forward tax treatment), https://www.irs.gov/pub/irs-drop/rr-03-07.pdf

REGULATORY CLASSIFICATION OF SECURITY FORWARDS

One of the primary threshold questions is whether the contract is a bona fide securities sale for deferred delivery or a derivative constituting a security-based swap (SBS).

Classification turns on contractual obligations and facts at inception, including legal transferability, actual delivery intent, contingencies, cash-settlement rights and economic exposure.

A single-name equity-linked derivative may fall within the SBS definition when it meets the swap definition and is based on one issuer's security or related narrow-based measure and does not otherwise satisfy an exclusion.

Calling a transaction a forward, financing, purchase agreement or private placement is not determinative; an SBS characterization can trigger separate offering, counterparty and intermediary rules.

- 7 U.S.C. § 1a(47) (swap definition), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title7-section1a
- 15 U.S.C. § 78c(a)(68) (security-based swap definition), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section78c
- SEC, Exchange Act Sections CFI 101.01 (June 9, 2022), https://www.sec.gov/rules-regulations/staff-guidance/corporation-finance-interpretations/exchange-act-sections

DODD-FRANK: STATUTORY FRAMEWORK

Title VII of the Dodd-Frank Act allocated primary oversight of swaps to the CFTC and security-based swaps to the SEC; mixed swaps are subject to coordinated treatment.

The statutory swap definition captures specified contingent payment arrangements and instruments transferring financial risk, subject to enumerated exclusions.

An SBS includes qualifying swaps based on a single security, loan, narrow-based security index or certain issuer-related events.

Securities Act § 5(e) restricts unregistered SBS offers and transactions involving non-eligible contract participants; Exchange Act § 6(l) addresses transactions with non-ECPs on national securities exchanges.

The ECP inquiry is transaction- and counterparty-specific; a private placement exemption alone does not resolve the distinct SBS restrictions.

- Dodd-Frank Act §§ 721, 761, Pub. L. 111-203, https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf
- 15 U.S.C. § 77e(e), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section77e
- 15 U.S.C. § 78f(l), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section78f

TWO RELEVANT STATUTORY EXCLUSIONS

Contingent Forward Exclusion:

Qualifying contingent purchases or sales of securities subject to the federal securities laws are excluded, except where the specified bona fide contingency relates to the creditworthiness of a nonparty.

Forward Delivery Exclusion:

A sale of a security for deferred shipment or delivery is excluded if the transaction is intended to be physically settled.

These exclusions are separate routes to exclusion; each requires analysis of its own statutory elements and the actual transaction terms. A product may satisfy one, both, or none of these exclusions.

Additional Practical Considerations: For pre-IPO shares, issuer consent requirements, ROFRs, lockups and transfer prohibitions can present conceptual inconsistencies and defeat the physical-settlement rationale even if the parties expect to deliver shares later.

- 7 U.S.C. § 1a(47)(B)(ii), (v)–(vi), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title7-section1a
- SEC/CFTC, 77 Fed. Reg. 48208, security forwards discussion, https://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2012-18003.html
- SEC, CFI 101.01 (June 9, 2022), https://www.sec.gov/rules-regulations/staff-guidance/corporation-finance-interpretations/exchange-act-sections

2012 JOINT PRODUCT DEFINITIONS RELEASE

The SEC and CFTC adopted joint final rules and interpretive guidance defining swaps, security-based swaps and security-based swap agreements.

The release discusses security forwards and explains that whether deferred-delivery securities transactions are intended to settle physically depends on facts and circumstances.

The purchase and sale of the underlying security (in a vanilla forward) generally occurs when the parties become contractually bound, not merely on the future settlement date.

Contract documentation, settlement design and the practical/legal capacity to deliver should therefore be evaluated at the time the parties enter into the arrangement.

The release predates the June 2022 SEC staff interpretation specifically addressing restricted underlying securities (more on this later).

- SEC/CFTC, Release Nos. 33-9338 / 34-67453, 77 Fed. Reg. 48208 (Aug. 13, 2012), https://www.sec.gov/rules-regulations/2012/07/further-definition-swap-security-based-swap-security-based-swap-agreement-mixed-swaps-security-based
- SEC, CFI 101.01 (June 9, 2022), https://www.sec.gov/rules-regulations/staff-guidance/corporation-finance-interpretations/exchange-act-sections

MORTGAGE-BACKED SECURITIES FORWARD EXAMPLE

The 2012 release specifically addresses forward sales of agency mortgage-backed securities guaranteed or sold by Fannie Mae, Freddie Mac or Ginnie Mae.

The agencies restated their interpretation of these transactions as securities forwards, focusing on whether they are intended to be physically settled.

This is an illustrative discussion of an established forward market—not a general SEC approval of every security forward involving an illiquid or transfer-restricted asset.

Agency MBS market conventions cannot automatically be transposed to private-company stock, where issuer approval and contractual transfer restrictions present meaningful distinctions.

- SEC/CFTC, 77 Fed. Reg. 48208, 48246–48 (2012), https://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2012-18003.html
- SEC, Exchange Act Sections CFI 101.01, https://www.sec.gov/rules-regulations/staff-guidance/corporation-finance-interpretations/exchange-act-sections

HISTORICAL ENFORCEMENT: SAND HILL, FORCERANK AND FORGE

Sand Hill Exchange:

SEC action concerned contracts referencing the value of private companies and cash payments upon liquidity events; the SEC treated the instruments as unlawfully offered security-based swaps to non-ECPs.

Forcerank:

SEC enforcement involved a game-like platform offering payouts based on rankings of securities, illustrating that novel presentation and small stakes do not avoid derivatives classification.

Forge:

A pre-IPO platform that utilized multi-legged 'payment dependent notes' to facilitate Pre-IPO securities transactions. The SEC deemed these structures as unlawful security-based swaps.

Enforcement Theme - functional analysis of economic exposure, settlement mechanics and investor eligibility—not reliance on a platform's label for the product.

- SEC, Investor Alert: Fantasy Stock Trading Websites (2015), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/investor-58
- SEC, In re Forcerank LLC, Securities Act Release No. 10235 (Oct. 13, 2016), https://www.sec.gov/files/litigation/admin/2016/33-10235.pdf

JUNE 9, 2022 SEC STAFF INTERPRETATION

SEC staff CFI 101.01 directly asks whether a cash-or-physical-settled forward can qualify as intended to be physically settled if the shares cannot legally be transferred or are contractually restricted at inception.

Staff answer: No.

The availability of a cash-settlement alternative does not cure an inability to effect a lawful transfer when the contract is entered into.

The staff identifies two necessary prerequisites at inception:

(1) the underlying offer/sale is registered or exempt from registration, and
(2) applicable contractual transfer restrictions are satisfied or waived.

The CFI is staff interpretive guidance, not a Commission rule or judicial holding, but it materially narrows the practical case for using the forward-delivery exclusion with restricted pre-IPO stock.

- SEC, Exchange Act Sections CFI 101.01 (June 9, 2022), https://www.sec.gov/rules-regulations/staff-guidance/corporation-finance-interpretations/exchange-act-sections
- SEC/CFTC, Release 33-9338, 77 Fed. Reg. 48208 (2012), https://www.govinfo.gov/app/details/FR-2012-08-13/2012-18003

RECENT SEC ENFORCEMENT — LINQTO

The SEC has provided relatively limited functional guidance on the boundaries of the swap and security-based swap definitions as applied to pre-IPO forward arrangements; the 2012 joint release and 2022 staff interpretation remain important reference points.

The Linqto matter illustrates the SEC's focus on pricing, valuation, and investor disclosures in indirect pre-IPO investment products, rather than resolving the security-based swap characterization of forward contracts.

On October 9, 2026, the SEC charged two former Linqto executives with allegedly misleading investors purchasing SPV interests referencing private-company shares; these are allegations, not adjudicated findings.

The SEC alleges that purported market-based prices, claimed scarcity and descriptions of algorithmic pricing misrepresented the actual pricing process.

The SEC stated that a Linqto subsidiary sold more than $430 million of SPV interests during 2021–2024; the allegations underscore valuation, disclosure and distribution risks in indirect pre-IPO exposure.

In September 2026, DOJ separately announced criminal charges involving former executives; distinguish criminal allegations, a reported guilty plea and any subsequent adjudication.

The Linqto allegations concern indirect private-company exposure and do not determine whether a particular prepaid forward constitutes a security-based swap.

- SEC, Litigation Release 26672 (Oct. 9, 2026), https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26672
- DOJ, Former Executives of Pre-IPO Investment Platform Charged (Sept. 2, 2026), https://www.justice.gov/usao-sdny/pr/former-executives-pre-ipo-investment-platform-charged-connection-450-million-fraud

SEC ENFORCEMENT — ADIT VENTURES

In August 2026, the SEC charged Adit Ventures Management, its CEO and affiliated general partners in connection with alleged misrepresentations concerning pre-IPO holdings, unauthorized fees, conflicted principal transactions and misuse of client assets.

The SEC complaint also alleged improper reliance on the venture-capital-fund adviser exemption and failure to register as an investment adviser.

The Adit allegations illustrate private-fund governance, disclosure, conflicts and adviser-registration risks in pre-IPO investment structures; they do not establish a rule governing security-forward classification.

- SEC, Litigation Release No. 26605 (Aug. 10, 2026), https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26605
- SEC, Complaint, SEC v. Munson et al., No. 26-cv-06800 (S.D.N.Y. Aug. 10, 2026), https://www.sec.gov/files/litigation/complaints/2026/comp26605.pdf

WHERE DO SECURITY FORWARDS STAND TODAY?

Vanilla physically settled forwards referencing transfer-restricted pre-IPO shares face significant classification risk after CFI 101.01 where the underlying transfer restrictions have not been satisfied or waived at inception.

An agreement to obtain consent later, or a promise to deliver only following an IPO, does not automatically establish an intended physical settlement for the statutory exclusion.

VPFCs may offer more flexibility in structuring economic exposure and financing terms, but variable settlement alone is not a safe harbor from SBS status.

- SEC, CFI 101.01 (2022), https://www.sec.gov/rules-regulations/staff-guidance/corporation-finance-interpretations/exchange-act-sections
- 7 U.S.C. § 1a(47)(B), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title7-section1a
- SEC/CFTC, 77 Fed. Reg. 48208 (2012), https://www.govinfo.gov/app/details/FR-2012-08-13/2012-18003

VARIABLE PREPAID FORWARDS AS SECURITIES OFFERINGS

A variable prepaid forward can be analyzed as the shareholder's issuance or sale of a contractual security to the purchaser, with prepaid consideration and a contingent future delivery obligation.

Under this private-placement approach, counsel evaluates the offer and sale under Securities Act § 5 and an available exemption, often § 4(a)(2) or Regulation D where their conditions are met.

The structure may resemble a structured note or bond economically, but that analogy does not itself establish its legal characterization or avoid SBS analysis.

Terms should address the delivery formula, corporate events, collateral, transfer restrictions, issuer consent, default remedies and whether cash settlement is permitted.

Tax treatment is distinct: Rev. Rul. 2003-7 addresses a specified variable prepaid forward fact pattern and should not be read as a securities-law exemption.

- 15 U.S.C. § 77d(a)(2), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section77d
- 17 C.F.R. §§ 230.501–508 (Regulation D), https://www.ecfr.gov/current/title-17/chapter-II/part-230
- IRS, Rev. Rul. 2003-7, https://www.irs.gov/pub/irs-drop/rr-03-07.pdf

MARKET PRACTICE CONTINUES DESPITE UNCERTAINTY

Pre-IPO investors continue to seek direct secondary shares, SPV interests and synthetic or forward-linked exposure where access to the issuer's capitalization table is constrained.

Market activity is not equivalent to regulatory endorsement; compliance turns on specific instrument terms, counterparties, offering practices and issuer transfer rules.

Key commercial drivers include shareholder liquidity, financing without immediate outright disposition, investor access and allocation of pre-IPO valuation risk.

- SEC, Investor Alert: Fantasy Stock Trading Websites, https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/investor-58
- SEC, Litigation Release 26672 (2026), https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26672
- SEC, CFI 101.01 (2022), https://www.sec.gov/rules-regulations/staff-guidance/corporation-finance-interpretations/exchange-act-sections

PROLIFERATION OF SPVS AND LAYERED SECONDARY EXPOSURE

A single SPV may acquire and hold issuer shares on the capitalization table while selling membership or limited-partnership interests to multiple indirect investors.

Investors may later resell SPV interests; feeder funds or additional SPVs may hold interests in the first vehicle, producing several layers between the ultimate investor and the underlying company.

Layering can facilitate access and centralized issuer ownership but complicates look-through ownership, valuation, fees, liquidity and enforcement of transfer restrictions.

An interest in an SPV is a separate security from the underlying issuer share; its transfer does not necessarily confer direct ownership or voting rights in the portfolio company.

The regulatory analysis must address both the original issuer-share acquisition and each separate issuance or secondary transfer of vehicle interests.

- Securities Act § 2(a)(1), 15 U.S.C. § 77b(a)(1), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section77b
- Investment Company Act §§ 3(c)(1), 3(c)(7), 15 U.S.C. § 80a-3, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section80a-3
- SEC, Litigation Release 26672 (2026), https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26672

SPV COMPLIANCE: LOOK-THROUGH, RESALES, CARRY AND OWNERSHIP

"Formed for the purpose of":	Investment Company Act exclusions under §§ 3(c)(1) and 3(c)(7) can require beneficial-owner look-through analysis, including special treatment for entities formed to invest in a particular fund.
Restricted securities:	Private SPV interests and underlying shares may require registration or a valid exemption for each resale; Rule 144 is conditional and is not a universal liquidity mechanism.
Crystallizing carry:	Manager-led transfers, rollover transactions and fees based on transaction activity warrant analysis of broker-dealer registration, transaction-based compensation and adviser conflicts.
Issuer restrictions:	Cap-table SPVs may be bound by ROFRs, transfer consents, information covenants and beneficial-owner reporting obligations; indirect changes in ownership can trigger contractual look-through provisions.

- Investment Company Act § 3(c)(1), (7), 15 U.S.C. § 80a-3, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section80a-3
- Securities Act Rule 144, 17 C.F.R. § 230.144, https://www.ecfr.gov/current/title-17/section-230.144
- Exchange Act § 15(a), 15 U.S.C. § 78o(a), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section78o

CFTC/SEC JURISDICTIONAL AND PRODUCT CHARACTERIZATION QUESTIONS RELATED TO EVENT CONTRACTS

THE SWAP DEFINITION'S OPTION PRONG & CEA § 2(a)(1)(C)(i)(I): ARE EVENT CONTRACTS OPTIONS ON SECURITIES AND THUS SECURITIES?

GENERAL

Event contracts potentially fit in all prongs of the swap definition.[1]

LITIGATION

Most of focus in event contract litigation on whether event contracts are swaps under the event prong.[2] Since so much analysis of that, focus today is whether they're swaps under the first prong of the swap definition. (CEA § 1a(47)(A)(i)).

PRONG (i)

"any agreement, contract, or transaction . . . (i) that is a put, call, cap, floor, collar, or similar option of any kind . . . for the purchase or sale, or based on the value, of 1 or more . . . commodities . . . ."

1. The swap definition is set forth in CEA § 1a(47).
2. CEA § 1a(47)(A)(ii).

PUBLIC STATEMENTS; RFC; CBOE EVENT CONTRACTS

CBOE CEO Craig Donahue

FIA Expo 2025: Donahue said Kalshi's "trading a binary option . . . based on the S&P 500 . . ." and said "that's clearly a binary option on a security that is . . . not . . . supposed to be traded on a DCM . . ." because subject to exclusive SEC authority.[3]

SEC Chairman Paul Atkins

At Boca 2026, his remarks stated "it is past time . . . the [SEC] work[s] with the CFTC to provide clarity on . . . Title VII . . . issues, including whether certain event contracts may be . . . [SBSs] or other . . . securities, such as options on securities."[4]

3. https://www.fow.com/insights/analysis-cboe-head-flags-issues-with-event-contract-regulation-ahead-of.
4. https://www.sec.gov/newsroom/speeches-statements/atkins-fostering-regulatory-harmony-between-sec-cftc-031026.

CFTC/SEC RFC[5]

CFTC/SEC RFC in the FR "request[ed] . . . comment on . . . draw[ing] clearer . . . lines with respect to innovative products that may implicate both . . . [agencies'] . . . interests."[6]

Courts don't always agree with how the agencies characterize their jurisdiction. CFTC and SEC both lost jurisdictional cases.

CFTC v. Archegos Capital Mgmt LP

- E.g., in CFTC v. Archegos Capital Mgmt LP,[7] the CFTC asserted jurisdiction over TRSs on ETFs that tracked BBSIs, such as the S&P 500.
- The court disagreed, held such TRSs are SBSs, dismissing CFTC complaint with prejudice.

Dunn v. CFTC

- In Dunn v. CFTC,[8] the S. Ct. unanimously held the CFTC lacked jurisdiction over OTC FX options because exempt under Treasury Amendment.[9]
- Treasury Amendment: CEA doesn't cover "a[] transaction in . . . foreign currency[.]" CEA § 2(c)(1)(A).
- CFTC tried to distinguish futures (which it conceded was squarely captured by Treasury Amendment) and options.
- S. Ct. didn't buy it, explaining more or less that a "transaction in" FX broadly covers any transaction where FX is the underlier.

5. Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance, 91 FR 37873 (June 24, 2026) ("RFC").
6. Id.
7. Case No. 22-CV-3401 (JPO), 2023 WL 6123102 (S.D.N.Y. Sept. 19, 2023).
8. 519 U.S. 465 (1997).
9. CEA § 2(c)(1)(A).

CFTC/SEC RFC CONT.

Even when the agencies try to share or delegate jurisdiction under a statutory provision permitting them to, courts don't always agree that they can.

Cboe Futures Exchange, LLC v. SEC[10]

The D.C. Circuit vacated an SEC exemptive order allowing MGEX to trade volatility futures under CFTC futures rules rather than security-futures rules.

If a futures is on an NBSI, it's a security futures subject to dual CFTC/SEC oversight under the security futures regime; if it's on a BBSI, it's a futures subject to only CFTC oversight.

CBOE sued.

D.C. Circuit vacated exemptive order as “arbitrary and capricious” because SEC failed to justify why security-linked futures should not be subject to security-futures regulation.

10. 77 F.4th 971 (D.C. Cir. 2023).

BACK TO WHAT THE RFC COVERED . . .

1. RFC noted market participants raised questions about whether certain event contracts are swaps, SBSs, mixed swaps, or instruments exclu[ded] from the "swap" definition."[11]

2. RFC added, while these event contracts may generally fall within "swap" and "[SBS]" definitions, there's a statutory exclusion for "any . . . option[] or privilege on any security or group or index of securities, including any interest therein or based on the value thereof, that is subject to the ['33 and '34 Acts]"."[12]

11. See RFC at 37875.
12. Id. at 37876 (quoting CEA § 1a(47)(B)(iii)). The option-based exclusion referenced in the RFC is in the swap definition in CEA § 1a(47)(B)(iii).

CEA § 2(a)(1)(C)(i)(I)

There's also CEA § 2(a)(1)(C)(i)(I), which says:

> Notwithstanding any other provision of law . . . CEA doesn't apply [where] . . . a party acquires a[n] . . . option on one or more securities . . . including any group or index [there]of . . . or any interest therein or based on the value thereof," unless SEC exempts it subject to Commissions exercising concurrent jurisdiction. [Emphasis added.]

1. The "notwithstanding" language was there before Dodd-Frank, and D-F didn't remove it.

2. The RFC then asked how to determine if an event contract on 1 or more securities should be considered a securities option, swap or SBS.

CBOE EVENT CONTRACTS

1. Illustrating some of the foregoing, CBOE sought SEC approval to list binary options on key performance indicators ("KPIs") (e.g., earnings per share) reported by certain stock issuers.[13]

2. Kalshi submitted a comment letter seeking to delay SEC approval of CBOE's contracts until the CFTC-SEC RFC process clarifies the nature of the products.[14]

   - Kalshi noted that question 8 in the RFC asks whether greater clarity needed "regarding when an event contract is an [option] on an 'interest' in, or 'based on the value' of" any security/securities index within 2(a)(1)(C)(i)(I).

3. The issue is that if an option on a KPI of a security constitutes an option on an interest in or based on the value of a security, then § 2(a)(1)(C)(i)(I), would seem to apply, and such options could only be listed on SEC-regulated exchanges, not DCMs.

13. Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend its Rules To Permit the Listing of Binary Options Overlying Key Performance Indicators . . . Reported by Certain Issuers of Stock . . ., 91 FR 43418 (Jul. 15, 2026).
14. https://www.sec.gov/comments/SR-CBOE-2026-061/srcboe2026061-993079-3105906.pdf.

SEC PRECEDENT: "INTEREST IN" AND "BASED ON THE VALUE OF"

SEC previously characterized credit default options (2007) and dividend index options (2009) as options based on an interest in, or on the value of, a security. CFTC staff disputed the latter.

Credit default options.

- In an order approving credit default options,[15] SEC said it interprets "based on the value of" a security or securities language in the '34 Act § 3(a)(10) security definition, which mirrors CEA § 2(a)(1)(C)(i)(I), "to include market moves in relation to the value of the security or securities underlying the option in question."[16]

Security Index Dividend Options.

- In 2009 order approving security index dividend options,[17] SEC said "[t]he concept of an 'interest in' a security plainly includes rights generating a pecuniary interest in a security, such as the right to a dividend payout . . . ."[18]
  - CFTC staff comment: The dividend index itself may be more event contract than securities index.
  - Staff asserted securities indexes traditionally based on weighted avg. of securities prices, but S&P 500 Div. Index based on accrued dividends

Regardless of RFC, only courts can definitively resolve product characterization issues, but SEC has final word if no one sues.

15. Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated . . . Order Granting Accelerated Approval of the Proposed Rule Change . . . 72 FR 32372 (June 12, 2007).
16. Id. at 32372, 32375. The SEC cited the analysis in a 2005 court case (Stechler v. Sidley, Austin Brown & Wood, L.L.P., 382 F.Supp.2d 580, 596–97 (S.D.N.Y. 2005)) that "made clear" that the fixed payout characteristic of a binary option is not a determining factor in deciding whether an instrument is an option on a security and stated it appropriate to consider whether the resale value of the instrument moves in relation to the movement of an underlying reference.
17. Chicago Board Options Exchange, Incorporated; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade S&P 500 Dividend Index Options, 74 FR 66711 (Dec. 16, 2009).
18. Id. at 66713 (citing Exchange Act Release No. 55781 (June 6, 2007), 72 FR 32372, 32376 (June 12, 2007) (emphasis added)).

On October 13th, the SEC issued an order approving CBOE's KPI binary option contracts.[19]

The SEC concluded the options can be characterized as both options on a security and options on an interest in, or based on the value of an interest in, a security or securities within the meaning of the '34 Act security definition.

Options because:

- Have typical options characteristics, including:
  - Listed & traded on exchange per rules specifying standardized terms typically applied to exchange-listed security options; and
  - Buyer pays seller non-refundable premium, has rights but no obligations and no further risk; and
- Subject to broader regulatory features typical of standardized securities option trading, such as:
  - Central clearing; and
  - Use of required options disclosure document.

Options on a security because that definition includes interests based on the value of a security and:

- Citing its prior CDS order, the SEC interprets "based on the value" to include any option whose pricing moves in relation to the value of the underlying security/securities;
- Each KPI binary option is based on disclosure of the KPI in earnings reports; and
- "[I]t is well-established that the value of an issuer's stock moves in relation to issuer performance disclosures."

Also options on a security because the security definition includes options on an interest in a security because:

- Again citing the 2007 CDS order, "the concept of an 'interest in' a security plainly includes rights generating a pecuniary interest in a security, such as the right to a dividend payment . . . .";
- The nature of an option as cash-settled doesn't undermine that conclusion;
- Each CBOE binary KPI option would provide a cash payout based on the relevant KPI; and
- Because the KPI is tied to a pecuniary interest in the issuer's stock, the binary KPI option is an option on an interest in that stock.

In a statement accompanying the order, Chairman Atkins highlighted that "the order speaks solely to the[se] . . . specific binary options[,]" "does not address what may be similar products . . . structured in different ways[,]" and "does not address . . . [or] foreclose—CFTC jurisdiction over KPI contracts . . . structured to fall under the CFTC's jurisdiction."[20]

19. Cboe Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Permit the Listing of Binary Options Overlying Key Performance Indicators Reported by Certain Issuers of Stock, available at https://www.sec.gov/files/rules/sro/cboe/2026/34-106659.pdf.

20. Statement on the Commission's Approval of a Proposed Rule Change to Permit the Listing of Binary Options Overlying Key Performance Indicators, available at https://www.sec.gov/newsroom/speeches-statements/atkins-101326-statement-commissions-approval-proposed-rule-change-permit-listing-binary-options-overlying-key?utm_medium=email&utm_source=govdelivery.

SO, ARE EVENT CONTRACTS OPTIONS?

CFTC case law saying yes

Intrade[21]
(various dates)

- Noted various DCMs, including Nadex and CME, offered binary options as options.

Banc de Binary
(2016)[22]

- A settlement.
- Noteworthy because SEC settled a parallel action.[23]
- Defendant was counterparty to customers' binary options on assets including stock indices.
- "The binary options. . . are 'commodity options' under the Act and Regulations: (1) they are 'of the character of' or are 'commonly known to the trade as' options; and (2) Banc de Binary holds them out to be options . . . and promotes to the public that it is offering options."[24]

Commodity Futures Trading Comm'n v. Vision Fin. Partners, LLC[25]

(2016) Binary options are commodity options as defined in the CEA's option definition.[26]

21. CFTC v. Trade Exchange Network, Civil Action No. 12-1902 (D.D.C. 2015) (summary judgment order) at 10. This is available at https://www.cftc.gov/sites/default/files/2018-07/enfintradepredictionmarketltdexchangenetworksummaryjudmentorder080315.pdf and was published at 117 F. Supp. 3d 29 and 2015 U.S. Dist. LEXIS 100994.
22. CFTC v. Banc de Binary, Case No. 2:13-cv-00992-MMD-VCF (D. Nev. 2016) (consent order) ("Banc de Binary"), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enforderbancdebinary022916.pdf.
23. https://www.sec.gov/enforcement-litigation/litigation-releases/lr-23481.
24. Banc de Binary at 16, ¶ 55.
25. 190 F. Supp. 3d 1126, 1130 (S.D. Fla. 2016).
26. Id. at 1130.

CFTC SWAP REPORTING NALS AND RELATED REQUEST LETTERS

Applicants and DMO staff in the NALs have often stated that event contracts are binary options.

E.g., in summarizing swap data reporting relief requests from Polymarket, staff wrote that:

- Polymarket intends to list for trading fully-collateralized options on various underliers, some of which would be structured as binary contracts.
- Polymarket represented that all contracts it intends to list are options within the swap definition and
- Polymarket stated that the CFTC has defined swaps to include commodity options.[27]

Similarly, in this spring's standing no-action position giving relief from swap data reporting rules, the staff said

- "DCM-listed binary options are . . . "options . . . ."[28]

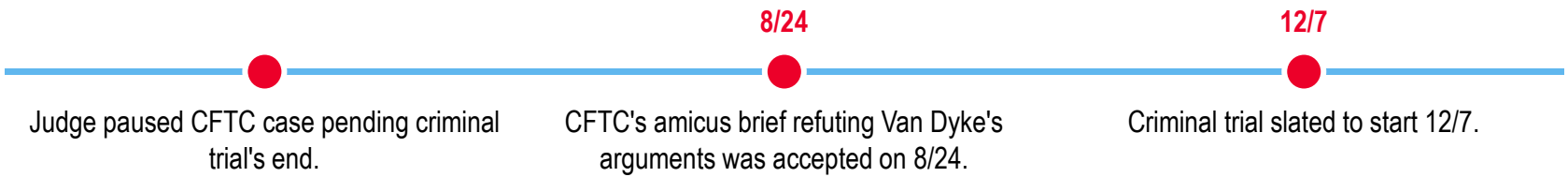
DCMs have long offered binary options as options.[29]

These facts could support a conclusion that binary options are options under "commonly known to the trade" as an option language in CEA options definition.[30]

27. See CFTC No-Action Letter No. 25-48 (Dec. 11, 2025) at 2.
28. CFTC No-Action Letter No. 26-14 (May 13, 2026) at 4-5.
29. See Intrade Summary Judgment Order at 9, https://www.cftc.gov/sites/default/files/2018-07/enfintradepredictionmarketltdexchangenetworksummaryjudmentorder080315.pdf.
30. CEA § 1a(36).

THE GANNON VAN DYKE CASE

Interesting aside: defense argued in Gannon Van Dyke case that similar language in swap definition[31] violates Constitution's ex post facto clause.[32]



31. CEA § 1a(47)(a)(iv) defines swap to include any agreement that is, or becomes, commonly known to the trade as a swap.
32. See U.S. v. Van Dyke, Case 1:26-cr-00156-MMG (S.D.N.Y 2026) (Memorandum of Law in Support of Defendant's Motion to Dismiss the Indictment), at 31-32.

SEC CASE SAYING NO: SEC V. BANC DE BINARY[33]

NV federal district court determined binary options offered by Intrade are not "options" under the '34 Act's security definition.

Court said

01
Traditional stock options are securities because they allow buying/selling stock itself at a set value.

02
Binary options do neither and are pure gambling and

03
Also unlike options because don't require exercise.[34]

04
This would treat all auto-exercised options as not options.

The Court disagreed with an older 2nd Cir. case[35] that cash-settled options are "options" under the meaning of § 78c(a)(10).

33. Sec. & Exch. Comm'n v. Banc de Binary Ltd., 964 F. Supp. 2d 1229 (D. Nev. 2013).
34. Id. at 1234, n.1.
35. Caiola v. Citibank, N.A., N.Y., 295 F.3d 312, 326-27 (2d Cir.2002).

TAKEAWAYS

1. § 2(a)(1)(C)(i)(I). “Notwithstanding any other provision of law . . .” the CEA doesn't apply to options on one or more securities or any interest therein or based on the value thereof.

2. If binary options are options under CEA, it would seem, w/r/t options on 1+ securities, this trumps special rule and the other provisions of swap definition, so DCM can't list binary options on 1+ securities and make available to retail unless also an NSE or ATS.

3. In other words, even if event contract fits in event prong (or other prong) of swap def'n in addition to options prong, if event contract is a binary option, then, because § 2(a)(1)(C)(i)(I) disenfranchises CFTC w/r/t options on securities “notwithstanding any other provision of law,” fact that event contract may otherwise be a swap and would thus fall within D-F swap regime, § 1a(47)(B)(iii) excludes the event contract from the swap definition because it's an option on a security and thus a security, not a swap.

4. This also means that event contract can't be an SBS either, because starting point of SBS definition = the product in question is a swap.

5. This isn't the only current CFTC-SEC jurisdictional options question. CME contesting an attempt by Nasdaq PHLX, an NSE, to list Bitcoin Index Options as security options subject to SEC jurisdiction.

CFTC/SEC JURISDICTIONAL QUESTIONS RELATED TO OPTIONS THAT ARE NOT EVENT CONTRACTS

NASDAQ PHLX BITCOIN INDEX OPTIONS

Factual Background

1. Nasdaq PHLX sought to list cash settled options on an index of cash market BTC prices.[36]
2. The SEC's Division of T&M approved related rules per delegated authority, conditioned on CFTC granting Nasdaq and OCC relief from applicable CEA provisions/CFTC rules per CEA § 4(c)(1) and subject to SEC exercising concurrent jurisdiction.[37]
3. CME petitioned SEC to review, vacate T&M approval order.[38]
4. SEC granted CME's petition to review the approval and stayed it while the Commission considers CME's petition.[39]
5. CME's position: no SEC jurisdiction over options on non-security index and CFTC can't confer it using § 4(c).[40]

36. Self–Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Proposed Rule Change To List and Trade Nasdaq Bitcoin Index Options, 90 FR 10545 (Feb. 24, 2025).
37. Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Nasdaq Bitcoin Index Options, 91 FR 31769 (May 28, 2026).
38. See Petition For Review Of Order Taken By Delegated Authority Granting Accelerated Approval Of A Proposed Rule Change, As Modified By Amendment No. 1, To List And Trade Nasdaq Bitcoin Index Options ("CME Petition"), available at https://www.sec.gov/comments/SR-Phlx-2025-50/srphlx202550-843099-2584187.pdf.
39. In the Matter of Nasdaq PHLX LLC; Order Granting Petition for Review and Scheduling Filing of Statements Regarding an Order Approving, on an Accelerated Basis, a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Nasdaq Bitcoin Index Options, 91 FR 48968 (Aug. 3, 2026).
40. See generally CME Petition.

LEGAL BACKGROUND: BITCOIN AND OPTIONS

Bitcoin

- CFTC and SEC: commodity not a security.
- March 2026 FR interpretive release:[41] "[d]igital commodities . . . are not themselves securities[]"[42] and gave BTC as an example of a "digital" commodity.[43]
- "The CFTC has consistently taken the position, since 2015, that bitcoin is a commodity and not a security."[44]
- "Courts have echoed that view."[45]

Options

- Because options on securities are securities under '33 and '34 Act definitions,[46] if these options = options on securities, they'd be securities options and Nasdaq PHLX could submit a rule change to SEC and ignore CFTC.
- But because SEC & CFTC said BTC ≠ a security, options on BTC ≠ securities options, so those provisions don't give SEC jurisdiction over Nasdaq PHLX BTC options.

41. Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, 91 FR 13714 (Mar. 23, 2026).
42. Id. at 13717.
43. Id. at 13718.
44. CME Petition at 8 (citing In the Matter of Coinflip, Inc., CFTC Docket No. 15-29, [2015-2016 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33,538, at 77,855 (Sep. 17, 2015) (stating that "Bitcoin and other virtual currencies are encompassed in the [commodity] definition and properly defined as commodities.")).
45. Id. (citing CFTC v. McDonnell, 287 F. Supp. 3d 213 (E.D.N.Y. 2018) *mot. for reconsideration denied*, 321 F. Supp. 3d 366 (E.D.N.Y. 2018)).
46. Securities Act of 1933 § 2(a)(1) and Securities Exchange Act of 1934 § 3(a)(10), respectively.

LEGAL BACKGROUND: JURISDICTION SHIFTING, CME ARGUMENTS AND RAMIFICATIONS

Jurisdiction Shifting

- § 3B of the '34 Act says "notwithstanding any other provision of law," any k the CFTC exempts under CEA § 4(c)(1) is deemed a security for securities law purposes.
- § 4(c)(1) permits CFTC to exempt any contract from any CEA §, other than those §§ listed in 4(c)(1).

Select CME Legal Arguments

- CFTC lacks authority to give exclusive jurisdiction to the SEC.[47]
- Non-delegation doctrine
- *Title of § 3B*
- *Legislative History of § 3B*
- *D-F § 712*

Interesting Ramifications of Approval Order

- Questions CME contends the Order didn't consider.
  - Whether FCMs/SDs would have to register as BDs and SBSDs to let customers/CPs trade BTC options;
  - Whether BTC options transactions would have to be cleared in futures accounts or securities accounts; and
  - What securities laws/regs., and margin rules in particular, would apply, given BTC options = securities but BTC ≠.

47. See CME Petition at 4. See also id. at 10 (citing Bd. of Trade of City of Chicago v. SEC, 677 F.2d 11397, 1142 n.8 (7th Cir. 1982), *vacated as mooted on other grounds sub nom.*, SEC v. Bd. of Trade of City of Chicago, 459 U.S. 1026 (1982) ("[t]he CFTC and SEC cannot 'reapportion their jurisdictions in the face of a clear, contrary statutory mandate.'")).

CFTC PERPS PRODUCT CHARACTERIZATION QUESTIONS

PERPS: SWAPS OR FUTURES?

CFTC Approval of Perps as Futures Contracts

5/29/26 CFTC order approving Kalshi listing BTC perps on BTC as futures. See Order Approving KalshiEx LLC BTCPERP Futures Contract.[48]

Kalshi indicated that the contracts have features of futures cited in certain seminal court holdings and CFTC authority.

Holdings/CFTC Authority

No CEA or CFTC regs. definition of a futures contract.

Kalshi noted courts have looked at whether contracts have certain key characteristics common to futures:

Standardization
(all futures on a commodity are identical in quantity and non-price terms);

Fungibility
(contracts' fungibility facilitates offsetting transactions); and

Offset
(buyers and sellers can liquidate their positions by entering opposite contracts).[49]

Delivery
(futures rarely result in delivery because obligations often extinguished by offset).[50]

Clearing – Kalshi also cited cases[51] for the proposition that futures clearinghouses guarantee original parties' obligations, and set margin and standard unit quantities.

CFTC Authority

Kalshi noted CFTC historically described futures as having certain features:

- standardized contracts to buy/sell commodities;
- future, not immediate, delivery;
- offered to the general public;
- generally secured by margin and
- mainly to assume or shift price risk rather than to transfer commodity ownership.[52]

Indefinite duration vs. expiration

- Kalshi conceded courts described futures as for buying or selling a commodity:
  - at a fixed date in the future;[53]
  - on a date certain;[54] or
  - at or before a stated future time.[56]
- *But* noted some courts *haven't* viewed settlement by specific future time as essential, citing a district court for the proposition that "some futures . . . [are] of 'indefinite duration'."[56]

48. See Order Approving KalshiEx LLC BTCPERP Futures Contract, available at https://www.cftc.gov/filings/documents/2026/orgdcmkexbtxperporder26601.pdf.
49. CFTC v. Co Petro, 680 F.2d 573, 581 (9th Cir. 1982).
50. Salomon Forex v. Tauber, 8 F.3d 966, 971 (4th Cir. 1993).
51. The CFTC omitted the cites.
52. In re: Stovall, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) 20,941, p.6 (CFTC Dec. 6, 1979).
53. Chicago Mercantile Exchange v. SEC, 883 F.2d 537, 542 (7th Cir. 1989) ("CME v. SEC").
54. Salomon Forex v. Tauber, 8 F.3d 966, 971 (4th Cir. 1993).
55. CFTC v. Erskine, 512 F.3d 309, 323 (6th Cir. 2008).
56. Standard Forex II, 1996 WL 435440, at *10 (E.D.N.Y. July 25, 1996), at *29.

PERPS: CME'S CHALLENGE; STATUS

Coinbase made similar arguments that perps can be futures.[57]

CME challenged Kalshi contract approval: swaps, not futures.[58]

- Reversal of prior position that perps are *swaps*, without explaining change = arbitrary and capricious.
- Perps meet swap definition; futures excluded from definition.[59]
- CME: the CFTC repeated Kalshi's reasoning almost verbatim.
- CME: CFTC sought comment just 1 month before approving Kalshi's contracts, without engaging with commenters.
- CME technical argument: because futures are formally called "contracts of sale of a commodity for future delivery," and a perp has no delivery, perps can't be futures.
  - *Cash settled futures not delivered either: literal reading = cash settled & intangible futures ≠ futures either?*
  - *Slippery slope: cash-settled options faced such issues too.*
- Finally, CME also claimed that a futures must convey a direct or indirect interest in the underlier.

Quick take:

- Swaps and futures have many similarities. For years the swap industry lived in fear of swaps being treated as futures.
- Swap definition is specific and broad.
- Futures definition unspecific and broad; broad/vague enough to support viewing perps as futures.

Status: Motion practice through at least December.

57. CFTC Staff Interpretation and No-Action Letter 26-17 (May 29, 2026), available at https://www.cftc.gov/csl/26-17/download.
58. Chicago Mercantile Exchange Inc. v. Selig, Case 1:26-cv-02157-CKK (D.D.C. June 18, 2026), available at https://www.courtlistener.com/docket/73500937/1/chicago-mercantile-exchange-inc-v-selig/.
59. CEA § 1a(47)(B)(i).

THANK YOU

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