

True Perpetuals Come Onshore

Key Takeaways

- Through four coordinated actions issued last week (an [order](#), a [policy statement](#), a [no-action letter](#), and a [staff advisory](#)), the CFTC has brought digital asset perpetual contracts onshore by classifying them as futures, rather than swaps, for the first time. These actions open a new channel for U.S. participation in these markets.
- The order approves Kalshi's cash-settled bitcoin perpetual contract for listing and clearing as a futures contract. It reasons that the contract has the characteristics of a futures contract and that its funding-rate mechanism is workable because the bitcoin spot market is deep, liquid, and continuously observable, keeping the contract from being readily susceptible to manipulation.
- The order is deliberately confined to bitcoin and other digital commodities with deep, active, and continuous spot markets; the companion policy statement provides that perpetual contracts on other asset classes must undergo case-by-case CFTC review rather than listing by self-certification.
- A separate no-action letter permits a registered futures commission merchant, Coinbase Financial Markets, to treat digital asset perpetual contracts traded on the platform of an offshore affiliate, Deribit, as "foreign futures." This treatment allows U.S. retail to access offshore perpetual markets through a registered futures commission merchant, an avenue unavailable when these products were classified as swaps.
- A staff advisory issued the same day sets the regulatory obligations and CFTC staff expectations for venues operating trading, clearing, and settlement on a 24/7 basis. It states that crypto markets may be well-suited to round-the-clock operation while cautioning that other asset classes may not be.
- The principal practical consequence is the elimination of the swap dealer *de minimis* problem: because these exchange-traded perpetuals are now futures, dealing in them no longer counts toward the \$8 billion notional threshold that triggers swap dealer registration (a costly undertaking involving capital requirements, reporting, and compliance obligations). This eliminates what had been a major deterrent to institutional onshore perpetual participation.
- The futures classification carries tradeoffs. Customer positions and collateral reside in the futures account class rather than under the segregated "LSOC" model used for cleared swaps. This exposes customers to "double default" risk, i.e., the possibility that a fellow customer's default coupled with their futures commission merchant's failure results in pro rata loss-sharing among all of the futures commission merchant's futures customers. The same distinction doubles the risk weight (from 2% to 4%) that banks must apply to their clearinghouse exposure when clearing perpetuals as clients.

- The futures classification supports section 1256 tax treatment (60% long-term, 40% short-term gain or loss with annual mark-to-market), though the treatment of periodic funding payments remains uncertain and may affect deductibility for individual investors.

Background

Until last week, true perpetual futures, the no-expiry contracts that have become the dominant form of crypto derivative trading worldwide, were effectively off-limits to U.S. persons. The CFTC had long treated perpetuals as swaps and, because retail customers generally may not trade swaps other than on a CFTC-registered exchange, the offshore platforms where these contracts primarily trade stayed out of reach.¹ Domestic exchanges could list only similar substitutes, such as long-dated contracts that approximate a perpetual while retaining an expiry date.² As a result, the true perpetuals market remained offshore and inaccessible.

The CFTC's four coordinated actions last week, in combination, bring digital asset perpetuals onshore as futures. The CFTC: (1) issued an order approving Kalshi's cash-settled bitcoin perpetual contract ("BTCPERP") for listing and clearing on a designated contract market as a futures contract (the "Order"); (2) released a companion policy statement explaining how the CFTC will treat perpetuals on other underlying assets going forward (the "Policy Statement"); (3) issued a staff interpretation and no-action letter (the "Perpetuals No-Action Letter") permitting a registered futures commission merchant ("FCM"), Coinbase Financial Markets, to treat similar digital asset perpetual contracts (as well as digital asset futures and options on futures) traded on the platform of an offshore affiliate, Deribit, as "foreign futures" and to post customer digital asset collateral with an affiliated foreign broker; and (4) issued a staff advisory on 24/7 trading, clearing, and settlement (the "24/7 Advisory").

The Order

The Order relies on the voluntary product pre-approval pathway under which the CFTC must approve a submitted contract unless it finds it violates the CEA.³ The CFTC determined that listing the BTCPERP as a "contract for sale of a commodity for future delivery" would not violate the CEA, crediting Kalshi's analysis that the contract exhibits the recognized indicia of a futures contract, namely standardization, fungibility, the ability to exit by offset, and "futures" in the form of ongoing executory funding payments, and that indefinite duration does not defeat futures characterization.⁴ The CFTC reinforced that determination with a susceptibility-to-manipulation analysis under DCM Core Principle 3: because a perpetual's reference price must be reliable at every funding interval rather than at a single expiry, the deep, broadly distributed, continuously observable, and liquid 24/7 bitcoin spot market is what

¹ Eligible contract participants could enter into swaps with offshore counterparties, subject to the cross-border application of the CFTC's swap rules. See 7 U.S.C. § 2(i). But an offshore platform that allows U.S. persons to trade perpetuals treated as swaps may itself be required to register as a swap execution facility, 7 U.S.C. § 7b-3; 17 C.F.R. § 37.3(a)(1), and a broker carrying those trades may be required to register as a futures commission merchant, 7 U.S.C. § 6d, leaving the offshore platforms effectively closed to U.S. participants of every kind. The CFTC has enforced these requirements against offshore crypto derivatives platforms. See, e.g., *CFTC v. HDR Global Trading Ltd. (d/b/a BitMEX)*, No. 1:20-cv-08132 (S.D.N.Y. Aug. 10, 2021) (consent order) (finding that the platform that pioneered the crypto perpetual swap operated a facility to trade or process swaps for U.S. customers without approval as a designated contract market or swap execution facility, and acted as a futures commission merchant without registration; \$100 million civil monetary penalty).

² One of the main obstacles was that a true perpetual could come onshore only as a swap and the swap regime's costs, from possible swap dealer registration to duplicative reporting, made that uneconomic. An expiring contract was the only way to bring a perpetual-style product within the less burdensome futures regime.

³ 7 U.S.C. §§ 7a-2(c)(4) & (c)(5)(B); 17 C.F.R. § 40.3. This is distinct from the more common "self-certification" route. See 17 C.F.R. § 40.2.

⁴ See *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, 541 (7th Cir. 1989) (treating "futures" as value set in the future through executory payment obligations, not requiring a fixed settlement date).

makes the funding mechanism workable.⁵ The Order is narrow in scope, limited to bitcoin and other digital commodities with deep, active, and continuous spot markets, and expressly is not extended to other asset classes. It requires that customer perpetual futures positions and collateral be held in a futures account at both the FCM and the clearinghouse.⁶

The Policy Statement

The Policy Statement addresses the asset classes the Order does not and provides that perpetuals referencing asset classes outside the scope of the Order should be submitted for CFTC review and approval, rather than self-certified.⁷ The CFTC was explicit that this guidance is a first step and that it may later address perpetuals more comprehensively through further guidance or rulemaking.⁸

The Perpetuals No-Action Letter

The Perpetuals No-Action Letter addresses the cross-border context. It interprets the Deribit perpetuals, listed on an affiliated foreign board of trade (“FBOT”) regulated by the Dubai Virtual Assets Regulatory Authority (“VARA”), as “foreign futures,” following the same reasoning as the Order and drawing on VARA’s treatment of perpetuals as exchange-traded derivatives, rather than swaps.⁹ It also grants no-action relief allowing Coinbase Financial Markets to post customer digital assets and payment stablecoins with its affiliated foreign broker under a right of re-use, subject to nine conditions anchored in the fact that each entity in the chain is a wholly owned subsidiary of a U.S. public reporting company.¹⁰

The 24/7 Advisory

The 24/7 Advisory addresses the operational dimension of these markets. It sets out the regulatory obligations and staff expectations for registrants that extend trading, clearing, and settlement to a 24/7 basis.¹¹ Because perpetuals trade continuously and depend on a funding mechanism that settles at intervals around the clock, a venue that lists them must operate on that basis, which makes the advisory directly relevant to the products the Order and Policy Statement reach. The advisory treats crypto markets as well suited to 24/7 operation, given their digital infrastructure and global reach, while cautioning that other markets, such as those for agricultural products, may be less suited because of their customer bases, regional character, and specialized trading practices.

⁵ 7 U.S.C. § 7(d)(3).

⁶ Order Approving KalshiEX LLC BTCPERP Futures Contract (May 29, 2026), https://www.cftc.gov/media/14071/DMO_KalshiBTCPERPOrder052926/download.

⁷ 17 C.F.R. §§ 40.2 & 40.3.

⁸ CFTC, Policy Statement Concerning the Listing of Perpetual Contracts (May 29, 2026); see CFTC Release No. 9242-26 (May 29, 2026) (announcing the Policy Statement and directing perpetuals on asset classes outside the Order to the Regulation 40.3 review process), <https://www.cftc.gov/PressRoom/PressReleases/pr-9242-26>.

⁹ 17 C.F.R. § 30.1. A “foreign board of trade” is any non-U.S. board of trade, exchange, or market. 17 C.F.R. §§ 1.3, 48.2(a). The term is broader than a CFTC-registered FBOT. An FBOT must register with the CFTC only where it seeks to provide U.S. persons with direct access. 17 C.F.R. §§ 48.1, 48.2(c); see also CEA § 7 U.S.C. § 6(b). Where, as here, U.S. customer access is instead intermediated through a registered futures commission merchant, Part 48 registration is not required, and the transactions are governed by other CFTC rules. 17 C.F.R. § 30.1(a)–(b). For these rules to apply, though, the instrument must be a futures contract or an option on a futures contract; a swap does not count. Hence the CFTC’s determination that the Deribit perpetual contracts are futures is crucial.

¹⁰ CFTC Letter No. 26-17 (May 29, 2026), <https://www.cftc.gov/csl/26-17/download>; see 17 C.F.R. § 30.7.

¹¹ Staff Advisory on 24/7 Trading, Clearing, and Settlement (May 29, 2026), <https://www.cftc.gov/csl/26-16/download>.

Analysis

The Swap Dealer De Minimis Threshold

For market participants, the most consequential aspect of treating perpetuals as swaps was the application of the swap dealer *de minimis* threshold. A person whose swap dealing activity exceeds \$8 billion in aggregate gross notional amount over the preceding twelve months must register with the CFTC as a swap dealer and take on the full swap dealer regime.¹² Because perpetuals carry no expiry and trade continuously, a dealing desk can accumulate notional rapidly: many quotes and resultant trades around the clock rather than a few discrete, periodic transactions mean that even a moderately active desk could approach or cross the threshold within a single rolling twelve-month window. Swap dealer registration is, in turn, an expensive undertaking, bringing capital and margin requirements, swap data reporting and recordkeeping, external business conduct standards, and compliance and annual reporting obligations.¹³ The prospect of those obligations, more than any other single factor, deterred participants from establishing perpetual dealing operations onshore.

The CFTC's actions remove that obstacle for the products they reach. Because the BTCPERP and similarly structured digital commodity perpetuals are now futures, rather than swaps, dealing in them does not count toward the swap dealer *de minimis* at all, and the futures regime contains no analogous notional threshold that turns a market maker into a registrant. The relief is, however, only as broad as the classification. The Order reaches bitcoin and other digital commodities with deep, active, and continuous spot markets. Perpetuals on other underlyings, or on digital commodities lacking such markets, remain potentially subject to treatment as swaps, and therefore count toward the *de minimis* threshold, unless and until the CFTC approves them as futures through the pre-approval process that the Policy Statement prescribes. A firm transacting in both approved and not-yet-approved perpetuals must still track the latter against the threshold.

Reduced Compliance Burden

The same reclassification spares participants from the broader swap dealer compliance obligations that registration triggers and spares exchanges the expense of maintaining a parallel swap program. As futures, these products report through existing futures infrastructure, including daily trading records, large-trader reporting, and recordkeeping, which are simpler than the parallel swaps reporting and recordkeeping regimes.¹⁴

Treatment in Bankruptcy

Classification also determines where customer money sits and how it is treated in an insolvency. The Order requires that positions in the BTCPERP and the collateral margining them be held in the futures account at both the FCM and the clearinghouse under the futures segregation regime, rather than in the cleared swaps account.¹⁵ That choice carries through to an FCM failure, where the customer account class under the Bankruptcy Code and CFTC rules turns on whether the positions are futures or swaps; futures treatment places perpetual customers in the futures account class for purposes of pro rata distribution.¹⁶ The futures account class is, on this dimension, the less protective of the two for customers. The futures model commingles customer collateral and leaves each customer

¹² 17 C.F.R. § 23.23(b)(1) (registration required when swap dealing activity over the preceding twelve months exceeds \$8 billion in aggregate gross notional amount); *see id.* § 23.23(d) (excepting only swaps a non-U.S. person enters anonymously on a CFTC-registered facility and clears).

¹³ *See* 17 C.F.R. pt. 23, subpt. H (external business conduct standards for swap dealers).

¹⁴ 17 C.F.R. pts. 43, 45 (real-time public reporting and swap data repository reporting for swaps); *id.* pts. 16, 38 (futures reporting and recordkeeping).

¹⁵ 7 U.S.C. § 6d (segregation of futures customer funds).

¹⁶ 11 U.S.C. §§ 761–767; 17 C.F.R. pt. 190.

exposed to fellow-customer risk: if another customer of the same FCM defaults and the FCM cannot make the segregated pool whole from its own capital, the shortfall is shared pro rata among all futures customers. Cleared swaps are instead held under the legally segregated, operationally commingled (“LSOC”) model, which prevents a clearinghouse from applying one customer’s collateral to a fellow customer’s default and was adopted to remove precisely the “double default” exposure (a fellow customer’s default coupled with the FCM’s failure) that the futures model retains.¹⁷ For FCMs, the calculus runs the other way, the omnibus futures model being operationally simpler and less costly to administer than LSOC’s customer-by-customer legal segregation. The classification is therefore operationally beneficial for intermediaries but less protective for their customers.

Bank Capital Costs

The same divide carries a quantifiable capital cost for bank participants. Under U.S. bank capital rules, a bank that clears as a client may assign a 2% risk weight to its trade exposure to a qualifying clearinghouse only where its collateral is protected against loss from the joint default of its clearing member and that member’s other clients; absent that protection, as under the omnibus futures model, the risk weight is 4%.¹⁸ Because the LSOC model furnishes the joint-default protection and the futures model does not, clearing perpetuals as futures rather than as cleared swaps doubles the risk weight, and thus the capital, a bank client must hold against its clearinghouse exposure.

Federal Income Tax Treatment

The CFTC’s classification of DCM-listed perpetuals as futures contracts, and not commodity swaps, strongly supports the conclusion that they are “section 1256 contracts” for U.S. federal income tax purposes.¹⁹ Section 1256 contracts generally are marked to market at the end of each tax year, and any gain or loss recognized by reason of the year-end mark or a taxable disposition is treated as 60% long-term and 40% short-term capital gain or loss.

Unlike traditional section 1256 contracts, however, perpetuals require counterparties to make periodic funding payments to each other. The U.S. federal tax treatment of funding payments is uncertain. Historically, many taxpayers appear to have treated funding payments as part of the overall economics of a perpetual and recognized capital gain or loss only on termination of the perpetual based on their net profit or loss. If a similar treatment applied to section 1256 perpetuals, funding payments would be reflected in a taxpayer’s annual mark. Alternatively, funding payments could give rise to ordinary income or expense each year, analogous to periodic payments under a notional principal contract.²⁰ Individual investors generally are not entitled to deduct net investment expense.²¹

Retail Participation on FBOTs

The foreign-futures characterization likewise reshapes cross-border access. By allowing some digital asset perpetuals to be characterized as futures, it permits FBOTs to offer these products to U.S. retail customers through a

¹⁷ See 17 C.F.R. pt. 22 (legally segregated, operationally commingled treatment of cleared swap customer collateral, under which a clearinghouse may not apply a non-defaulting customer’s collateral to a fellow customer’s default); *cf.* 7 U.S.C. § 6d; 17 C.F.R. §§ 1.20–1.30 (omnibus segregation of futures customer funds).

¹⁸ See 12 C.F.R. § 217.35(b)(3)(i)(A)–(B) (2% risk weight for a clearing member client banking organization’s trade exposure to a qualified central counterparty where the arrangement protects against loss from the joint default of the clearing member and its other clients; 4% if that requirement is not met); Basel Committee on Banking Supervision, Capital Requirements for Bank Exposures to Central Counterparties (Apr. 2014).

¹⁹ See 26 U.S.C. § 1256(b) (1256 contracts include regulated futures contracts).

²⁰ See Treasury regulations section 1.446-3(d).

²¹ See 26 U.S.C. § 67(h).

registered FCM, an avenue that was unavailable when the products were deemed swaps.²² The Perpetuals No-Action Letter channels the Deribit perpetuals into the CFTC framework for foreign futures offered to U.S. persons and separately permits customer digital assets and stablecoins to be posted as margin under a right of re-use, subject to conditions designed to preserve customer protection. The *de minimis* relief travels with that characterization, so a participant dealing in foreign perpetuals treated as foreign futures accrues no swap dealing notional either, though the Part 30 intermediation requirements and the conditions of the Perpetuals No-Action Letter continue to govern.

Future Challenges

Of course, all of this relief is, in the end, only as durable as the classification and the instruments that deliver it. The classification could be tested directly through Administrative Procedure Act review of the Order, and it is not certain that a court would accept that a no-expiry, funding-rate instrument is a “contract for future delivery,” a conclusion the CFTC’s reasoning supports but that the CFTC’s prior treatment of perpetuals as swaps leaves contestable. The risk could also reach private litigants. If the futures classification were later rejected, participants who treated these products as futures could face a private right of action under the CEA for unmet swap requirements. Nor do the four actions stand on equal footing: the Order is an action of the CFTC itself, while the Policy Statement is a non-binding statement of policy, the Perpetuals No-Action Letter is a staff position that binds only the issuing division and may be modified or withdrawn, and the 24/7 Advisory is likewise a non-binding CFTC staff advisory that states staff expectations rather than imposing requirements. A later reversal, or a contrary judicial classification, would restore the swap consequences, including the *de minimis* threshold.

Conclusion

This is a dramatic step for the establishment of domestic perpetuals markets and for facilitating U.S. person participation in offshore markets. For the first time, institutional participants can build perpetual dealing operations onshore without triggering the swap dealer registration framework and retail customers gain access to offshore perpetual markets through the intermediation of a registered FCM. The practical task for market participants is now one of implementation: identifying which products fall within the Order’s scope, structuring clearing and margin arrangements in light of the futures account requirements, quantifying the capital and customer-protection tradeoffs that flow from the futures classification, and seeking pre-approval for perpetuals on additional asset classes. For the CFTC, these actions establish a template for bringing other digital asset derivatives within the domestic regulatory perimeter.

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If you have any questions about the issues addressed in this alert, or if you would like a copy of any of the materials referenced in it, please do not hesitate to contact Gary Kalbaugh (Partner) at 212-701-3505 or gkalbaugh@cahill.com or Jason Schwartz (Partner) at 202-862-8912 or jdschwartz@cahill.com.

²² See 7 U.S.C. § 2(c)(2)(E) (retail restriction on commodity transactions offered to non-eligible contract participants); 17 C.F.R. pt. 30 (foreign futures and options offered to U.S. customers through registered FCMs).