August 24, 2026

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

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance[1] (the "Joint RFC")

Dear Mr. Kirkpatrick and Ms. Countryman:

The Securities Industry and Financial Markets Association and its Asset Management Group (collectively, "**SIFMA**") and the International Swaps and Derivatives Association, Inc. ("**ISDA**") (together, the "**Associations**")[2] appreciate the opportunity to submit this letter in response to the Commodity Futures Trading Commission ("**CFTC**") and Securities and Exchange Commission's ("**SEC**" and together with the CFTC, the "**Commissions**") Joint RFC.

Introduction

The Associations and their respective members appreciate the Commissions' commitment to coordinating in areas of common regulatory interest to enhance regulatory effectiveness and market integrity with the goal of reducing regulatory gaps and providing greater certainty regarding regulatory responsibility[3] in support of efficient markets and lawful innovation. Members welcome the Joint RFC and are delighted to support the Commissions' efforts by means of this letter and any further clarification or support the Commissions may require.

For ease of reference, this letter is organized into four sections in the following order: (I) Innovative Products, (II) Established Products, (III) Harmonization and Alternative Compliance, and (IV) General Relief and Safe Harbor. Given the breadth of the Joint RFC and its, by definition, information-seeking nature, our responses are generally principles-based, and our recommendations are focused on what we believe are the core considerations the Commissions should weigh in their rulemaking, including the considerations that should be taken into account when determining the appropriate regulatory framework for both innovative and established products. The Associations and their members look forward to continuing to provide feedback on more specific matters and generally supporting the Commissions in their ongoing efforts. While

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[1] Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance, 91 Fed. Reg. 37873 (June 24, 2026).
[2] *See* Association Annex attached hereto.
[3] Joint RFC at 37874.

this letter is not directed at each individual question raised in the Joint RFC, we have sought to identify the questions from the Joint RFC that are pertinent to the relevant discussion in this letter.

Executive Summary

At the outset, the Associations wish to emphasize that, with respect to established products, market practice is generally well settled and want to caution the Commissions that disrupting such market practice would have significant adverse effects on the market, and could jeopardize market integrity and certainty and cause market participants to incur significant cost and expense for de minimis gain. In many instances the Commissions have already provided extensive guidance about product classification and regulatory obligations, which the market has applied to the established products they transact in. Certain classification determinations are fact-specific and market participants have developed robust processes to analyze and characterize such products and comply with the applicable regulatory regime. As such, for established products, there are limited and narrow issues where additional guidance would resolve genuine ambiguity in the application of the law, which we have outlined below. In general, however, the Associations submit that the Commissions would best serve their objectives of promoting market integrity by maintaining the status quo.

However, in relation to more innovative products, market practice around how products are currently brought to market, their regulatory classification, and what regulatory obligations apply is continuing to evolve, and the Commissions' attention and further review is warranted. As part of that review, the Associations respectfully request that the Commissions ensure that any rulemaking or guidance does not inadvertently disrupt existing market practice or modify guidance in relation to more established products.[4]

In addition to these general recommendations, the Associations have the following specific recommendations. To that end, the Commissions should:

1. Establish a better framework to determine the proper characterization of innovative products. This should include processes for each Commission that may have a regulatory interest in a product to review such product before it is listed or cleared on a Commission-regulated exchange or central counterparty.
2. Provide clarity regarding a limited number of established products where the current framework leaves open significant interpretive gaps.

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[4] Further, as multiple new products, trading models, and market-access pathways emerge, we encourage the Commissions to evaluate these developments in a coordinated and forward-looking manner. Many new offerings cross regulatory perimeters and rely on fundamentally different market architectures. This introduces practical questions around liquidity provisioning, margin treatment, leverage limits, and participant readiness across the ecosystem. While supporting innovation, the Commissions should also seek to ensure that new offerings do not negatively impact core markets and maintain investor protections. The Associations note the remarks of Chairman Selig at the Innovation Advisory Committee Conference on August 20, 2026, where he previewed forthcoming proposed amendments to Parts 38 and 40 that would, among other things, establish clear expectations for product governance and consumer protection requirements—developments that further highlight the need for careful consideration of how characterization decisions interact with the broader regulatory framework applicable to these products. CFTC, "Remarks at Innovation Advisory Committee Conference" (Aug. 20, 2026), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/opaselig10.

3. Harmonize rulemaking to the extent possible and appropriate to ensure product characterization does not lead to arbitrary and inconsistent regulatory results.
4. Adopt an alternative compliance framework that will allow market participants to meet the obligations of each Commission by complying with a single set of rules in limited circumstances, including but not limited to mixed swaps, in instances where a product presents ambiguity or the nature of the classification changes over time, and where transactions are offered as a package. This is based on the comprehensive regulatory regimes the Commissions have put in place that achieve comparable regulatory goals for swaps and security-based swaps.
5. Adopt a safe harbor from enforcement for market participants that make good faith efforts to characterize products.

In considering further guidance and rulemaking pursuant to the Joint RFC, the Associations note that Congress deliberately allocated jurisdiction over swaps to the CFTC, except where such swaps are security-based swaps or other securities, in which case jurisdiction has been allocated to the SEC. Consistent with this allocation, as a general matter, each product should be subject to rules and regulations that are appropriate for that product. Only a narrow category of products, such as mixed swaps and single stock futures, is subject to regulation by both Commissions, and the Associations encourage the Commissions to be mindful of this deliberate allocation of regulatory responsibility. [5]

I. Innovative Products

The Associations and their members appreciate the Commissions' dedication to fostering a regulatory environment that is both conducive to innovation and protective of market participants. Our comments in this section focus on event contracts and perpetual contracts, and we outline areas where the Commissions should provide additional clarity on the appropriate regulatory characterization for such products, as well as the regulatory framework, and in particular the protections that should be in place to enable continued growth and innovation for these products. Event contracts and perpetual contracts may also be components of an exchange-traded fund ("**ETF**"), in which case many of these same issues would be present. This letter also does not address ETFs with innovative product components, which are the subject of a separate SEC request for comment.[6]

a. Securities-Related Event Contracts

The Commissions have asked whether greater clarity is needed with respect to the characterization of event contracts.[7] We believe that it is, and, in particular, the Commissions should provide greater clarity about the regulatory classification, regulatory regime, and

[5] *See* 77 Fed. Reg. 48208, 48291 (Aug. 13, 2012) ("the Commissions believe that the scope of mixed swaps is, and is intended to be, narrow.")

[6] *See* SEC, Request for Comment on Novel ETFs, 91 Fed. Reg. 40647 (July 2, 2026). In particular, Question 5 of that request for comment asks commenters to consider similar market integrity and investor protection considerations to those discussed herein with respect to event contracts and perpetual contracts. In the context of perpetual contracts on equities the Commissions may wish in particular to consider whether and how such contracts should merit different regulation than ETFs on equities.

[7] *See, e.g.*, Joint RFC, Questions 1, 7, and 9.

compliance obligations that apply to event contracts that may touch on the regulatory interests of the SEC.[8] This includes event contracts that may be priced or whose pricing may be related to or may impact trading in a security or narrow-based security index ("**Securities-Related Event Contracts**").

Depending on the structure and the reference event, such an event contract may be one of a number of different product categories, such as an option subject to SEC jurisdiction, a swap subject to CFTC jurisdiction, or a security-based swap subject to SEC jurisdiction. Title VII ("**Title VII**") of the Dodd-Frank Wall Street Reform and Consumer Protection Act[9] ("**Dodd-Frank Act**") added Section 3(a)(68) of the Exchange Act, which defines "security-based swap," inter alia, as any agreement, contract, or transaction that is a swap (without regard to the "swap" definition's exclusion for security-based swaps) and is based on "the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in an index that is a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer" ("**SBS Event Contract Prong**"). Where a company-linked event contract references information that is published in the financial statements of an issuer, the Commissions should provide clarity in what circumstances such a contract would or would not be a security-based swap. Equally, they should provide a framework for determining what factors should be taken into account when determining in what circumstances a contract would "directly affect the financial condition or financial obligation" of an issuer, noting in each case that there is no materiality qualifier.

The Commissions should adopt objective criteria that market participants can use to determine whether an event contract is a swap or security-based swap.[10] In so doing, it is paramount that the regulatory framework applicable to Securities-Related Event Contracts does not disrupt or undermine the integrity of securities markets. This could occur, for example, if Securities-Related Event Contracts are not subject to a uniform surveillance regime with other trading venues that offer products related to the same issuer. The practical costs of a bifurcated

[8] Our comments do not address other event contracts that do not reasonably implicate the interests of both agencies. Event contracts that do not implicate securities-market concerns—such as contracts referencing weather events, commodity prices, or purely macroeconomic indicators—present no comparable ambiguity and should continue to be subject to CFTC jurisdiction, since the characteristics of those products are already clearly, and appropriately, addressed by the CFTC's own market-integrity, customer protection and surveillance tools and the Associations' members encourage the CFTC to continue the development of its regulatory framework. We do, however, believe that in defining permissible types of event contracts the Commissions must begin with a categorical exclusion of contracts that are readily susceptible to fraud and manipulation. We note that the CFTC has made this a focus of its efforts recently and we encourage it to continue to do so. *See* CFTC "Advisory on Enforcement Authority over Event Contracts" (Feb. 25, 2026), available at https://www.cftc.gov/PressRoom/PressReleases/9185-26.

[9] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.

[10] Because certain event contracts inevitably implicate the same regulatory issues as the traditional securities markets and may directly impact those markets, characterization should be driven by those issues. Characterization implicates the primary regulatory regime that will apply to a product, and in some cases that regime may carry practical consequences unrelated to the underlying characterization question—for example, security-based swaps are not currently offered to retail customers (i.e., persons who are not eligible contract participants) in any practical manner, regardless of what safeguards, such as listing or clearing on a regulated market-structure provider, might otherwise be available to address investor-protection concerns. SIFMA raised this concern in the context of the original advanced notice of proposed rulemaking and request for comments on prediction markets that resulted in the Joint RFC. *See* SIFMA, Letter Responding to CFTC Prediction Markets ANPRM (Apr. 30, 2026), at 4.

approach are illustrated by considerations already identified in the existing regulatory record.[11] Where trading in a company-linked event contract could be used to exploit or signal the misuse of material non-public information about an issuer, effective surveillance requires visibility into both the event-contract market and the related securities market, and a regulator with jurisdiction over only one of those markets may be unable to detect or address cross-market manipulation or information leakage on its own. Ensuring that such contracts are subject to a single, comprehensive surveillance framework would allow innovation and allow such event contracts to develop in a manner that provides greater price transparency and additional pricing inputs, while also ensuring that they do not disrupt the integrity of existing securities markets. In general, to the extent possible, a single agency administering a unified surveillance approach can more effectively monitor related markets for abusive or manipulative trading patterns. For securities markets, this is currently done by the SEC, FINRA, and self-regulatory organizations involved in securities trading. For Securities-Related Event Contracts, the Commissions should ensure that these organizations are able to incorporate such contracts into their existing surveillance programs. As a next step, pursuant to the Joint RFC, the Commissions should work together to define objective criteria to determine whether a given event contract is a Securities-Related Event Contract, i.e., if such contract may be priced or whose pricing may be related to or may impact trading in securities, and then, if so, ensure that there is an adequate and robust surveillance program that forms part of an appropriate regulatory framework, in place.

Securities-Related Event Contracts may also give rise to issues regarding price formation, capital formation, and market integrity in the securities markets if price discovery related to securities were to occur outside of the regulatory framework of the Federal securities laws. This could include, for example, event contracts where settlement is related to an event that references company-specific information, including, for example, contracts settling on corporate events such as mergers, acquisitions, earnings announcements, initial public offerings, or other developments. The Commissions should recognize that an integrated securities-market regulatory framework—rather than an approach bifurcated across regulators—may be best suited to safeguarding these objectives.[12] Oversight over such event contracts can be addressed most effectively and efficiently by a single regulator, namely the SEC.[13]

Finally, further clarifying the appropriate regulatory classification of Securities-Related Event Contracts and the attendant regulatory obligations will facilitate greater liquidity and market participation. The Associations' member firms operate under comprehensive regulatory regimes

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[11] *See* Joint RFC, Question 15 ("Under an alternative compliance regime, how could the Commissions best deter market manipulation and trading on material non-public information? What steps should the agencies take to ensure robust surveillance and oversight of cross-market activities?"). *See also* 17 C.F.R. § 180.1 (CFTC's anti-manipulation and anti-fraud rule for swaps, modeled on SEC Rule 10b-5); 17 C.F.R. § 240.9j-1 (SEC's parallel anti-fraud rule applicable to security-based swaps).

[12] This recommendation is directly responsive to Question 1 of the Joint RFC, which solicits comment on what types of event contracts "may touch on the regulatory interests of both Commissions" and whether "additional clarification [is] necessary to provide principled, objective criteria for distinguishing between swaps, mixed swaps, [security-based swap], or other securities or instruments that are excluded from the definition of 'swap.'" *See* Joint RFC, Question 1.

[13] Regardless of which regulator is primarily responsible for such contracts, the Commissions should ensure event contracts benefit from a robust cross-jurisdictional portfolio margining framework, and we appreciate the attention the Commissions are giving this issue. *See* SIFMA's and ISDA's responses to the Joint Request for Comment on Further Implementation of Portfolio Margining and Cross-Margining of Securities and Derivatives for discussions of the benefits of portfolio margining and cross-margining across swaps and security-based swaps.

that depend on well-defined product categorizations, and legal certainty regarding jurisdictional boundaries is a prerequisite for the Associations' members' direct engagement in these markets.

1. The Commissions Should Ensure that any Further Clarity Regarding Innovative Products Does Not Disrupt Trading in Existing, Well-Functioning Markets

The Commissions have asked about the characteristics that distinguish event contracts from other products and from options on securities, including binary options that already trade as standardized options on national securities exchanges.[14] The definitional clarity the Commissions provide for event contracts should be specific to innovative products that are either not yet traded or traded in nascent markets. In providing such clarity, the Commissions should continue to leverage the existing processes for public notice and comment, where appropriate, as part of bringing new or novel products to market.[15] Finally, the Commissions' guidance related to event contracts should not recharacterize existing, well-established products, including certain security options or credit default swaps.

- Options that Reference Price, Dividends, or Volatility of a Single Security or a Group or Index of Securities: The Associations note that binary options referencing individual equity securities as well as binary options referencing a group or index of securities, have long traded as standardized options on registered national securities exchanges, subject to the full panoply of securities-law protections.[16] Section 1a(47)(B) of the Commodity Exchange Act ("**CEA**") is clear in that it excludes certain instruments from the definition of swap (including security based swap). Specifically, Section 1a(47)(B) of the CEA contains, among others, exclusions for any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof, that is subject to the Securities Act of 1933 ("**Securities Act**") and the Securities Exchange Act of 1934 ("**Exchange Act**").

- Credit Default Swaps: The Associations further note that the Commissions have provided adequate guidance and the market and regulatory characterization and treatment of credit default swaps is mature and clear with no further guidance being needed. The Commissions focus in that regard should be to ensure that the status quo is not disturbed or disrupted.[17]

[14] Joint RFC, Questions 7 and 8.

[15] On June 30, 2026 Cboe Exchange, Inc. filed with the SEC proposed rule change to permit the listing of binary options overlaying key performance indicators reported by certain issues of stock, including detailed information regarding the proposed rule changes, pursuant to which interested persons may submit written comments. The commission will be required to approve or disapprove the proposed rule changes before the exchange can actively list the product for trading. This process will allow for consideration of the complex issues raised by these products before they are traded. In this regard, the Associations welcome the CFTC's recognition of the need for enhanced consumer protections, as previewed by Chairman Selig in his remarks at the Innovation Advisory Committee Conference on August 20, 2026, and look forward to engaging constructively with the forthcoming proposed amendments to Parts 38 and 40, including the anticipated provisions on product governance, market design, and incentive programs.

[16] *See, e.g.*, CBOE, Binary Options on Individual Stocks and ETFs (listing standardized binary options on national securities exchanges); *see also* Product Definitions Adopting Release, 77 Fed. Reg. at 48234–35 (discussing treatment of binary options on securities).

[17] *See* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48208 (Aug. 13, 2012) ("Product Definitions Adopting Release"), § II.A.2 ("The Term 'Narrow-Based Security Index' in the Security-Based Swap Definition" and subsection "Narrow-Based Security Index Criteria for Index Credit Default Swaps") (addressing the characterization of single-

b. Perpetual Contracts

The Commissions have asked whether there is a need for greater clarity regarding futures, including security futures, in the context of innovative markets, and specifically whether a cash-settled "perpetual" contract referencing an equity security could be treated as a security future.[18] We believe such clarity is warranted. Perpetual contracts are a novel and rapidly evolving product category that originally became prevalent in the context of digital assets but were generally not available to U.S. market participants. The CFTC recently approved certain perpetual contracts on digital commodities to be offered in the U.S. as futures contracts.[19] Their characterization as such paved the way for perpetual contracts listed on a foreign board of trade to be offered to U.S. customers as foreign futures pursuant to an interpretation and no-action letter.[20] Perpetual contracts on other asset classes are currently offered only outside of the United States but certain trading venues in the United States are now exploring offering perpetual contracts on additional asset classes.

The Associations and their members agree with the CFTC that perpetual contracts referencing asset classes beyond digital commodities raise "distinct considerations meriting independent analysis,"[21] regardless of where they are listed. We also agree with the CFTC's suggestion that market participants seeking to offer perpetual contracts on assets other than digital commodities submit such products for affirmative approval, rather than offering such products through self-certification.[22] The Associations encourage the Commissions to codify such suggestion into a more concrete framework and respectfully offer the following observations and recommendations to assist the Commissions in developing an appropriately tailored framework for the regulation of perpetual contracts generally, and of perpetual contracts on equity[23] and non-digital commodity underliers in particular.

1. Features of Perpetual Contracts

Perpetual contracts have unique characteristics and trading conventions that the Commissions should take into consideration when determining the appropriate regulatory

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name and index credit default swaps as security-based swaps or swaps depending on whether the referenced index is narrow-based or broad-based); *see also* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29818 (May 23, 2011) ("Product Definitions Proposing Release") (proposing the same framework, including with respect to debt-security-referencing instruments such as constant-maturity credit default swaps).

[18] Joint RFC, Question 11.

[19] *See* Policy Statement Concerning the Listing of Perpetual Contracts, 91 Fed. Reg. 33160 (June 3, 2026); Order Approving KalshiEX LLC BTCPERP Futures Contract (May 29, 2026); CFTC Letter No. 26-17, Staff Interpretation Regarding the Categorization of Deribit Perpetuals as Foreign Futures and No-Action Position Regarding Digital Commodities and Payment Stablecoins Deposited to Margin Customer Positions with a Foreign Broker Under a Right of Re-Use (May 29, 2026).

[20] *See* CFTC Letter No. 26-17, Staff Interpretation Regarding the Categorization of Deribit Perpetuals as Foreign Futures and No-Action Position Regarding Digital Commodities and Payment Stablecoins Deposited to Margin Customer Positions with a Foreign Broker Under a Right of Re-Use (May 29, 2026).

[21] *See* Request for Comment on the Extension of Standard Futures Contracts to 24/7 Trading and on Perpetual Contracts Referencing Physically Delivered or Storable Energy Commodities, 91 Fed. Reg. 38334 (June 25, 2026).

[22] *See* Policy Statement Concerning the Listing of Perpetual Contracts, 91 Fed. Reg. 33160, 33161-2 (June 3, 2026).

[23] Our comments focus on perpetual contracts on equities because the Commissions' questions focus solely on equities. Note, however, that perpetual contracts that reference other types of securities also raise novel issues that the Commissions should consider. *See* Joint RFC, Question 11.

compliance and risk management controls that must be in place to enable their trading. Perpetual contracts are derivative instruments that offer leveraged exposure to a reference underlier. Market participants are able to take the long or short side of the contract.[24] Perpetual contracts have a pricing mechanism that differs from that used for traditional futures contracts: perpetual contracts do not have a settlement date, and instead use a funding rate mechanism to incentivize convergence between the spot price of the underlier and the perpetual contract price. The price of the perpetual contract is not based on a future price of the underlier at any particular time or on a particular day. Rather, perpetual contracts are designed to track the price of the underlier and employ a periodic funding rate mechanism that is intended to maintain price convergence between the perpetual contract and the underlying cash price[25] on a perpetual basis. Pursuant to this funding rate mechanism, "[w]hen a perpetual contract trades above the spot price, the traders with long positions make payments while the traders with short positions receive payments; and vice versa," incentivizing market participants to engage in arbitrage trades which would converge the perpetual price back to parity with the spot price.[26] Since perpetual contracts do not have a fixed settlement date, there are not multiple settlement dates that can be referenced to form a forward curve in connection with such contracts as there is in traditional futures markets. In the context of digital assets, perpetual contracts allow participants to obtain long and short exposure to such digital assets without needing to "roll contracts regularly [or] trade with a much smaller basis to the spot market," and "allow liquidity to be concentrated in a single contract rather than fragmented across multiple expiration dates."[27] These may be features particularly relevant to retail investors looking for exposure to those digital assets.

Consistent with many perpetual contracts, the perpetual contracts that have been approved by the CFTC trade on a 24/7 basis. In connection with the approval of these products, several divisions of the CFTC issued a staff advisory setting out their regulatory expectations for designated contract markets ("**DCMs**"), swap execution facilities, derivatives clearing organizations ("**DCOs**"), and futures commission merchants ("**FCMs**") that intend to offer or facilitate 24/7 trading, clearing, or related operations.[28] While the advisory relates to 24/7 trading, clearing, and related operations for all asset classes, the advisory notes that derivatives referencing crypto assets "may be well-suited for 24/7 trading due to their digital infrastructure and global reach, while other derivatives markets, may be less suited for 24/7 trading due to their unique customer bases, regional nature, and the specialized trading and hedging practices in those markets."[29]

2. <u>Recommendations in Light of the Particular Features of Perpetual Contracts</u>

As described above, perpetual contracts pose novel considerations. The Commissions should provide greater clarity about the conditions that should be met to approve the trading of perpetual contracts that reference underliers other than digital commodities. We recommend addressing, at

[24] *See* Order Approving KalshiEX LLC BTCPERP Futures Contract, at 7 (May 29, 2026).
[25] *Id.*
[26] Policy Statement Concerning the Listing of Perpetual Contracts, 91 Fed. Reg. 33160, 33161 (June 3, 2026).
[27] KalshiEX LLC, Voluntary Submission of New Products for Commission Review and Approval Regarding the Initial Listing of the BTCPERP Futures Contract (May 28, 2026); *See also* Coinbase Derivatives, LLC, Comment Letter to the CFTC on Request for Comment on the Trading and Clearing of "Perpetual" Style Derivatives (May 21, 2025).
[28] CFTC Letter No. 26-16, Staff Advisory for Extending Trading and/or Clearing Operations to a 24 hours-a-day, 7 days-a-week Basis (May 29, 2026).
[29] *Id.* at 2.

a minimum, the following considerations to ensure that such decisions address the particularities of the market for the relevant reference underlier.

- The Commissions should consider both the reliability of the spot price for particular perpetual contract underliers and whether the funding rate mechanism will effectively ensure that the difference between the perpetual contract price and the spot price is driven by appropriate factors. This should include an assessment of whether perpetual contract markets are sufficiently liquid for the funding rate mechanism to adequately align the spot and perpetual contract prices. The Commissions should consider the unique features of perpetual contracts when evaluating the effectiveness of the funding rate mechanism for a particular contract, including whether the absence of traditional futures pricing factors (such as storage and other costs associated with holding the underlier) may give rise to distortions in the perpetual contract price that do not arise in connection with traditional futures contracts.
- The Commissions should ensure that markets in perpetual contracts do not impair liquidity and supply and demand in the underlying asset or the capital formation objectives of the equity markets.
- The Commissions should ensure that perpetual contracts will not create opportunities for market manipulation.[30] In addition, the Commissions should minimize the opportunities for regulatory arbitrage between the regulatory framework governing perpetual contracts and other frameworks (for example, between the differing cross-border frameworks that apply with respect to the futures and securities markets).
- The Commissions should evaluate the impact of 24/7 trading and risk management and auto-liquidation on those looking to the underlying commodity markets, including energy and agricultural commodities, for hedges. The Commissions should ensure that the increase in human and technological resource requirements that would result if 24/7 trading is permitted does not impair the ability of smaller market participants and intermediaries to participate in the underlying markets.
- The Commissions should ensure that appropriate risk management measures are in place to enable extended hours trading, to the extent this is a feature of perpetual contracts. Those seeking to offer perpetual contracts should develop and describe the risk management measures they will use and how those measures will align with the trading hours of the contracts. This includes, for example, how positions will be risk managed where trading happens on a 24/7 basis without corresponding 24/7 collateral movement, and whether features such as auto-liquidation or margin calls will be used and the extent to which such features would be appropriate in connection with particular underliers.
- In addition, the Associations note that the customer protection regimes established under the Commissions' regulations provide for varying degrees of loss mutualization at both the clearing house and clearing member level. The Commissions should take these loss mutualization considerations into account when determining the appropriate risk management framework for perpetual contracts, and should require that those seeking to offer perpetual contracts describe how the clearing of perpetual contracts may expose

[30] *See* Section I.a.1 above regarding the importance of a single sophisticated surveillance framework developed by the SEC in the context of equity markets.

market participants to risks associated with such products even though such participants may not directly enter into perpetual contracts themselves.[31]

3. Considerations that the Commissions Should Take into Account in Determining Whether to Treat Perpetual Contracts Referencing Equity Securities as Security Futures

In response to the Commissions' question as to whether "there [is] a need for greater clarity regarding whether a cash-settled 'perpetual' contract referencing an equity security could be treated as a security future,"[32] the Associations submit that the Commissions should each consider carefully whether and under what conditions the treatment of equity perpetual contracts as security futures would be appropriate. The Associations note that, pursuant to the existing framework governing security futures under CFTC and SEC regulations, security futures may be listed on a DCM that is notice-registered with the SEC as a national securities exchange, but subject to ongoing primary regulation by the CFTC, and may be cleared by an FCM that is notice-registered with the SEC as a broker-dealer but subject to primary regulation by the CFTC.[33]

When Congress established the framework for joint CFTC-SEC regulation of security futures under the Commodity Futures Modernization Act of 2000,[34] the unique features of perpetual contracts were not contemplated. Accordingly, the Commissions should consider those unique features de novo and tailor the regulatory treatment of perpetual contracts to those features in a way that adequately protects consumers and the market. Indeed, the CFTC has acknowledged that perpetual contracts "raise novel and complex questions relating to market structure, customer protection, resilience during periods of market stress, and consistency with the Core Principles applicable to registrants under the CEA."[35] The Associations respectfully suggest that the Commissions take the unique features of perpetual contracts described above, as well as the considerations set out below related to equity perpetual contracts in particular, into account in deciding whether perpetual contracts referencing equity securities should be treated as security futures or whether it would be more appropriate for such products to instead be subject solely to oversight by the SEC and subject to the SEC's comprehensive surveillance and customer protection regime. This is particularly relevant if trading in such products could affect equities markets, directly or indirectly.

The Associations' members urge the Commissions to keep the scope of products subject to regulation by both Commissions narrow and limited to the specific circumstances mandated by Congress. In the context of equity-linked products, members are particularly concerned that parallel regulation raises the risk of regulatory arbitrage and could give rise to a "regulatory race to the bottom" where the market trends to the regime that allows the fastest route to market but which may not offer either adequate market protections or adequate scope for full consideration of all relevant risks and benefits of the product.

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[31] For example, if an FCM that clears perpetual contracts at a DCO defaults, losses associated with the perpetual contract positions of that FCM may be allocated to other FCMs, even if such other FCMs are not themselves intermediating perpetual contract activity. The potential risks related to perpetual contracts are therefore not only relevant to those entering into or intermediating such contracts, but to market participants more generally.

[32] *See* Joint RFC, 91 Fed. Reg. at 37876, Question 11.

[33] *See* 17 C.F.R. Part 41; 7 U.S.C. § 7b-1; 7 U.S.C § 6f(a)(2); 15 U.S.C § 78f(g); 15 U.S.C. 78o(b)(11)(A); 17 C.F.R. § 240.6a-4.

[34] Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554.

[35] Policy Statement Concerning the Listing of Perpetual Contracts, 91 Fed. Reg. 33160, 33161 (June 3, 2026).

If equity perpetual contracts were to be made available as security futures, the Commissions should ensure that notice-registered national securities exchanges on which such products are traded have adequate risk management and surveillance capabilities tailored to the distinct features of perpetual contracts. As mentioned above, perpetual contracts make use of a funding rate mechanism that is based on intra-day changes in the price of the underlier and is not tied to the close-of-day trading price of the underlying asset as is common in other equity-linked products. The Commissions should ensure that such contracts can always maintain reliable and robust pricing, especially during extended hours when there is not trading on national securities exchanges or other venues. In addition, manipulative activity in equity perpetual contract markets could distort prices in related equity and options markets (and vice versa), and such activity may go undetected without coordinated oversight and surveillance across related markets. The Commissions should ensure that effective surveillance mechanisms and information sharing arrangements are in place to provide coordinated oversight of all products that could affect price formation in the equity markets under a single regulatory authority.

Price distortions in the equity markets resulting from a failure of the funding rate mechanism to maintain price convergence with the underlying spot price (whether due to manipulation or a flaw in the mechanism itself) could affect not only equities trading, but also capital raises by issuers, thereby impairing the ability of the equity markets to effectively allocate capital to businesses. The availability of perpetual contracts on equity underliers could also sap liquidity from traditional equity markets, which could further impact the ability of issuers to raise capital. The Commissions should take these potential impacts on the wider equity markets into account when considering the appropriate regulatory framework that should apply to equity perpetual contracts.

The Commissions should also consider how they will ensure that the regulatory framework governing equity perpetual contracts affords adequate investor protections, and whether the protections under the existing security futures regime would be adequate. To the extent that equity perpetual contracts have characteristics that are different than traditional security futures, the Commissions would need to analyze what protections would be appropriate. Considering that equity perpetual contracts are designed to more closely track the spot price and are economically more similar to leveraged spot transactions, this may include ensuring parity with spot trading of equities.[36]

There are also credit exposure considerations relevant to equity perpetual contracts that are not relevant to the spot equity markets and are more similar to those present in the context of security-based swaps. A party to a perpetual contract is exposed to the credit risk of the counterparty (i.e., the clearing house) and is subject to margining requirements. The Commissions should ensure that equity perpetual contracts are treated in a manner that takes these features into account.

4. <u>Perpetual Contracts Referencing Commodities Raise Concerns Around Price Formation and the Ability of Farmers and Other Market Participants to Hedge</u>

Many of the same considerations relevant to equity perpetual contracts are also relevant to perpetual contracts on commodity underliers, though there are also unique considerations relevant to such contracts. In the context of commodities, the Commissions should ensure that there are

[36] *See, e.g.,* 17 C.F.R. § 242.605; 17 C.F.R. § 242.610; 17 C.F.R. § 240.15c3-5.

reliable spot prices for particular commodity underliers prior to approving perpetual contracts on such underliers. For certain commodities, price formation may not occur on highly liquid markets, but rather in much more thinly traded markets with more limited oversight. Manipulation or volatility in these underlying markets could impact the perpetual contract price (and vice versa), which could then lead to broader price disruptions in related commodity markets generally.

In addition, certain commodity markets are physically settled markets with unique pricing inputs (including freight costs, delivery locations, and warehousing pricing and access) that may not be sufficiently captured by spot market indicators that market participants can use to price perpetual contracts. To the extent that perpetual contracts are priced by reference to spot market indicators that do not adequately take these factors into account, then (to the extent perpetual contract markets lead price formation) the introduction of such contracts could give rise to pricing distortions in commodity markets generally. Prior to approving a perpetual contract on a particular commodity underlier, the CFTC should scrutinize the reference price mechanism for such perpetual contracts and ensure these risks are mitigated.

Traditional commodity derivatives markets are hedging markets, and wider pricing disruptions caused by distortions in perpetual contract markets could impair the ability of farmers, corporates, and other entities to hedge their activities. Such price disruptions could, therefore, have a serious impact on the real economy. In addition, in the case of energy or other commodity-linked perpetual contracts, end users may require pricing that distinguishes between delivery times for hedging purposes (linked to production cycles, farming seasons, or seasonal demand), whereas perpetual contracts do not have a fixed settlement date, and therefore do not offer multiple settlement dates forming a forward curve in connection with such contracts. In considering perpetual contracts on these commodities, the Commissions should ensure that these forward looking hedging tools are not disrupted by the introduction of perpetual contracts. Accordingly, the Commissions should consider the unique characteristics of such perpetual contracts when determining the relevant regulatory considerations, which may differ from traditional commodity derivatives.

Certain of the features of perpetual contracts described above may make perpetual contracts ill-suited for use by hedgers. In particular, perpetual contracts may be ill-suited for hedging purposes due to: (1) the inability to hedge a future exposure tied to a specific point in time, since as described above perpetual contracts do not have a specific settlement date or multiple settlement dates that can be referenced to form a forward curve in connection with such contracts, and (2) the potential for a perpetual contract to be auto-liquidated at a time when the hedger is unable to post additional margin. For instance, a wheat farmer may want to enter into a hedging position with a settlement date tied to the wheat harvest season, but would not be able to use perpetual contracts for that purpose. In addition, if a wheat farmer is hedging their farming activity with perpetual contracts on wheat, and those contracts are automatically terminated over the weekend when the farmer is unable to post additional margin, the farmer could become unhedged and be forced to try to re-establish a hedging position to avoid losing their hedge for the season. This would likely have a far greater real-world impact than the termination of the bitcoin perpetual contracts of someone speculating on the price of bitcoin. For example, if perpetual markets disrupt spot or other derivative markets, it could impair the ability of farmers to effectively hedge, which could have significant downstream effects in the economy and to end-users such as American families. Given these limitations, the Commissions should consider the purpose of perpetual contracts on commodities especially if they serve a limited hedging function. The Commissions should be mindful of ensuring that perpetuals do not undermine the integrity of prices in commodity markets that are used for hedging, including related traditional futures.

Market participants also need to account for how perpetual contracts will be risk managed based on the trading hours of such contracts. As noted above, perpetual contracts on certain reference underliers may not be appropriate for 24/7 trading. The Commissions should scrutinize whether the 24/7 trading of perpetual contracts may pose particular challenges to physical commodity markets. In addition, as the CFTC has acknowledged in the context of energy commodity futures, 24/7 trading raises questions as to whether "prices formed during overnight, weekend, and holiday periods are sufficiently liquid and reliable to resist manipulation where the underlying physical market is assessed only during defined windows."[37] If perpetual contracts on certain reference underliers are not appropriate for 24/7 trading, market participants should explain what the appropriate trading times are and how pricing disruptions can be mitigated. The Commissions should take these considerations and open questions into account when determining whether to approve perpetual contracts on particular commodity underliers or engaging in any relevant rulemaking.

II. Established Products

The Associations and their members appreciate the effort and focus of the Commissions in seeking input on potential ways to draw clearer regulatory lines and implement principled, objective criteria in continuing to develop the regulatory frameworks each Commission oversees. We are particularly grateful that the Commissions recognize the accumulated experience of market participants and their interest in evolving market practice. It is precisely this accumulated experience that leads the Associations and their members to believe that the Commissions should exercise caution in issuing interpretations or taking other regulatory actions that would affect well-established market practice that has developed since the enactment of Title VII and the release of the Commissions' rulemaking further clarifying the product definitions (the "**2012 Product Definitions**").[38] The Associations anticipate that disrupting such well-established market practice would have significant adverse effects on the market and cause uncertainty and confusion in the derivatives markets. Market participants have invested significant resources to develop robust regulatory compliance frameworks that reflect their accumulated experience, guidance from the Commissions' staff and the needs and expectations of their customers.

In general, the Associations do not believe there are many regulatory gaps where greater clarity would enhance efficient markets or lawful innovation. The Commissions have provided significant guidance in relation to complicated products such as credit default swaps and market practice in applying such guidance has, by necessity, developed and evolved in relation to other products identified by the Commissions in the Joint RFC, such as structured notes. The Joint RFC does reference a number of products that have raised particular characterization challenges, for example, those with index underliers, but market participants have generally sought to deploy more

[37] In the Matter of the 10-Barrel WTI Crude Oil futures contract self-certified by the New York Mercantile Exchange, Inc. under Commission Regulation 40.2, Order Instituting Proceedings and Staying the Listing of the Contract Under Commission Regulation 40.2(c), at 4 (July 9, 2026) (citing Request for Comment on the Extension of Standard Futures Contracts to 24/7 Trading and on Perpetual Contracts Referencing Physically Delivered or Storable Energy Commodities, 91 Fed. Reg. 38334, 38335-38 (June 25, 2026)).
[38] *See* Product Definitions Adopting Release.

general regulatory guidance and their collective experience to undertake the often fact-specific characterization analysis required. The efficiencies of the market as well as its integrity and lawful innovation would not be enhanced by more detailed or prescriptive guidance or clarity that, if not carefully calibrated, could do more harm than good and would, in any event, be unlikely to assist in answering the fact-specific, complex questions that arise as markets and products develop.

Further, market participants have invested significant resources in developing the compliance infrastructure, documentation practices, legal analyses, and operational systems that support their current activities under the existing framework. Significant changes to the regulatory framework, if not carefully calibrated with a goal of harmonization and minimizing disruption to well-established practices, could risk imposing great costs to market participants who may need to overhaul their compliance, operational, and documentation practices and creating friction, rather than efficiency, in the market in general. Such costs would be borne not only by dealers and intermediaries but also by end users, including corporate hedgers, asset managers, and other market participants who rely on the availability of well-understood, efficiently-priced risk-management tools.

For this reason, other than the limited circumstances set out below, for many of the specific topics raised in the Joint RFC, we do not believe that the market is in need of, or would benefit from, further clarity from the Commissions.[39] The existing definitional framework, as understood and applied by market participants, has achieved a substantial degree of stability and predictability, including through the COVID-19 pandemic and the 2023 regional bank crisis, where the CFTC provided ad hoc guidance and support on unanticipated and unprecedented matters of regulatory compliance.[40] While additional clarity is generally not required for these products within the Title VII framework at this time, the Associations encourage the Commissions to develop principled, objective criteria that would form the basis of a narrow and carefully tailored safe harbor from enforcement for market participants that apply regulatory guidance and market experience to their analysis of the Commissions' rulemaking in characterizing innovative products and structures within the Title VII framework.

More generally, the Associations request that the Commissions take a measured approach in seeking to improve their regulatory framework over swaps and security-based swaps in a manner that preserves the existing framework to the extent that it is functioning well, while focusing on harmonization of their regulations and related application where warranted and providing further clarity only where it is actually needed. With that principle in mind, the Associations have identified the following discrete areas in which the Commissions could take certain actions to increase market efficiency and reduce unnecessary compliance burdens at negligible regulatory cost by (i) providing additional clarity relating to specific products identified by the Associations' members, (ii) taking targeted actions to harmonize the Commissions' regulations and enhance the alternative compliance framework, as discussed in Section III, and (iii) developing a framework for a safe harbor from enforcement, including where the Commissions

[39] Topics we do not believe would benefit from greater clarity include, without limitation, narrow- and broad-based security indices, future delivery, and mixed options. *See e.g.* Joint RFC, Questions 5, 8, 10, and 11.
[40] *See* CFTC, CFTC Statement on Swaps Rules Implicated in Recent Bank Failures (Mar. 16, 2023), available at https://www.cftc.gov/PressRoom/SpeechesTestimony/commissionstatement031623.

do make changes to the regulatory framework or provide interpretive clarity to market participants as discussed in Section IV.

In response to Question 3 of the Joint RFC, which asks whether there is a need for greater clarity regarding the definitional lines between swaps, security-based swaps, and mixed swaps,[41] the Associations make the following requests for clarity on the Commissions' prior interpretations:[42]

1. Financial Guaranty

In the 2012 Product Definitions, the Commissions determined that state or Federally regulated insurance products, including financial guaranty policies, that are provided by persons that are subject to state or Federal insurance supervision that otherwise could fall within the definitions should not be considered swaps or security-based swaps so long as they satisfy certain requirements (the "**Insurance Safe Harbor**").[43]

However, there exists a class of financial guaranty products that are bona fide financial guarantees in substance but that do not satisfy the Insurance Safe Harbor (because, for example, the provider is not subject to state or Federal insurance supervision). Under the current framework, these products risk being classified as swaps or security-based swaps despite the fact that they are, in economic substance, identical to the financial guaranty policies exempted from the swap and security-based swap definitions.

We respectfully submit that the Commissions clarify that a financial guaranty is not a swap or security-based swap, regardless of whether it is covered by the Insurance Safe Harbor.

When adopting the Insurance Safe Harbor, the Commissions recognized that financial guaranty insurance has "certain key characteristics that distinguish [it] from swaps and security-based swaps."[44] For example, under a financial guaranty policy, the insurer typically is required to make timely payment of any shortfalls in the payment of scheduled interest to the holders of the underlying guaranteed obligation. Also, for particular bonds that are covered by a financial guaranty policy, the indenture, related documentation, and/or the financial guaranty policy will provide that a default in payment of principal or interest on the underlying bond will not result in acceleration of the obligation of the insurer to make payment of the full amount of principal on the underlying guaranteed obligation unless the insurer, in its sole discretion, opts to make payment of principal prior to the final scheduled maturity date of the underlying guaranteed obligation. Conversely, under a credit default swap, a protection seller frequently is required to make payment of the relevant settlement amount to the protection buyer upon demand by the protection buyer after any credit event involving the issuer or a qualifying debt instrument of the issuer, provided certain conditions are met.

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[41] Joint RFC, Question 3.

[42] While the Associations do not anticipate the need for clarity in other areas, this list should nevertheless be viewed as non-exhaustive. In particular, there are areas where prior guidance or FAQs (rather than rulemaking) has been confusing in the context of specific products.

[43] Product Definitions Adopting Release at 48215.

[44] Product Definitions Adopting Release at 48215.

These structural differences are, as described in the 2012 Product Definitions, features of the product, not of the provider. A bona fide financial guaranty exhibits similar structural characteristics, often driven by accounting or regulatory capital related drivers. The fundamental substance of a financial guaranty is that of a guarantee regardless of whether the product is entered into by an insurance company or a different type of financial institution. The Commissions, however, left a gap in their characterization of these products, explicitly carving out only those that meet the Insurance Safe Harbor requirements when the same considerations apply to financial guarantees that are not written in the insurance context. The Associations, therefore, respectfully submit that the Commissions should complete their rulemaking related to these types of guarantees and provide a safe harbor from characterization as a swap for financial guarantees commonly written by financial institutions, including those that are designed to achieve certain regulatory capital and accounting treatment.

Further, while there are unrelated reasons why financial guarantees are not commonly entered into by swap dealers that are U.S. persons, they are a common feature of the financial markets elsewhere, including in Europe. Swap dealers in those markets, and in particular affiliates or branches of U.S. swap dealers, require certainty regarding the characterization of financial guarantees as a financial product that is not a swap to ensure that they can transact and compete on a level playing field with competitors that do not have a U.S. nexus. The Associations' members understand that a financial guaranty that is a true credit-support obligation — as opposed to a contract that, notwithstanding its label, has the economic characteristics of a derivative instrument (such as a credit default swap) — is generally not treated as an OTC derivative under the European Market Infrastructure Regulation ("**EMIR**"). [45] For this reason, clarity on the characterization of financial guarantees would enhance the efficient operation of the market and in particular avoid regulatory uncertainty that disadvantages U.S.-based firms.[46]

2. <u>Guarantees of Swaps</u>

The Associations note that in the 2012 Product Definitions, the CFTC interpreted the term "swap" to include a guarantee of a swap, reasoning that a guarantee is "a term of that swap that affects the price or pricing attributes of that swap."[47] In the view the CFTC articulated at the time, when a swap counterparty provides a guarantee as credit support, "the market will not trade with that counterparty at the same price, on the same terms, or at all without the guarantee," and therefore the guarantee is an integral part of the swap itself.[48]

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[45] Under EMIR, "OTC derivative contracts" and "derivative contracts" are defined by reference to the MiFID II categories of financial instruments. See Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, Art. 1(1), Art. 2(5); see also Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("MiFID II"), Annex I, Section C(4)–(10) (listing the categories of derivative financial instruments, which do not include financial guarantees as an autonomous derivative type). The same analysis applies under UK EMIR, which retains the same MiFID-derived definitional structure. *See* The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2019 (SI 2019/335) (retaining EMIR in UK domestic law).

[46] Such clarity would provide similar efficiency benefits to those offered by our requested harmonization of the treatment of guarantees of swaps and security-based swaps. *See* Section III.a below.

[47] Product Definitions Adopting Release at 48225.

[48] Product Definitions Adopting Release at 48226.

The SEC, by contrast, took a different approach with respect to guarantees of security-based swaps. The SEC concluded that "a guarantee of an obligation under a security-based swap, including financial guaranty insurance of a security-based swap, is not a separate security-based swap," and the SEC declined to adopt an interpretation that a guarantee of a security-based swap is part of the security-based swap.[49] Instead, the SEC noted that a guarantee of a security-based swap is a security subject to Federal securities law regulation under the Securities Act, since a guarantee of a security is itself a "security."

This divergence has caused frictions in the market as market participants have had to develop separate compliance frameworks, policies, and procedures for what is essentially the same product. Further, we note that the CFTC expressed that it would provide further guidance on guarantees of swaps, but further guidance has not been issued.[50]

In light of the Commissions' request for comment on potential ways to draw clearer regulatory lines and provide additional clarity for products within the Title VII framework, we respectfully request that the CFTC revise its interpretation that a guarantee of a swap is an integral part of that swap and adopt an approach consistent with the SEC's treatment of guarantees of security-based swaps: namely, that a guarantee of a swap is neither a separate swap nor part of the underlying swap, but that information about guarantees should be reported in connection with the reporting of the underlying swap transaction.

This change would eliminate an unnecessary regulatory inconsistency between the Commissions, reduce compliance burdens without sacrificing transparency, and properly characterize guarantees as the credit support arrangements they are, rather than as derivatives positions.

The CFTC's own reasoning in the 2012 Product Definitions further supports this position. In adopting the Insurance Safe Harbor, the Commissions drew a careful structural distinction between financial guaranty insurance policies and credit default swaps, concluding that financial guaranty policies should not be regulated as swaps or security-based swaps. The Commissions observed that "[u]nder a financial guaranty policy, the insurer typically is required to make timely payment of any shortfalls in the payment of scheduled interest to the holders of the underlying guaranteed obligation" and that "a default in payment of principal or interest on the underlying bond will not result in acceleration of the obligation of the insurer to make payment of the full amount of principal on the underlying guaranteed obligation unless the insurer, in its sole discretion, opts to make payment of principal prior to the final scheduled maturity date."[51] By contrast, the Commissions noted that "[u]nder a [credit default swap], a protection seller frequently is required to make payment of the relevant settlement amount to the protection buyer upon demand by the protection buyer after any credit event involving the issuer."[52] It was precisely these structural differences in payment mechanics that led the Commissions to exclude financial guaranty insurance from the swap definition.

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[49] Product Definitions Adopting Release at 48227.
[50] Product Definitions Adopting Release at 48226 ("[i]n a separate release, the CFTC will address the practical implications of interpreting the term 'swap' to include guarantees of swaps").
[51] Product Definitions Adopting Release at 48215.
[52] Product Definitions Adopting Release at 48215.

A guarantee of a swap is structurally identical to a financial guaranty policy in the respects the Commissions identified: the guarantor's obligation is contingent, arises only upon default by the primary obligor, and does not require payment on demand following a defined credit event. Indeed, the CFTC itself defined a guarantee of a swap as "a collateral promise by a guarantor to answer for the debt or obligation of a counterparty obligor under a swap" — a characterization that is, in all material respects, identical to the economic structure of a financial guaranty policy that the Commissions determined should not be a swap. The CFTC should apply the same logic here and revise its interpretation accordingly.

3. Commodity Warrants

Title VII provides explicit exclusions from the definitions of "swap" and "security-based swap" for purchases and sales of securities on a fixed basis or contingent basis, as well as for sales of securities for deferred shipment or delivery that are intended to be physically settled. These exclusions reflect a fundamental structural principle of the Dodd-Frank Act: transactions that are purchases and sales of securities are not derivatives subject to Title VII.[53]

The Associations and their members respectfully submit that the Commissions clarify that warrants on commodities within the meaning of the CEA, including asset classes like exempt commodities as well as FX rates and interest rates, that are documented as securities and offered in compliance with applicable securities laws, are not swaps.

The fact that a security's return is linked to the value of a commodity does not alter its character as a security. A gold ETF, for example, is universally recognized as a security, notwithstanding that its value is determined entirely by reference to the price of gold. The same reasoning applies to other commodity-linked securities, such as warrants. Like a commodity ETF, a commodity warrant provides the purchaser with exposure to commodity price movements through a securitized instrument, albeit that such exposure has a return profile similar to that of an option on the referenced commodity. The purchaser purchases a security; the issuer's obligation is embodied in that security; and the instrument is offered pursuant to applicable securities regulations and trades as a security.

Classifying commodity-linked warrants as swaps subjects them to a regulatory framework designed for bilateral OTC derivatives that is inconsistent with how such warrants are bought and sold in the market and which creates impossible compliance obligations. For example, know-your-counterparty and suitability obligations applicable to swap dealers cannot be satisfied when the issuer does not know, and has no means of knowing, who will purchase the security in the open market.[54]

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[53] 7 U.S.C. § 1a(47)(B)(v), (vi).

[54] The CFTC has itself recognized the impossibility of complying with the full suite of swap regulations in respect of commodity warrants. *See* CFTC Letter No. 20-18 (May 18, 2020), available at https://www.cftc.gov/node/230901 ("The Divisions acknowledge that it may not be practicable, or in some cases possible (e.g., in the case of legal entity identifiers), for [Firm A] to fulfill its obligations under the Margin and Reporting Rules with respect to the FX/Commodity Warrants"). However, this CFTC Letter has created ambiguity by granting relief from those requirements rather than clarifying that these products, so long as they are securities subject to the securities laws, are not swaps. The Associations respectfully request that the Commissions fill this regulatory gap.

The result is a regulatory framework that does not fit the product, imposes compliance obligations that cannot be meaningfully discharged, and serves no regulatory purpose that is not already served by the applicable securities laws.

4. Compo Equity Swaps

In the 2012 Product Definitions, the Commissions drew a distinction between quanto and compo equity swaps for purposes of determining whether such transactions are security-based swaps or mixed swaps. The Commissions describe quanto equity swaps as swaps referencing foreign currency-denominated securities, where performance is tracked in foreign currency, and converted to the settlement currency based on the spot FX rate at inception of the transaction, and the 2012 Product Definitions treated quanto equity swaps as security-based swaps (and not mixed swaps) on the basis that any exchange rate or currency risk exposure incurred by the dealer arises from the instruments the dealer chooses to use to hedge the quanto equity swap, and is not a direct result of any expected payment obligations by either party under the quanto equity swap and is therefore "incidental."[55] Notably, in a footnote in connection with the Commissions' discussion of quanto equity swaps, the Commissions stated that a total return swap referencing a security denominated in a foreign currency, the payout of which is determined by (i) calculating the "total return" by comparing the initial price and final price in the foreign currency (without conversion to USD) and (ii) then converting the total return amount to USD at the then prevailing spot rate at maturity, is still a security-based swap rather than a mixed swap, despite not being a quanto swap.[56]

By contrast, in a compo equity swap, the parties assume exposure to, and the total return is calculated based on, both the performance of specified foreign stocks and the change in the relevant exchange rate.[57] A typical compo equity swap would be a total return swap referencing a security denominated in a foreign currency, the payout of which is determined by (i) converting both the initial and final prices to USD at the respective prevailing spot rates when the initial and final prices are determined, and (ii) calculating the "total return" comparing the initial price and final price in the converted USD amount. This is no different from an investor who converts USD to local currency to purchase a foreign stock and some time later, sells it, and exchanges the foreign currency proceeds for domestic currency at the spot price. No one would characterize the currency conversion in that scenario as a "swap." The compo equity swap replicates the same economic sequence, and the currency translation is a function of the underlying asset's denomination, not an independent derivative position. The Commissions treated compo equity swaps as mixed swaps, reasoning that because the counterparty initiating a transaction can choose to avoid currency exposure by entering into a quanto equity swap, the currency exposure obtained via a compo equity swap is not incidental to the equity exposure.[58]

[55] Product Definitions Adopting Release at 48264.
[56] Product Definitions Adopting Release at 48265, n. 650.
[57] Product Definitions Adopting Release at 48265.
[58] Product Definitions Adopting Release at 48265.

We respectfully request that the Commissions revise their interpretation of compo equity swaps on a single security or narrow-based security index such that they are treated as security-based swaps and not mixed swaps, consistent with the treatment of quanto equity swaps. [59]

The only meaningful difference between a quanto equity swap, on the one hand, and a typical compo equity swap as described above, on the other, is which party is allocated the risk of exchange rate movements over the life of the transaction. In the quanto swap, the dealer absorbs that risk; in the compo swap, the investor does. This allocation of currency risk between the parties should not be the determinative factor in whether a product falls within the jurisdiction of one Commission or both, and does not provide a principled basis for treating compo equity swaps as mixed swaps while treating quanto equity swaps as security-based swaps. Neither of these two swaps involves a party "hedging" its currency exposure through a derivative transaction or makes the party's currency exposure more than "incidental" to their exposure to the referenced security that is denominated in a foreign currency.

Products such as compo equity swaps, where there is not both an element that independently satisfies the statutory definition of "swap" and some element that independently satisfies the definition of "security-based swap," should not be characterized as mixed swaps. The FX exposure inherent in a compo equity swap does not independently satisfy the swap definition and compo equity swaps should be treated as security-based swaps and not mixed swaps.

III. Harmonization and Alternative Compliance

The Associations and their members appreciate the Commissions' attention to the regulatory frictions that arise from the dual regulatory regime for swaps and security-based swaps, on the one hand, and the statutory exclusion of certain economically similar transactions from that regime, on the other. We recognize that the Commissions have taken steps to reduce the burden on market participants that are subject to overlapping obligations under both the CFTC and SEC regimes, both by harmonizing regulations applicable to dual registrants and through application of alternative compliance mechanisms. We welcome additional efforts to alleviate the compliance costs and operational complexities of dual registration and dual regulation, particularly through further harmonization of SEC and CFTC requirements and development of a robust alternative compliance regime.

a. Harmonization

Where possible, harmonization of SEC and CFTC requirements is preferable to reliance on substituted or alternative compliance frameworks as harmonization avoids the need for layering dual compliance mechanisms over inconsistent requirements. A single, harmonized standard across swaps and security-based swaps is, in our view, a more efficient method to reduce compliance costs, provide market participants with greater regulatory certainty, and reduce incentives for regulatory arbitrage, except, of course, where the nature or structure of the product

[59] Addressing this may also require the Commissions to consider that not all market participants will be able to change their existing compliance framework which was built for the original characterization in the 2012 Product Definitions without significant expense and any operational or reporting breaks that result. For example, the Commissions may consider whether to give firms the option to continue operating under the current framework.

or the relevant market requires a different regulatory treatment. Further, even when rules themselves are harmonized, the Commissions must also ensure that related interpretations and compliance expectations are harmonized, including as related to delegated examinations to relevant self-regulatory organizations.

Accordingly, we have urged the Commissions to prioritize harmonization efforts wherever and whenever possible, and incorporate by reference several recent letters that highlight areas for harmonization that we think will have substantial benefit[60]:

1. SIFMA letters to the SEC on requirements to submit certain reports and notices.[61]
2. ISDA-SIFMA letter to the CFTC and SEC on Harmonization, which focuses on areas related to cross border, reporting and cross-margining, in addition to providing an appendix of further achievable and impactful examples.[62]
3. ISDA-SIFMA letter to the SEC commenting on dealer de minimis thresholds.[63]
4. ISDA-SIFMA and SIFMA AMG letters responding to the Commissions' joint request for comment regarding swap and security-based swap reporting.[64]

b. Alternative Compliance

The Associations and their members acknowledge that harmonization may not be feasible or, as stated above, desirable in all cases. In addition to harmonization efforts, the Commissions should adopt a robust alternative compliance framework that provides certainty for market participants during the full life of a transaction.

Questions 12 and 13 of the Joint RFC ask whether compliance with one Commission's regulatory framework could appropriately satisfy substantially similar requirements of the other Commission and under what circumstances the Commissions should pursue joint or coordinated approaches to facilitate alternative compliance.[65] Developing an alternative compliance framework is necessary and appropriate for market participants. The Commissions have both developed comprehensive regulatory regimes for swaps and security-based swaps that achieve similar goals and impose similar requirements. There are instances where market participants are not able to resolve genuine ambiguities about the characterization of a product between a swap and a security-based swap or the characterization changes during the life of the transaction due to changes in facts or changes in law. By way of illustration, market participants could enter into one or more transactions that reference a security index, where the index transitions from a narrow-

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[60] The issues raised in the letters highlighted are not an exhaustive list of opportunities for harmonization.

[61] See SIFMA Letter to SEC Division of Trading and Markets Director, Application of Structured Machine-Readable Language to Security-based Swap Dealer Chief Compliance Officer Annual Compliance Reports, (Feb. 17, 2026); Application of Structured Machine-Readable Language to Broker-Dealer and Security-based Swap Dealer Audited Annual Financial Reports and Broker-Dealer Risk Reports (17-H) (Mar. 13, 2026); and Amendments to Electronic Submission Requirements for Security-based Swap Dealer Valuation Dispute Reports and ANE Exception Notices (May 19, 2026).

[62] See ISDA and SIFMA Letter, CFTC-SEC Harmonization Letter to the Commissions (May 18, 2026).

[63] See ISDA and SIFMA Letter, Staff Report on the Definitions of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant"; Notice, Request for Comment (July 6, 2026).

[64] Letters to be submitted in response to Joint Request for Comment on Swap and Security-Based Swap Data Reporting, 91 Fed. Reg. 37877 (June 24, 2026).

[65] Joint RFC, Questions 12 and 13.

based security index to a broad-based security index (or vice versa) during the life of the transaction. Although a classification decision is done at the time the transaction is entered into, if the parties revisit the classification as a result of a relevant amendment or during the course of dealing, and such change in the index leads to a different classification result, the parties would currently have to change their approach to compliance based on a change of the applicable regulatory regime, even though the compliance is substantively the same and the risks to the parties or the market do not change.

Complying with multiple regimes and/or changing the compliance approach imposes costs, operational burden, and leads to potential disruption. Considering the largely overlapping regulatory goals and requirements, these costs derive from regulatory differences but not practical or risk-based ones and could be avoided with a robust alternative compliance regime. In addition, there may be other circumstances where, due to a particular product structure or market practice (including where package transactions are implemented), an alternative compliance regime may be warranted.[66] We urge the Commissions to develop and propose a regime that provides clarity for when market participants, in the face of ambiguity, can elect the regime that is appropriate for the given circumstance and provides clarity that such regime can be followed consistently notwithstanding changes to the transaction throughout its life.

Alternative compliance is also appropriate in the narrower case of mixed swaps. The Commissions should permit counterparties to a mixed swap to comply solely with either CFTC or SEC requirements with respect to such mixed swap, consistent with their internal risk management and supervision requirements.

The Associations look forward to working with the Commissions on such a regime and we view it as an important regulatory tool that should be implemented.

IV. General Relief and Safe Harbor

As noted above, the complexity and evolving nature of the regulatory framework applicable to both innovative and established products underscores the need for the Commissions to develop robust transitional frameworks and safe harbors that protect market participants from undue regulatory risk and exposure to private causes of action as these frameworks continue to evolve. The Commissions' decision to seek input on the need for further definitional clarity through the Joint RFC itself demonstrates the complexity of the existing statutory and regulatory provisions and the uncertainty surrounding how certain products fit within them. The Associations' members have also identified that market practice based on good faith analysis of that regulatory regime has developed in over a decade.

Where there exists genuine ambiguity in the proper characterization of a product under the current rules, enforcement should not be the first tool the Commissions reach for when they disagree with a market participant's characterization decision. A market participant who has engaged in good faith should be afforded certain protections from enforcement actions by the

[66] For example, in seeking permission to list Bitcoin Index Options, Nasdaq claimed that market participants would benefit from the ability to carry the proposed index options and Spot Bitcoin ETPs in the same account subject to the same margin regime. *See* 90 Fed. Reg. 46706, 46714 (Sep. 29, 2025).

Commissions, and, where possible, from private rights of action, and provided a reasonable opportunity to bring itself into compliance with the Commissions' characterization should such intervention be warranted and required based on the principles set out above. The Associations' members further believe that, particularly in the case of the proliferation of innovative products, the Commissions should develop a framework that allows products to be brought to market in a way that allows each Commission whose regulatory interest may be implicated by the product to consider its characterization and appropriate regulatory framework in line with Congressional intent.

In furtherance of enhancing regulatory effectiveness and market integrity, with the goal of reducing regulatory gaps, providing greater certainty regarding regulatory responsibility, and in support of efficient markets and lawful innovation, the Associations propose the following:

First, any remediation requirement resulting from new guidance or rulemaking should be strictly forward-looking. Market participants should not be required to recharacterize existing transactions, including following life-cycle events, or bring them into compliance with a new regulatory regime retroactively (including where this letter requests for further regulatory clarity and guidance in Section III of this letter). Where a market participant has entered into a transaction in reliance on a reasonable interpretation of the existing framework, the regulatory consequences of that transaction should be governed by the framework in effect at the time of execution, which should include a reasonable interpretation of the rules and regulatory framework at that time to reduce the risk of private causes of action (see third point below).

Second, the Commissions should provide an adequate conformance period and, where appropriate, a transition or wind-down process for market participants to adjust their systems, documentation, and reporting infrastructure to reflect any revised classifications, which should be limited. The operational burden of reclassifying products, including modifications to trade reporting, risk management, and registration analyses, is substantial, and market participants should be afforded sufficient time to implement any required changes in an orderly manner.

Third, and most critically, the Commissions should establish safe harbors and other appropriate protections for market participants who have made good faith compliance efforts under the existing framework. We expect these safe harbors to be narrowly tailored and designed to minimize evasion risk. For example, a safe harbor should only be available to the extent all relevant Commission guidance has been considered. A higher standard may be warranted where the characterization would mean the product is not subject to regulation by either Commission.[67] In addition, market intermediaries should be afforded protection where they have relied on the characterization adopted by a Commission-regulated exchange or clearing house. For example, where a DCM brings a product to market premised on the product's characterization as a swap, but the product is subsequently recharacterized by one or both Commissions, regulatory consequences of such recharacterization should not attach to any FCM or swap dealer that provided access to, or engaged in market making in, the product in reliance on the original characterization, notwithstanding that such FCM or swap dealer was not registered in any capacity

[67] *See* Section III.b above for a discussion on deploying alternative compliance options between the Commissions' swaps and security-based swaps regulatory regimes.

that would otherwise be applicable in relation to security-based swaps or other securities under the Federal securities laws.

Relatedly, the Associations' members want to ensure that going forward, the Commissions develop a framework that allows for, ex-ante clearer regulatory lines with respect to innovative products, without needing to rely on any safe harbors in the face of regulatory uncertainty. Many of the concerns relating to innovative products discussed above relate to products that have already been listed, often pursuant to a self-certification process, by CFTC-regulated DCMs. The Associations agree with the views expressed by the CFTC that certain products should not be brought to market pursuant to the self-certification process and should instead be subject to affirmative approval by the appropriate Commission or Commissions. In addition, the Commissions should consider the best framework for ensuring that, where the regulatory interests of both Commissions may be implicated (or, indeed, where the product may more properly fall within the jurisdiction of a Commission other than the one being approached), both Commissions can review and consider any such requests before an innovative product is brought to market. Further, the Associations submit that each Commission should, as part of their considerations and before certifying or admitting an innovative product, consider whether the other Commission's regulatory interests are implicated.

The Associations do not intend for such safe harbors to act as a blanket exemption; rather, they are intended to provide assurance that further definitional clarity, whether in connection with this Joint RFC or subsequent guidance or investigations by the Commissions, will not expose firms to enforcement action or private causes of action for conduct if such conduct was permitted at the time undertaken, or if there was reasonable ambiguity. The Associations believe such a framework would benefit all market participants and ensure that innovative products can develop in a safe and efficient manner, including in the bilateral, OTC markets.

Where jurisdictional classification is uncertain, a product may be retroactively recharacterized — exposing market participants to conduct and registration violations, claims of having dealt with ineligible counterparties, and private rights of action under the Federal securities laws or the CEA. As SIFMA observed in its April 30, 2026 letter responding to the CFTC's Advanced Notice of Proposed Rulemaking Relating to Prediction Markets,[68] "[m]arket participants may hesitate to engage where product classification is uncertain and may be subject to retroactive reinterpretation."[69] This risk is amplified for innovative products, where the route to market — whether through DCM self-certification or voluntary prior CFTC approval — turns on the product's initial characterization, underscoring the importance of jurisdictional clarity at the outset, as the CFTC's Division of Market Oversight's recent staff advisory on event contract self-certification confirms.[70] To further prevent the safe harbors from being abused, we would propose that any safe harbor available to a Commission-regulated exchange or clearing house (as opposed to market intermediaries) be conditioned on foregoing the use of the self-certification process and

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[68] *See* Prediction Markets, 91 Fed. Reg. 12516 (Mar. 16, 2026).

[69] SIFMA, Letter Responding to CFTC Prediction Markets ANPRM (Apr. 30, 2026), at 3.

[70] CFTC Staff Advisory, Division of Market Oversight, CFTC Letter No. 26-22 (July 24, 2026), available at: https://www.cftc.gov/PressRoom/PressReleases/9273-26.

instead require such a firm submit all new contracts to each Commission that may have a regulatory interest for pre-approval before listing.[71]

Finally, the Commissions should also consider, when granting exemptions or other relief from regulatory requirements for innovative products, whether such exemptions or relief should be applied regardless of the underlying product type and whether similar exemptions or relief would be warranted for established products and intermediaries to ensure consistent regulation and a level playing field across market participants.

* * *

The Associations and their members appreciate the Commissions' willingness to engage early and publicly on these topics and support an approach that allows innovation to develop within a clear, coordinated, and principles-based regulatory framework. As the Commissions evaluate potential next steps, we encourage a deliberate approach that builds on existing regulatory frameworks, avoids unnecessary market fragmentation or competitive disparities, and maintains robust market integrity and customer protection outcomes.

We look forward to continued dialogue and stand ready to provide additional perspective as the Commissions evaluate whether and how to proceed with further regulatory action.

Respectfully submitted,

Kyle Brandon
Managing Director, Head of Derivatives Policy
SIFMA

Christopher Young
Head of U.S. Public Policy
ISDA

William C. Thum
Managing Director and Associate General Counsel
SIFMA AMG

[71] As noted above, market intermediaries that provide access to, or are engaged in market making in, a product should still be entitled to rely on the characterization determination made by a Commission-regulated exchange or clearing house regardless of whether the exchange or clearing house used a self-certification process or sought Commission approval.

Annex

The Associations

1. SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

2. SIFMA's Asset Management Group (SIFMA AMG) brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms that manage more than 50% of global AUM. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

3. Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 79 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.