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CLIENT ALERT

Drawing the Line: CFTC Distinguishes Gambling Products From Event Contracts

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In a bid to further define the contours of the term "swap" that is contained in the Commodity Exchange Act, the Commodity Futures Trading Commission has issued (i) an interim final rule[1] with respect to gambling products and (ii) a proposed rule[2] with respect to event contracts. The Interim Final Rule confirms that sportsbook wagers, casino games and similar gambling products are not swaps. The Proposal would expressly classify event contracts as swaps. Included within the CFTC's jurisdiction would be contracts based on sports-, politics-, cultural-, and weather-related events.

Dodd-Frank[3] introduced an extremely broad definition of the term "swap" into the CEA. The Releases continue the CFTC's longstanding effort, beginning with its 2012 joint rulemaking with the Securities and Exchange Commission (the "SEC"), to clarify which products fall within that definition and which do not. The timing is significant. Two

[1] *Further Definition of "Swap" To Exclude Casino-Style Gambling Products*, 91 FR 65969 (October 19, 2026) (herein, the "Interim Final Rule").

[2] *Further Definition of "Swap"— Inclusions*, 91 FR 66022 (October 19, 2026) (herein, the "Proposal" and together with the Interim Final Rule, the "Releases").

[3] Title VII of Dodd-Frank was formally titled The Wall Street Transparency and Accountability Act of 2010.

federal courts of appeals recently concluded that sports event contracts are not swaps, reasoning in large part that a contrary conclusion would also render every casino bet and sportsbook wager a swap. The Interim Final Rule responds directly to that concern by confirming that traditional gambling products fall outside the definition of "swap" and remain, as applicable, subject to state and tribal oversight. The Proposal, in turn, asserts that exchange-traded event contracts fall within the "swap" definition and, accordingly, within the CFTC's exclusive jurisdiction.

This memorandum summarizes the key takeaways, the relevant background, each of the two Releases, how they operate together, and the issues market participants should monitor.

Key Takeaways

- **The Interim Final Rule is in Effect.** The Interim Final Rule took effect on October 19, 2026, with public comments due by November 18, 2026. The CFTC dispensed with the customary advance comment period, citing the risk that state enforcement actions could shut down federally regulated markets on a state-by-state basis.

- **The Proposal is Open for Comment.** The Proposal would add "[e]vent contracts, including those based on sports-, politics-, cultural-, and weather-related events" to the list of products that CFTC rules expressly identify as swaps. Comments are due by November 18, 2026.

- **Swap Status Depends on How a Product is Traded, Not What It References.** Under both Releases, whether a product is a swap turns on how it is offered and traded. A wager that a licensed casino or sportsbook prices and accepts directly from a customer is not a swap. A contract that buyers and sellers trade with one another at market prices on a CFTC-registered exchange is a swap.

- **Existing Compliance Obligations are Largely Unchanged.** The CFTC views both Releases as codifying positions it already holds and does not expect either to alter market participants' existing obligations under the CEA. Exchanges that list event contracts remain subject to existing requirements, including an obligation to list only contracts that are not readily susceptible to manipulation.

- **Impact on Litigation.** The Releases may shape the contours of outcomes in pending litigation between prediction market operators and the states or Indian tribes. A rule pursuant to the Proposal could be referenced by parties arguing that federal law preempts state gambling laws as applied to event contracts.

Background: What Counts as a "Swap"

A "swap" pursuant to the CEA could be, generally, any transaction that is not immediately intended to be settled by delivery of the underlying commodity, subject to certain exclusions. The definition of "swap" includes:

- options, such as puts, calls, caps, and floors on most reference assets;

- defined categories of swaps, such as those on interest rates, broad-based securities indices and most other reference assets;

- credit default swaps;
- any other instrument that is or becomes commonly known as a swap;
- certain foreign currency transactions; and
- an instrument that combines any of the above.

Read literally, the definition could reach many ordinary transactions that are not generally regarded as derivatives. In a 2012 joint rulemaking, the CFTC and SEC addressed this issue and confirmed that traditional insurance and a range of customary consumer and commercial arrangements, such as product warranties, extended service plans, and layaway plans, are not swaps. A principal basis for that conclusion was that such arrangements are not traded on an organized market.

One prong of the definition of "swap" covers any transaction whose payment depends on whether an event occurs, provided the event is "associated with a potential financial, economic, or commercial consequence." Whether an instrument is a swap has significant implications, as the CEA grants the CFTC exclusive jurisdiction over swaps traded on CFTC-registered exchanges. If event contracts are swaps, states may be preempted from regulating them and may not be able to apply their gambling laws to them.

The federal courts of appeals are divided on the question of whether event contracts are swaps, and if so, whether the CEA preempts state gambling laws from applying to such contracts. In April 2026, the Third Circuit held that sports event contracts traded on a CFTC-registered exchange are swaps covered by federal preemption. In August 2026, the Ninth Circuit reached the opposite conclusion, finding that such contracts are likely not swaps and that state gambling laws therefore are not preempted with respect to them. In September 2026, the Sixth Circuit likewise held that sports event contracts are not swaps, reasoning that a sporting event is not "inherently" associated with financial consequences. Unlike the Third and Ninth Circuits, the Sixth Circuit held that even if such event contracts were swaps, state gambling laws would not be preempted as to them. The circuit split may ultimately be resolved by the Supreme Court. States have also taken independent action. Minnesota has attempted to enact a criminal prohibition on prediction markets, and other states have brought criminal charges, sought emergency injunctive relief, or obtained orders restricting access to event contracts within their borders.

The Interim Final Rule: Casino-Style Gambling is not a Swap

The Interim Final Rule adds a provision to the CFTC rule further defining "swap," confirming that certain gambling products are not swaps. The CFTC modeled the provision on the clarifications it adopted with the SEC in 2012 for traditional insurance and customary consumer and commercial contracts. A product qualifies for the exclusion only if it satisfies both of the following tests.

- **Licensed Provider.** The product must be (i) offered by a person licensed or authorized under state law, or under tribal law pursuant to the Indian Gaming Regulatory Act, (ii) offered within the scope of that license or authorization, and (iii) regulated as gaming or gambling under applicable state or tribal law.

- **No Exchange Trading.** The product must not be traded on an exchange, swap execution facility, or any other market in which multiple participants trade with one another or negotiate terms individually. A sportsbook or casino that accepts bets directly under its standard "house rules" satisfies this test; a contract traded on a CFTC-registered exchange does not.

Where both tests are satisfied, the Interim Final Rule explicitly excludes from the definition of "swap" (i) sports wagers accepted by a licensed sportsbook; (ii) casino games, including table games and slot machines; and (iii) other licensed games of chance, such as bingo, pool wagering, lotteries, and raffles.

The CFTC bases the distinction on the structural differences between the two categories of products. A casino or sportsbook sets the price, takes the opposite side of each wager, and does not permit customers to resell their positions. Event contracts, by contrast, trade between buyers and sellers at market-determined prices on a registered exchange, are backed by a clearinghouse, and generate the same fee revenue for the exchange regardless of the outcome of the event. The CFTC acknowledges that a wager and an event contract may produce similar economic results, but notes that insurance and credit default swaps likewise overlap economically while remaining subject to different regulatory regimes.

The Interim Final Rule is subject to two notable limitations. First, a product that does not satisfy both tests would not necessarily be a swap. The CFTC notes, for example, that a casual bet between friends or a bet placed with an unlicensed sportsbook may also fall outside its jurisdiction. Second, the exclusion does not permit gaming operators to offer exchange-traded products outside the federal framework. A licensed operator that wishes to offer a tradable product must do so in compliance with the CEA.

The Proposal: Event Contracts are Swaps

The Proposal would add event contracts to the existing list of products that CFTC rules expressly identify as swaps. The CFTC explained its view that event contracts already qualify as swaps under several prongs of the statutory definition. The CFTC has specific authority under the CEA as amended by Dodd-Frank to "further define" swap. It identifies four factors that support its view:

- **Market Practice.** The CEA treats as a swap any product "commonly known to the trade as a swap." The CFTC points to decades of regulatory history, thousands of event contracts listed by exchanges under CFTC rules, statements by established exchanges, and trading and hedging activity by institutional firms. The CFTC emphasizes that this argument stands independently and does not depend on whether a particular event has financial consequences.

- **Potential Economic Consequences.** The CEA requires only a "potential" financial, economic, or commercial consequence for the "event" prong of the "swap" definition. The CFTC offers examples ranging from playoff ticket revenue and franchise valuations to player performance bonuses and business promotions tied to game outcomes.

- **Option Structure.** Many event contracts pay a fixed amount if an event occurs and nothing if it does not. Courts and the CFTC have long treated these "binary options" as swaps.

- **Existing Statutory Authority Over Event Contracts.** The CEA already authorizes the CFTC to prohibit event contracts involving "gaming" and certain other activities. The CFTC reads this authority as confirming that such contracts fall within its jurisdiction.

The CFTC also has authority to review individual contracts. It may stay the listing of a contract that does not qualify as a swap and may prohibit gaming-related contracts that it determines to be contrary to the public interest. The Proposal references a separate June 2026 proposed rule[4] that would distinguish contracts based on performance over a season or full game from contracts based on a single play, pitch, shot, or foul.

Why the Releases Matter Together

States and courts challenging CFTC jurisdiction have argued that if sports event contracts are swaps, every sportsbook wager and casino bet must also be a swap. The Interim Final Rule addresses that argument by confirming that traditional gambling products are not swaps and remain subject to state and tribal regulation. The Proposal can therefore confirm that event contracts are swaps without any implication for casinos. Taken together, the Releases do not alter the scope of the statute; they clarify where particular products fall within it, much as the CFTC and SEC did in 2012 for insurance and consumer contracts. The CFTC characterizes the Interim Final Rule as responsive to the suggestion of the Third Circuit that the agency use its rulemaking authority to address "far-fetched scenarios" such as bingo games and ping-pong matches.

The practical result is that the same sporting event may underlie both a swap traded on a CFTC-registered exchange and a sportsbook wager that is excluded from the definition of "swap." This distinction will be relevant to prediction market operators, gaming companies evaluating exchange-traded offerings, and trading firms that provide liquidity in event contracts. The CFTC has also reminded trading platforms not to offer market-priced products in a manner that could lead customers to confuse them with casino-style products.

Open Questions and Next Steps

The CFTC has requested comment on all aspects of the Releases. With respect to the Interim Final Rule, it specifically seeks comment on:

- whether the traditional gambling product exclusion should extend to categories of providers beyond state-licensed gaming companies and tribes;

- whether the Interim Final Rule makes sufficiently clear which products are regulated as gaming or gambling under state or tribal law, and whether a better approach is available; and

[4] For a further discussion of this proposal, read "Prediction Markets Get a New Playbook."

- whether objective means exist to distinguish swaps from traditional gambling products other than that a product trades on a multiparty market.

Market participants should also monitor the following issues:

- **Potential Challenges to the Interim Final Rule.** It is possible that the Interim Final Rule may face legal challenges, including those related to the CFTC's reliance on the "good cause exception" in the Administrative Procedure Act from the use of the notice-and-comment process. The CFTC has indicated that it may revise the Interim Final Rule after considering public comments.

- **A Role for Congress.** Both Releases rest on the CFTC's authority to further clarify provisions in the CEA. Notably, the CEA was last amended (by Dodd-Frank) more than 15 years ago, long before modern prediction markets existed. Market participants should monitor legislative developments alongside the rulemaking and litigation.

- **Permissible Contracts.** Though the Releases further clarify the definition of "swap," the definition is not exhaustive. The question of which specific event contracts the CFTC may find contrary to the public interest remains open. The CFTC will likely continue to address that question through its separate prediction markets rulemaking and its review of individual contract listings.

- **Review Product Structures**. Exchanges, prospective exchange applicants, and gaming operators should evaluate how their products align with the two tests, particularly hybrid products and any plans to transition between state and federal regulatory frameworks.

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If you have any questions regarding this client alert, please contact one of the authors, any member of our CFTC team listed below, or the Willkie attorney with whom you regularly work.

Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the Commodity Exchange Act and the CFTC regulatory regime. We would be pleased to assist with your matters.

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