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July 27, 2026

VIA ELECTRONIC SUBMISSION

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

Re: Commodity Futures Trading Commission Notice of Proposed Rulemaking, "Prediction Markets; Public Interest Determinations," RIN 3038-AF65

Dear Mr. Kirkpatrick,

CME Group Inc. ("CME Group") appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or the "Commission") Notice of Proposed Rulemaking on prediction markets (the "NPRM" or the "Proposal").[1] The NPRM seeks comment on certain proposed amendments to CFTC Regulation 40.11 (and a new Appendix F to Part 40). The Proposal would introduce a new set of public interest factors that the Commission would apply on a contract-by-contract basis when reviewing contracts under Part 40.11. The NPRM also adopts new procedural requirements to govern a revised 90-day review process for implicated contracts and would also clarify several statutory terms that have caused marketplace confusion, including "involve" and "gaming."

CME Group is a holding company that owns and operates multiple futures exchanges each of which is registered as a designated contract market ("DCM"). Throughout our history, CME Group exchanges have been central to the major developments that underpin today's futures industry, including the standardization of futures contracts, the creation of the clearing process, and the introduction of financial futures, cash-settled contracts, and electronic trading. In 2022, CME Group began offering event contracts that allow individuals to trade their views on daily price movements in some of the world's most widely quoted benchmark futures markets, including the E-mini S&P 500 and gold. We have consistently led in developing innovative products while at the same time maintaining a firm commitment to our regulatory obligations and to the legal framework established by the Commodity Exchange Act ("CEA" or the "Act") and CFTC regulations.

At the outset, we note that the CFTC's regulatory system, the foundation on which the world's leading derivatives markets have been built, presumes that registered entities, including futures exchanges like ours, take their regulatory responsibilities seriously. Any exchange seeking to list a new product must, by law, certify in writing that it has analyzed the legal basis for the contract. These "self-certified" submissions must also provide a concise explanation and analysis of the results of that legal review. But that is only one side of the equation. The CFTC, as the agency responsible for overseeing registered exchanges, must also perform its statutory role of monitoring exchanges' compliance with their legal responsibilities. Our system can address an

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[1] *Prediction Markets; Public Interest Determinations*, 91 Fed. Reg. 35806 (June 12, 2026). CME Group also submitted a comment letter on April 30, 2026, in response to the Commission's request for comment on its Advance Notice of Proposed Rulemaking ("ANPRM") on the same topic. *Prediction Markets*, 91 Fed. Reg. 12516 (Mar. 16, 2026).

exchange's failure to meet its obligations — that is what enforcement actions are for. Market integrity depends on the CFTC acting in accordance with its statutory obligations and taking appropriate steps, consistent with its oversight authority, when actions of registrants do not comport with the rules that apply to them.

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EXECUTIVE SUMMARY

CFTC Rule 40.11 (the "Special Rule") authorizes the Commission to prohibit certain event contracts that it finds contrary to the public interest. We support the Commission's effort to give the marketplace guidance on how the Special Rule should be applied. Congress clearly granted the CFTC authority to address this subject, and it is both appropriate and helpful for the Commission to use that authority to bring clarity through rulemaking. However, before the Commission addresses open questions under the Special Rule, it should first resolve certain basic but critically important threshold listing problems.

Simply put, many event contracts have already been listed that do not meet the existing standards of the CEA, a problem separate from and antecedent to the downstream application of the Special Rule. The NPRM would help responsible exchanges evaluate new listings prospectively. But it does not address how the Commission will deal with the exchanges that have already listed many event contracts whose terms are plainly deficient under the CEA today. The CEA and its Core Principles for DCMs ("Core Principles")[2], for example, prohibit an exchange from listing any contract that is readily susceptible to manipulation. Under a longstanding, common-sense understanding of this Core Principle, no responsible exchange would self-certify a contract that settles to a discrete event entirely within the control of a single person who might trade it, yet there are many such listings, such as those related to so-called "mention markets."

As we have said before, CME Group believes the Core Principle framework remains fit for purpose to address the most important issues before the CFTC today. The Commission must enforce the Core Principles uniformly across all exchanges to serve the public interest as Congress intended. The uneven and at times non-existent enforcement of basic DCM listing requirements has facilitated the rapid listing of more than 8,000 event contracts, many of which on their face do not seem to comply with the CEA. The NPRM will not retroactively eliminate these past problems with a new and limited prospective rule.

Congress anticipated that novel contract designs would raise legal questions requiring careful consideration and deliberation. It intentionally established a flexible, thoughtful regulatory framework to account for this possibility. That framework has served the industry well and is in large part responsible for much of the derivatives markets' success. But the framework has limits. Exchanges bear the responsibility to make measured legal assessments of their proposed products to ensure that they are consistent with the Core Principles. When exchanges fail in that duty, it falls to the Commission, as the oversight agency, to enforce their compliance with the law.

[2] See 7 USC §7(d) and 17 C.F.R. Part 38.

SPECIFIC COMMENTS ON THE PROPOSAL

I. <u>The Commission Must Address How It Will Resolve Fundamental Threshold Listing Problems</u>

We commended the Commission when it first sought comment, through its ANPRM, on the broader issues raised by event contract listings on DCMs, including how the CEA, the Core Principles, and the CFTC's regulations apply to these new contracts. Over 8,000 event contracts have been submitted across many DCMs in a short period of time, and we understand the Commission is still working to catch up with the many problems involved. It is therefore understandable that the Commission's instinct is to try to focus on a narrow task that it can accomplish, that is, clarifying interpretive open questions relating to existing Rule 40.11. But that narrow focus risks missing the larger point: many event contracts already listed have fundamental definitional and Core Principle defects that should have prevented their listing in the first place. Therefore, the Commission should review all potentially non-compliant listed event contracts to consider carefully whether the exchanges that listed them provided the legal analysis required by currently applicable CFTC regulations.

At the outset, we agree with the Commission's observation in the Proposal:

> *"It is notable that the Special Rule applies in addition to the other requirements applicable to event contracts traded on a prediction market. That is, the Special Rule is not the only way in which a prediction market could be prohibited from listing an event contract, and the Special Rule applies only if the event contract is certified to be in compliance with all other requirements (because an event contract can be listed only if it is certified to be in compliance)."* [3]

Thus, even before the Special Rule comes into play, there are reasons why certain contracts should not be listed at all. Yet the NPRM does not take this problem up and fails to address the fundamental problem that exchanges have listed event contracts that do not comply with applicable legal standards. Worse, many of the issues the NPRM does take up are matters for the initial listing analysis and should not be deferred to the new post-listing Rule 40.11 review process. These threshold listing issues are already squarely addressed by the CEA, its Core Principles, and the CFTC's existing regulations.

A. Limits of the Swap Definition — Not Everything Is a Swap

If a contract does not meet the definition of a swap, it cannot be listed as one. The Commission needs to confront the fact that many contracts previously filed by DCMs do not seem to meet the statutory elements of a swap as defined by the CEA.

The economic characteristics of a contract are integral to qualifying the contract as a swap in the first instance. The Commission seemed to grapple with this question at points in the NPRM but ultimately dismissed the need to consider economic purpose in the narrow context of the amended Rule 40.11 public interest reviews.[4] However, the statutory text of the CEA does not allow an exchange to ignore the economic aspects of a contract it proposes to list as a swap because these factors are embedded in the definition of a swap.

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[3] *See* NPRM at 35810, *available at* https://www.federalregister.gov/d/2026-11854/p-365.

[4] "[T]he Commission preliminarily believes that the legislative history of the Special Rule does not indicate Congressional intent for the Commission to apply the economic purpose test that was applied prior to the CFMA." *See* NPRM at 35819, *available at* https://www.federalregister.gov/d/2026-11854/p-365.

The Commission is correct that the "old" economic purpose test was removed from one section of the CEA when the Commodity Futures Modernization Act ("CFMA") was adopted.[5] But Congress later restored similar concepts to the swap definition itself in the Dodd-Frank Wall Street Reform and Consumer Protection Act, and additional related concepts were also embedded in the Core Principles themselves at CFMA adoption. Thus, while the Commission may not be required to consider a contract's economic characteristics when assessing whether it is contrary to the public interest under Rule 40.11, it cannot so easily set aside the statutory definition of a swap when an exchange initially lists a contract.

The statutory definition of swap is relevant because DCMs have typically listed event contracts as swaps and exchange-traded swaps are subject to the CFTC's exclusive jurisdiction. The CEA's definition of "excluded commodity" is the starting point for classifying the event as the underlying commodity for a swap because the Special Rule applies to "agreements, contracts, transactions, or swaps in excluded commodities."[6] Section 1a(19) of the CEA defines an excluded commodity to include "the occurrence, extent of an occurrence, or contingency beyond the control of the parties to the contract that is associated with a financial, commercial, or economic consequence." A DCM intending to list an event contract as a swap must first consider the application of this definition to the event underlying its swap. After it does, the next step would be to satisfy the swap definition itself, which essentially incorporates the substance of the excluded commodity definition. The relevant prong for most event contracts that an exchange classifies as swaps is found in Section 1a(47)(A)(ii) of the CEA, which defines such a swap as an "agreement, contract or transaction" that:

> *"provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence or the extent of the occurrence of any event or contingency associated with a potential financial, economic or commercial consequence."*[7]

Therefore, any contract listed as a swap should have an underlying event that has a financial, economic, or commercial consequence that is tangible, or at the very least apparent, and should also be beyond the control of the parties to the contract.[8] If there is no real link to such a consequence, or if the event is potentially within a counterparty's control, a listing venue considering listing such a contract would have to be able to explain exactly how what it proposes to do complies with the law. The Commission is the arbiter of whether that explanation passes muster.

B. Contracts Have Been Certified Without Proper Analysis of the Applicable Statutory Definition

Fundamental textual and definitional questions regarding listing an event contract as a swap come first — before any consideration of whether a contract involves one of the activities enumerated in the Special Rule. If a contract does not meet the swap definition, how the Special Rule might or might not apply is not the most pressing matter.

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[5] *See* NPRM at 35812, *available at* https://www.federalregister.gov/d/2026-11854/p-223.

[6] 7 USC 7a-2(c)(5)(C).

[7] *See* NPRM at 35809, *available at* https://www.federalregister.gov/d/2026-11854/p-166. It is possible to list swaps under other prongs of the definition of course. When doing so, a listing exchange would have to specify which prong and exactly how the proposed contract meets it.

[8] *See* 1 Philip McBride Johnson et al., *Derivatives Regulation* (2nd ed.), Section 6.04 at page 6-35.

The definitional requirements discussed above are not mere academic questions. When an exchange prepares a Rule 40.2 submission to self-certify a contract for listing and trading, it is required by regulation to provide a concise explanation and analysis of the basis for listing. Specifically, before listing a product, a DCM must provide:

> *"A concise explanation and analysis that is complete with respect to the product's terms and conditions, the underlying commodity, and the product's compliance with applicable provisions of the Act, including core principles, and the Commission's regulations thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources…"*[9]

Thus, each exchange that lists a contract as a swap must provide analysis showing how the product satisfies the definition of a swap in order to comply with the plain terms of Rule 40.2. The swap definition is indeed broad and complex, but not everything meets it. Only contracts that meet the swap definition may be self-certified as swaps in compliance with the law. To illustrate, we highlight just one category of currently listed and traded contracts (there are many more examples) that we believe cannot qualify as swaps: so-called "mention market" contracts. These contracts let users place trades on specific words or topics a public figure might say during a live event, such as an interview or earnings call. Exchanges have self-certified that such contracts meet the legal definition of a swap. But how can they? Public figures have caught on and needled the exchanges by casually uttering the triggering words on purpose, underscoring the immateriality of the underlying "event." And the outcomes of these events are entirely in control of the single individual who could be a party to the contract. These contracts also raise other problems, including Core Principle compliance challenges discussed below, in addition to their threshold statutory definitional problems.

We believe Section 3 of the CEA, which is discussed at various points in the NPRM, provides another, entirely separate and potentially limiting factor on an exchange's ability to list these types of contracts. Section 3 sets out the fundamental purpose of regulating derivatives transactions federally (including according them the protection of federal preemption), providing that covered transactions "are **affected with a national public interest** by providing a means for **managing and assuming price risks, discovering prices, or disseminating pricing information** through trading in liquid, fair and financially secure trading facilities."[10] As former Commissioner Dan Berkovitz (then the CFTC's General Counsel) explained, this provision is "an implicit authority for the Commission to make a determination of whether the contract would accomplish something consistent with the purpose of the Act, such as managing and assuming price risks."[11] The U.S. derivatives industry has long understood that Congress's initial intent in developing these markets was to serve the "economic purpose" of providing American producers, merchants, and consumers "a basis for determining prices" or "a means of hedging themselves against possible loss through fluctuations in price," and that a contract used "entirely or almost entirely for speculation" would not satisfy that standard.[12]

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[9] *See* CFTC Regulation 40.2(a)(3)(v).

[10] 7 U.S.C. § 5(a) (emphasis added).

[11] CFTC Public Meeting to Consider the Trading of Contracts Based on Motion Picture Box Office Receipts and Gather Views of Interested Parties Transcript 32: 16-20 (May 19. 2010).

[12] H.R. Rep. No. 975, 93rd Cong., 2d Sess., at 29 (1974).

We recommend that the Commission consider carefully whether certain categories of swaps that have been listed meet the swap definition and, separately, whether the exchanges that listed them provided the legal analysis required by CFTC Regulation 40.2. We refer the Commission to its authority under Regulation 40.2(d)(2), which allows it to require a registered entity to withdraw a swap class certification made under Regulation 40.2(d)(1) and to resubmit each individual swap, or certain swaps within the class, for review under the pre-approval process of Regulation 40.3 where appropriate.

II. <u>Core Principles Remain Fit for Purpose – But They Have Been Ignored in Product Submissions</u>

CME Group continues to believe the CEA's Core Principle framework is the best regulatory regime for exchanges (and clearinghouses) across the globe. It was designed to be flexible and to accommodate innovation. It remains fit for that purpose without amendment, including for prediction markets. But it must be enforced as intended to be effective. The public interest demands effective enforcement to ensure fair, liquid, and financially secure markets are available to the farmers, ranchers, businesses, and the American people, who rely on them for risk management and price discovery. Applied uniformly, the Core Principles create a level playing field for exchanges and extend the framework's time-tested customer and market integrity protections to all participants on all exchanges. When applied unevenly, there are real competitive concerns, and participants engaging in U.S. derivatives markets are deprived of protections they are owed under the law and become exposed to potential abuse.

A. Exchanges Must Analyze Applicable Core Principles Adequately in Initial Product Submissions

As explained above, each DCM must conclude that a contract it proposes to list as a swap meets the statutory swap definition and include supporting legal analysis in its Regulation 40.2 submission to that effect. But that exchange must also conduct a separate review of Core Principle compliance for each new product, an analysis which turns on entirely different factors. Failing to prove out the Core Principles, including failing to describe the results of that process in the submission, is an independent basis for disqualifying a product from listing. Many currently listed contracts present inescapable Core Principle compliance problems that should have prevented their initial listing. While we recognize that it is no small undertaking, we encourage the Commission to review potentially non-compliant listings and utilize its authority under Regulation 40.2(d)(2) to require a registered entity to withdraw a swap class certification made under Regulation 40.2(d)(1).

While a DCM must comply with all Core Principles, several have drawn particular attention in the context of prediction markets. Core Principle 3 requires each DCM to list only contracts that are not readily susceptible to manipulation. Core Principle 4 requires a DCM to have the capacity and responsibility to prevent manipulation, price distortion, and disruption of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures. Core Principle 12 requires a DCM to establish and enforce rules protecting markets and participants from abusive practices and promoting fair and equitable trading.

The Commission is well aware of these fundamental exchange obligations. In fact, staff issued an advisory letter in March 2026 calling them out specifically in the context of certain event contracts.[13] This staff guidance provided exchanges a reminder which, among other things,

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[13] *See* CFTC Staff Letter 26-08, *available at* https://www.cftc.gov/PressRoom/PressReleases/9193-26.

underscored a DCM's regulatory obligations to comply with relevant Core Principles and all relevant product submission requirements:

> "*DMO staff reminds all DCMs that the Commission retains authority to stay the listing of a self-certified contract pending Commission proceedings for filing a false certification or pending a petition to alter or amend the contract terms and conditions pursuant to section 8a(7) of the CEA. This would include any proceedings for filing a false certification that a contract complies with the "not readily susceptible to manipulation" requirements of DCM Core Principle 3*."[14]

However, the Commission in the NPRM acknowledged that it is aware that certain exchanges are making product certifications without providing sufficient detail or analysis, which is a clear violation of Regulation 40.2 requirements:

> "*Currently, many event contracts are certified using a template submission, which is then used for listing many specific event contracts. These templates often provide only a general description of type of event contracts that will be listed….this general description would be insufficient for the Commission's review under § 40.11 and would not comply with the § 40.2(a)(3)(v) requirement that the prediction market explain why the event contracts comply with the CEA.*"[15]

A failure to include sufficient detail regarding the "type of event contract that will be listed," and failure to include detail regarding how such contracts would meet the applicable Core Principles, is a violation of CFTC Regulations.

B. Core Principle 3—Contracts not Readily Susceptible to Manipulation

The CEA and its Core Principles require every DCM to assess whether a potential new product could be readily susceptible to manipulation. Core Principle 3 is an unambiguous directive: an exchange may not list a contract unless it can conclude that the contract's design satisfies this standard. Appendix C to the Part 38 Regulations sets out detailed standards to guide a DCM in designing contracts that meet this Core Principle. While DCMs have flexibility in how they satisfy this cornerstone obligation, they must demonstrate they can comply with the Core Principle's obligations and cannot ignore them. We understand there is a risk that any product could be manipulated by those determined to do so. But certain products on their face are *readily* manipulable.

It is difficult to see, for example, how the "mention market" contracts discussed above could ever have been certified under Regulation 40.2. There is not a credible Core Principle 3 argument that supports a contract where the outcome settles on whether a single individual utters a particular word which makes them plainly susceptible to manipulation. An exchange that certifies such contracts is legally obligated to analyze these points, and an exchange that offers no analysis has violated Regulation 40.2.

C. Core Principles 4 and 12

Core Principle 4 requires a DCM to have the capacity, and bear the responsibility, to prevent manipulation, price distortion, and disruption of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures. Core Principle 12

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[14] *See* CFTC Staff Letter 26-08 at pg. 5.

[15] *See* NPRM at 35847, *available at* https://www.federalregister.gov/d/2026-11854/p-781.

requires a DCM to establish and enforce rules that protect markets and participants from abusive practices and promote fair and equitable trading. To satisfy Core Principle 4, an exchange must demonstrate that it has implemented market surveillance, compliance, and enforcement procedures, including effective real-time monitoring and the ability to reconstruct trades, for the contracts it proposes to list. To satisfy Core Principle 12, it must further show that it has systems capable of protecting traders from abusive practices by any party, along with enforceable rules that promote fair and equitable trading. Exchanges that take these obligations seriously have devoted considerable time, effort, and resources to building these capabilities, and do not list contracts that by design cannot meet these standards.

For many currently listed event contracts, demonstrating compliance with Core Principles 4 and 12 is exceedingly difficult. A contract's structure and design can make it impossible to surveil effectively or to guard against abuse. That is precisely why exchanges must conduct this analysis at the product-development stage. If an exchange cannot conclude that a proposed contract's structure and design allow it to build systems meeting the applicable Core Principle standards, it should not self-certify the contract.

We again recommend that the Commission determine whether exchanges have provided sufficient explanation and analysis of Core Principle compliance, particularly with Core Principles 3, 4, and 12. Where they have not, or where the analysis is otherwise deficient, we again refer the Commission to its authority under Regulation 40.2(d)(2) to require a registered entity to withdraw a swap class certification made under Regulation 40.2(d)(1) and to resubmit each individual swap, or certain swaps within the class, for review under the pre-approval process of Regulation 40.3, as appropriate.

III. <u>The Commission Is Responsible for Ensuring the Integrity of the Self-Certification Process</u>

The CEA's self-certification process has enabled the timely listing of innovative new contracts while preserving a mechanism for Commission staff to review and prohibit unlawful contracts. Under Regulation 40.2, a DCM may list a new contract one business day after submitting an adequate self-certification. DCMs have thus been able to bring new contracts to market quickly, and speed to market can be critical to providing liquidity and price discovery and to enabling robust competition, including with foreign exchanges operating under different standards.

CME Group acknowledges that one business day is a narrow window in which to decide whether to invoke the Commission's review authority. But the linchpin of the self-certification system is the listing exchange's responsibility to comply with the regulatory requirements that apply to it. The volume of contracts now flooding the market is a genuine challenge, far beyond anything contemplated when Regulation 40.2 was adopted. Compounding the problem, exchanges making hundreds of filings are regularly failing to meet their minimum regulatory obligations as explained above. They are certifying compliance with the law without sufficient consideration or analysis. The Commission, in response, must exercise its oversight authority to stay or reject filings when necessary — for example, where a certification is false or otherwise not in compliance with the CEA.

The current state of affairs could lead some to question the wisdom of self-certification. Given the many benefits self-certification affords, it would be regrettable if abuses of it led to calls for its demise. CME Group does not believe wholesale changes to the self-certification process are necessary but urges the Commission to ensure that the process does not continue to be exploited in ways that undermine its validity.

In the narrow area of event contracts, we could support a targeted effort to make thoughtful changes to the self-certification process to address the challenges posed by the very high daily volume of certifications of event contracts that may involve one of the special rule's enumerated activities. Due to the unique concerns presented by these event contracts, the Commission would be justified in amending Rule 40.2 to provide a longer time period, for example, a uniform ten day initial review and certification period. This extended time period could help the Commission to ensure Core Principle compliance in addition to determining whether an extended review period is necessary for conducting a public interest analysis.

IV. <u>The Commission Should Reconsider its Proposed Approach Because Contracts Contrary to the Public Interest Should Not Trade</u>

As noted above, we support the Commission's goal of giving the marketplace guidance on applying the Special Rule to contracts that otherwise satisfy the CEA and its Core Principles. Under the Proposal, only after listing would the Commission review the contract against the new factors in the NPRM. And, critically, the Commission proposes a system here that would explicitly permit the contract under review to trade while the review proceeds. The problems with this approach are exacerbated by the Commission's decision not to adopt categorical prohibitions, as that decision will expand the scope of contracts that can be listed before a public interest determination can be made.

We urge the Commission to rethink this approach, which departs from prior practice as we understood it. If the Commission adopts the proposal, some contracts that violate the Special Rule, because they are plainly contrary to the public interest, will be listed and traded by the public for a period of time. That is an unnecessary and poor policy outcome that runs counter to the very public interests that Congress established the Commission to protect.

A simple example can illustrate our point. The proposed NPRM framework has three steps. First, after a contract is listed, the Commission determines whether it is an event contract potentially within scope. Second, the Commission determines whether the contract "involves" one of the activities enumerated in the Special Rule and the CEA. Third, the Commission assesses whether the contract is contrary to the public interest. All three steps must be completed before a contract, already listed and trading, becomes prohibited. Under this scheme, an exchange could self-certify a contract that violates the statute, the Special Rule, and the Commission's guidance, and the public would be able to trade it for as long as 90 days. Imagine an exchange that, 30 days before a specified event, lists a contract with a one-day self-certification that the Commission later determines violates the prohibition on an enumerated activity. Under the Commission's proposed scheme, the public would be allowed to trade that contract, contrary to the public interest, for the full period preceding contract expiration when the event occurs, all before the Commission completed its review and prohibited it.

Adopting a framework that allows contracts contrary to the public interest to be offered and traded is problematic for the reasons above. Additionally, in circumstances where a contract is found to be violative before its expiry, the NPRM does not address how the Commission would deal with the open interest in the contract at that time. It also may expose firms that carry customer accounts to liability should the customers incur losses due to a contract that was later found to be in violation of the regulations. These are non-trivial details that would have to be addressed under the proposed process.

The Commission should not structure the review procedure in this manner. Rather than move forward with the process outlined in the NPRM, the Commission should instead re-propose rules that establish time periods for listing self-certified event contracts that may implicate the Special Rule. For example, as suggested in the section above, the Commission could establish a ten-day self-certification period for contracts on events that may implicate the Special Rule. If the Commission determines within that ten-day period that it will not conduct the Special Rule public interest review, then the contract could be listed at that time. If the Commission decides during that period that the contract involves an enumerated activity that is not categorically prohibited, then the period for listing the contract would extend an additional 80 days during which the Commission would make the public interest determination.[16] Under this proposed approach, the Commission would have sufficient time to conduct its oversight authority on the listing process and protect the public interest while evaluating event contracts that implicate the Special Rule without unduly impeding the listing of contracts that the Commission determines are not contrary to the public interest.

V. <u>The NPRM Provides Useful Guidance on Public Interest Factors – But Many Are Actually Relevant to Threshold Listing Issues</u>

As explained above, the NPRM would amend the Special Rule to give the marketplace new guidance on which event contracts fall within its scope, which contracts would "involve" an enumerated activity, the scope of the enumerated activities, and whether the Commission might find a contract contrary to the public interest under new factors. We found much of this discussion to be a thoughtful treatment of complicated issues. In our view, however, certain of the factors discussed are more relevant to threshold compliance with the CEA and its Core Principles than to whether an already listed contract is within the Special Rule's scope or otherwise contrary to the public interest.

A. General Public Interest Factors Applicable to All Contracts

The NPRM identifies factors the Commission would apply to all enumerated activities in conducting its post-listing public interest reviews. The Commission proposes the following factors to serve as its initial criteria for assessing whether any event contract is contrary to the public interest:

- whether the event contracts serve the public interest by providing meaningful hedging or price-basing utility consistent with CEA Section 3, yielding information that is economically, financially, or commercially useful or otherwise meaningful, or promoting responsible innovation and fair competition[17];
- whether, in the context of the focused review required by the Special Rule, the event contracts present a particular risk of manipulation or market disruption, exhibit settlement-integrity deficits arising from the event contracts' particular characteristics, or create particular risks of information leakage or exploitation of material non-public information by insiders; and
- whether trading or clearing of the event contracts would challenge the prediction market's self-regulatory tools or compliance infrastructure because of the event contracts' involvement in enumerated activities.

We view the above as relevant and important considerations, but the CEA and the Core Principles themselves dictate that they be considered in the product development and listing

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16 Of course, if the Commission were to establish categorical prohibitions (see section _VI_ below), any event contract that the Commission determines falls within one of them could not be listed at all.
17 CME Group believes that while responsible innovation is an overarching goal of the CEA, on a stand-alone basis innovation is not proof of meaningful economic utility.

process, rather than after listing and within the limited context of a Regulation 40.11 public interest review. For example, the second factor asks whether a contract presents a particular risk of manipulation or market disruption. Were an exchange to conclude that a contract it was considering presented such a risk, the exchange must not certify that the contract meets the applicable Core Principles. And if the Commission reached the same conclusion, it should not allow the exchange to list the contract.

The same applies to a contract that would materially challenge an exchange's self-regulatory tools or compliance infrastructure. In our decades of experience filing new product rules, there were times when CFTC staff believed that a feature of a product specification we shared with them might present certain risks or might challenge our infrastructure. In our experience, staff never hesitated to raise their concerns in those instances, including the prospect of staying the filing if their concerns went unaddressed. We believe an exchange that complies with its obligations would hesitate before advancing any contract it believed would materially challenge its self-regulatory tools or compliance infrastructure. The Commission simply should not permit an exchange to list, under Regulation 40.2 and the Core Principles, such a contract.

B. Category-Specific Public Interest Factors: The Definition of "Gaming"

The NPRM proposes a new definition of "gaming" to guide the marketplace on that single statutory factor in the Special Rule. The purpose of codifying this definition is to provide guidance to listing exchanges as to which contracts might become subject to a post-listing Regulation 40.11 public interest review. Where the new definition of gaming is implicated, the Commission would then apply the new factors specified in the NPRM to determine whether the contract is in fact contrary to the public interest and should be delisted subsequently. While CME Group supports the goal of defining gaming, it notes that a combination of the following factors could result in an unintended safe harbor (albeit a potentially temporary one): (i) the broad definition of gaming, (ii) the retroactive public interest determination, and (iii) the proposal to effectively house the economic, financial, commercial consequence analysis in the public interest determination.

The proposed definition is quite broad and clearly captures activities that are not swaps under the CEA. One example to illustrate is a simple "roulette wheel" contract that settles on the outcome of where a ball spun on a wheel lands. Such an activity checks all the boxes of the proposed definition: (1) it is done for entertainment; (2) it is governed by rules, (3) it includes measurable outcomes, and (4) those outcomes depend on a players' luck. Surely the Commission does not believe that such a contract is a swap under the CEA and that it can be listed as such on a DCM while the Rule 40.11 review proceeds.

The Commission seems to acknowledge this problem and attempts to address it through the application of the Special Rule itself. But this inverts the proper gating and consideration of event contracts. The problems with this position are illustrated by the explanation of how the CFTC will apply certain of the factors in its public interest analysis. The Commission states that it is likely to find that contracts are contrary to the public interest "where event contracts lack the potential to inform any economic, commercial or financial decisions." But if an event contract lacks such potential, then it seems obvious that it also fails to meet the definition of a swap. The CFTC's explanation of this factor, coupled with the expansive definition of "gaming," leaves the impression that the CFTC would ignore the statutory definition of a swap at the listing stage and then address any absurd results through application of the Special Rule. The obvious risk here is that, as Rule 40.11 is currently proposed, that contract would be available for trading to the public until the CFTC makes a determination to the contrary. CME urges the CFTC to consider whether this approach aligns with the CEA and whether there is a more targeted approach that will allow responsible innovation in event contracts without opening additional avenues to legal challenges.

From a technical drafting standpoint, CME Group also notes that subpart (iii) of the definition of proposed gaming includes “measurable occurrences or outcomes.” CME Group cautions the CFTC to carefully consider this part of the definition. As the Commission is aware, it has been argued that there is a difference between the occurrence of an event and the outcome of an event. The Commission has rightly taken the position that there is no difference between the two; that is, an occurrence of an event can of course include an outcome. However, by using both “occurrence” and “outcome” in this definition the Commission undermines that position. After all, if an “occurrence” includes “outcomes[,]” why mention both in this definition? Since the CEA only defines swaps by using the term occurrence, the rule should use parallel language to avoid any confusion going forward.

The CFTC should also consider whether the proposed definition of “gaming” is consistent with Section 12(e)(2) of the CEA. That section provides preemption in certain circumstances of “any State or local law that prohibits or regulates gaming.” The CFTC must carefully consider whether the proposed definition of gaming undermines the protections of Section 12(e)(2). Congress wrote Section 12(e)(2) to preempt state anti-gambling, anti-wagering, and bucket-shop statutes that would otherwise criminalize derivatives trading. Congress did *not* intend for the CEA to preempt state laws governing actual sports and recreation (such as athletic licensing, stadium safety, or high school sports eligibility rules). By defining "gaming" as the sport itself rather than the financial wagering on the sport, the CFTC’s definition suggests the CEA is preempting state sports regulations, which is a striking overreach. Equally important, it could undermine the safe harbor against state gambling laws that was intended to be created by this section. While CME Group appreciates that the CFTC attempts to limit the definition by using the phrase “for purposes of this section[,]” it must still consider how the proposed definition will be applied by courts in light of Section 12(e)(2). CME is concerned that courts may have difficulty understanding why the CFTC believes that Congress used the term “gaming” differently in the Special Rule versus Section 12(e)(2). CME Group urges the CFTC to carefully consider this point and only advance a definition of gaming that it can defend as consistent across all of the CEA’s provisions.

The NPRM also includes an alternative proposed definition of gaming and seeks comment on that alternative definition. Under the alternative, gaming would mean an activity created by its rules, in which (1) all participants whose conduct determines the outcome operate within the activity itself, and (2) those participants, in their capacity as participants, have purposes that are defined by and internal to the activity itself. Of particular concern with the alternative definition is that it highlights the breadth of what products could fall into the unintentional safe harbor described above. Nathan’s hotdog eating contest? Gaming. Craps? Gaming. 16-inch beer league softball in Chicago? Gaming. Indeed, four friends could make up a game involving dice, a tennis racket, two ducks and a hot air balloon and it would likely constitute gaming under this definition as long as they wrote down the rules on a napkin in a bar. Perhaps that is the intention of the definition as proposed. But as noted above, taking such an expansive view of gaming, coupled with a structure that appears to move the consideration of potential economic consequences into the Special Rule analysis conducted after listing, could lead to the listing of contracts that Congress never intended to be covered by its definition of a swap. As a result, CME Group fears that this definition would weaken the CFTC’s position and undermine its well-intended goal of allowing responsible innovation in event contracts while staying true to the dictates of the CEA.

The CFTC also proposes that a contract will be deemed to "involve" an activity "if [its] settlement is determined by an occurrence, extent of an occurrence or contingency in the activity." CME Group notes two issues for consideration

First, CME Group recommends that the language should align with the CFTC's definition of a swap. The proposed definition references "an occurrence, extent of occurrence, or contingency in the activity" while the CEA defines a swap by referencing "the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency[.]" Given the high profile of these issues and the heated debate around the CEA's definition of a swap, CME Group recommends that the Commission consider aligning the language with the CEA's definition of a swap. This will eliminate any confusion as to the scope of the Special Rule, and also eliminate any suggestion that the CFTC changed this language in an attempt to expand its jurisdiction over contracts that would not otherwise meet the definition of a swap as defined by Congress.

Second, CME Group is concerned that the focus on settlement may capture contracts that the CFTC does not intend to regulate. In particular, by formalizing a strict, look-through settlement test for what "involves" gaming, CME Group is concerned that the CFTC has inadvertently made it nearly impossible to explain why a regulated derivative and a standard sports bet are legally distinct. A bet placed on a sportsbook and an event contract listed on a DCM settle on the exact same pathway—for example, the final score of the game. The proposal begs the question—why is one subject to the Special Rule while the other is not? CME Group encourages the CFTC to tackle this issue and carefully craft the Special Rule so that it only covers the review of contracts that the CFTC believes must be listed on a DCM and regulated by the CFTC, and does not cover contracts that the CFTC believes should be regulated by state gaming authorities.

VI. The Commission Can Categorically Prohibit Contracts

The NPRM explains that the Commission considered whether its proposed rules should authorize categorical determinations, that is, determinations applying prospectively to a defined class of agreements, contracts, transactions, or swaps not yet certified or submitted to the Commission. The Commission concluded that it lacks authority to do so "under the structure of CEA section 5c," based on its reading of the Administrative Procedure Act ("APA").[18] The Commission appears to believe the CEA does not authorize prospective determinations for a class of contracts because such actions would be unauthorized rules not subjected to APA notice and comment. We disagree. The Commission could use a re-proposed rulemaking to make a determination that all contracts involving a particular enumerated activity are contrary to the public interest. So long as the Commission defines the scope of the activity and makes a public interest determination applying the factors identified above, such a categorical prohibition would in our view be consistent with the CEA and the APA.

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[18] The Commission noted that it "preliminarily believes that these provisions reflect the principle that a party adverse to consequential agency action should have the opportunity to identify errors in the Commission's reasoning before the agency acts." *See* NPRM at 35842.

CME Group appreciates the opportunity to comment on the NPRM. We urge the Commission to use this opportunity to recalibrate its approach and enforce uniform compliance with the laws and regulation that apply to the listing exchanges. The Commission can facilitate responsible innovation while at the same time discharge its statutory obligation to oversee industry participants and enforce their compliance with the law and the CFTC's existing regulatory framework. We continue to believe firmly that the Core Principles remain fit for purpose and that applying current laws and regulations evenly across all markets within the CFTC's jurisdiction is paramount. We look forward to continued engagement with the Commission on these important issues.

Should you have any questions or require additional information concerning the above, please contact me at (312) 930-2324 or via email at jonathan.marcus@cmegroup.com.

Sincerely,

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