ALERT MEMORANDUM

Equity Perpetuals and KPI Contracts: Regulatory Approvals and Legal Challenge

November 5, 2026

On November 3, 2026, perpetual contracts on individual equity securities (Equity Perpetuals) became eligible to trade for the first time on CFTC-regulated exchanges, after filings by several designated contract markets (DCMs) to list them as security futures were approved by the CFTC.[1] The approvals follow related SEC notice registrations and rule filings, as well as parallel CFTC and SEC approvals of contracts tied to corporate key performance indicators (KPIs). On the same day that the Equity Perpetual contracts were approved, an industry group sued to vacate the approvals.

Background: Crypto Perpetual Contracts and Commission Statements on Equity Perpetuals

A perpetual contract is a cash-settled derivative with no expiration date that uses periodic funding payments to keep its price aligned with the underlier. (When a perpetual contract trades above the spot price, those with long positions make funding payments while those with short positions receive funding payments, and vice versa – for further information, please see our client alert regarding perpetual contracts here.) In May, the CFTC approved KalshiEX LLC's listing of perpetual contracts that reference the spot price of Bitcoin and other digital commodities with "deep, active, and continuous" spot markets as futures contracts.[2] The CFTC concurrently issued a policy statement allowing

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[1] CFTC Chairman Michael S. Selig, Statement on Equity Perpetual Futures (Nov. 3, 2026).
[2] CFTC, Order Approving KalshiEX LLC BTCPERP Futures Contract (May 29, 2026).

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DCMs to self-certify such perpetual contracts, while directing DCMs seeking to offer perpetual contracts on other asset classes to seek pre-approval under CFTC Regulation 40.3 before listing such contracts.[3]

In the policy statement, the CFTC had noted that Equity Perpetuals "would benefit from review by the Commission and the [SEC]."[4] In a request for comment released in June of this year, the CFTC and SEC had further asked if 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."[5]

SEC Notice Registrations and Related Rule Filings

In September, several DCMs (Coinbase Derivatives, KalshiEX, Bitnomial Exchange, Nadex, and ICE Futures U.S.) filed with the SEC to register as national securities exchanges for purposes of trading security futures products, with the intention of listing Equity Perpetuals as security futures. Several of these entities also filed rule changes with the SEC and CFTC establishing listing standards, margin requirements, and related rules for Equity Perpetuals. Under the SEC and CFTC regulations governing security futures, these rule changes generally took effect immediately, subject to publication by the SEC for comment and the ability of the SEC and CFTC to abrogate or stay the rule filings. A number of market participants submitted comments on these rule filings, though the SEC and CFTC did not take action to abrogate or stay the filings.

CFTC Approval of Equity Perpetuals

On September 18, several of these exchanges also filed with the CFTC for approval to list a number of individual Equity Perpetual contracts on certain equity underliers. The contracts were deemed approved on November 2 because the CFTC let its 45 day review period lapse without issuing a non-approval notice. In a statement that day, Chairman Selig stated that "for too long, regulatory uncertainty left innovative products, such as security futures and equity perpetual futures, stranded in what SEC Chairman Paul S. Atkins has aptly described as a regulatory "no man's land" due to a lack of harmonization between the agencies," and that "the CFTC and SEC have turned the page on that era, and are committed to delivering regulatory clarity for innovative products and a clear path to market, rather than more casualties of jurisdictional disputes."[6]

Litigation Challenging the Approvals

On November 3, the Capital Markets Alliance Association[7] sued the CFTC in the Southern District of New York challenging the CFTC's approval of Equity Perpetuals.[8] The complaint alleges that Equity Perpetuals are security-based swaps within the SEC's exclusive jurisdiction, not security futures, because they lack the "future delivery" that a security future requires. The complaint further alleges that the CFTC violated the Administrative Procedure Act by acting without providing a reasoned explanation for its decision, ignoring its prior treatment of perpetuals as swaps, and failing to consider the risks of such products. The complaint asserts that "the CFTC cannot redraw the statutory boundaries that Congress established through mislabeling. Single-stock perpetuals are not security futures . . . [T]he CFTC has permitted an end-run around Congress's deliberate statutory protections and invited a parallel, synthetic market in U.S. stocks to grow outside the exclusive jurisdiction of the [SEC]."

The Capital Markets Alliance Association moved for a temporary restraining order on November 3, which was denied the same day. The court indicated that the

[3] Policy Statement Concerning the Listing of Perpetual Contracts, 91 Fed. Reg. 33160 (June 3, 2026).
[4] *Id*. at 33161.
[5] Joint Request for Comment on Further Definition of "Swap" and "Security-Based Swap" and on Alternative Compliance, 91 Fed. Reg. 37873, at 37876 (Jun. 24, 2026).
[6] CFTC Chairman Michael S. Selig, Statement on Equity Perpetual Futures (Nov. 3, 2026).
[7] The Capital Markets Alliance Association is a trade association of financial institutions.
[8] *Capital Markets Alliance Ass'n v. CFTC*, Compl., Dkt No. 1, No. 1:26-cv-09608 (S.D.N.Y. Nov. 3, 2026).

plaintiff "is likely to succeed on the merits of its claim that the CFTC lacks statutory authority to allow perpetual derivatives on individuals stocks to be offered to retail investors on CFTC-regulated platforms" because the Equity Perpetuals appear to be swaps on securities subject to SEC regulation rather than security futures subject to CFTC regulation.[9] However, the court found that the plaintiff failed to meet the requisite irreparable harm standard, and therefore denied emergency relief. The court set an expedited schedule on the plaintiff's motion for a preliminary injunction, which will be fully briefed on November 10.

KPI Contract Approvals

On October 13, the SEC approved Cboe Exchange, Inc.'s proposal to list binary options on specified KPIs reported in issuers' SEC filings (such as revenue or earnings per share) as security options on a national securities exchange.[10] The SEC acknowledged in its approval order that its approval of the relevant KPI contracts does not foreclose the CFTC's jurisdiction over similar products with the same underlying KPIs. In a statement released along with the approval, Chairman Atkins noted that "[t]he SEC's approval order today does not address—and does not foreclose—CFTC jurisdiction over KPI contracts based on the same underlying KPIs as those contemplated in the approval order structured to fall under the CFTC's jurisdiction."[11]

On October 27, the CFTC approved the listing by Rothera Exchange and Clearing LLC (a registered DCM) of KPI contracts listed on its DCM as swaps. The approved KPI contracts included cash-settled, binary outcome contracts, that reference KPIs of individual issuers, including a contract that settles based on whether "Tesla, Inc…reports fourth quarter Non-GAAP Diluted earnings per share…greater than $0.65."[12] The CFTC determined that the KPI contracts meet the definition of a swap and do not satisfy the conditions to be security-based swaps, which would make them subject to SEC jurisdiction. The CFTC explained that the underlying KPI referenced by the contract is a commodity because it is a "reported statistic" rather than "a security or its value". In addition, the CFTC stated that the statistical underlier does not "directly affect" the referenced issuer's financial statements, financial condition, or financial obligations, which would make the contract a securities-based swap. As with the SEC, the CFTC also acknowledged that its approval does not foreclose the SEC's jurisdiction over similar products with the same underlying KPIs. Chairman Selig noted in a statement that the "approval order does not address — and does not foreclose — SEC jurisdiction over KPI contracts based on the same underlying KPIs as those contemplated in the approval order that are structured to fall under the SEC's jurisdiction. Indeed, our sister agency recognized as much in its own approval order issued earlier this month."[13]

Next Steps

We will continue tracking developments in the ongoing litigation against the CFTC and any further actions that may be taken by the CFTC, SEC, or Congress in connection with these developments, and will provide updates accordingly. Please also feel free to reach out to the Cleary team with any questions on these or other developments.

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[9] *Capital Markets Alliance Ass'n v. CFTC*, Order, Dkt. No. 11, No. 1:26-cv-09608 (S.D.N.Y. Nov. 3, 2026) (order denying temporary restraining order).

[10] Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Permit the Listing of Binary Options Overlying Key Performance Indicators Reported by Certain Issuers of Stock, 91 Fed. Reg. 65854 (Oct. 16, 2026).

[11] Chairman Paul S. Atkins, Statement on the Commission's Approval of a Proposed Rule Change to Permit the Listing of Binary Options Overlying Key Performance Indicators (Oct. 13, 2026).

[12] CFTC, Order Approving Rothera Exchange and Clearing LLC KPI Swap (Oct. 27, 2026)

[13] Chairman Michael S. Selig, Statement on the Commission's Approval of a Designated Contract Market's Listing of a Key Performance Indicator Contract (Oct. 27, 2026).