HAYNES BOONE

FINANCIAL SERVICES

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On April 21, 2025, the Commodity Futures Trading Commission ("CFTC") issued a Request for Comment seeking input on the potential uses, benefits and risks of perpetual contracts in derivatives markets. The comment period ended on May 21, 2025;[1] below we discuss some notable comments submitted by industry participants.

Perpetual Derivatives

Perpetual derivative contracts (known colloquially as "perpetuals") represent one of the most popular and widely traded forms of investment in the digital asset markets globally. Although they have so far not been available in the U.S. market due to lack of regulatory clarity, there has been increasing interest in the market for such a product, and U.S. regulators have indicated potential openness to reconsider their regulatory treatment.

1 The comment period was later extended to May 23, 2025, due to technical difficulties.

Perpetuals are a type of derivative with no fixed maturity date and no settlement price, allowing investors to take a view on the price fluctuations of an asset over an indefinite period with the ability to terminate the transaction at any time. Unlike other derivative instruments such as options or futures contracts, perpetuals allow investors to hold positions indefinitely, without the need for rollovers or ownership of the underlying asset. Without a settlement price or maturity date, perpetuals incorporate a funding rate mechanism to compensate the parties and reset the trade periodically, allowing the contract price to closely mirror the spot price of the underlying asset. The funding rate, either positive or negative, is used to calculate periodic payments, occurring as often as every eight hours, based on the difference between the futures and spot prices of the underlying asset.

As noted, despite their popularity in global digital asset markets, perpetuals have until recently been generally unavailable to U.S. investors due to lack of clarity and the potential additional regulatory hurdles from U.S. regulators. In recent months, however, centralized and decentralized platforms have indicated renewed interest in perpetuals and have taken steps to launch perpetuals trading.[2]

The CFTC's Request for Comment

On April 21, 2025, the CFTC issued a request for comment[3] on perpetual contracts in derivatives markets. The CFTC's questions sought input on the following issues:

1. Defining and classifying a "perpetual derivative" and how they differ from futures or swaps.
2. The potential and current user base for perpetual derivatives.
3. The unique risks and benefits of perpetual derivatives compared to futures or swaps.
4. The impact that perpetual derivatives would have on the current market and whether perpetuals are applicable to physical commodity markets.

Commenter Submissions

On May 23, 2025, the CFTC closed submissions for comments. Among the commenters, most (although not all) were participants in the digital asset trading markets.

Many comments urged the CFTC to adopt a more flexible approach to the definition and classification of perpetuals because perpetuals contain aspects of both futures and swap contracts.

Several commenters also observed that perpetuals are often used by retail investors globally due to their versatility and suitability to retail investors' desired exposure and indefinite holding period, while noting that U.S. retail investors are disadvantaged by their unavailability in the U.S.

2 On April 23, 2025, Bitnomial's Designated Contract Market ("DCM"), Bitnomial Exchange, LLC, self-certified as the first ever U.S. listing of perpetuals: Bitnomial Perpetual Bitcoin USD Centi Futures. See Innovation and Market Structure: Keynote Address by Acting Chairman Caroline D. Pham, Piper Sandler Global Exchange and Trading Conference 2025, CFTC (June 5, 2025), https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham16. As of June 12, 2025, Coinbase announced plans to launch CFTC-compliant perpetual futures trading in the U.S. through its DCM and Futures Commission Merchant entity, Coinbase Derivatives, LLC. See Coinbase to launch CFTC-compliant perpetual futures trading in US, REUTERS (June 12, 2025), https://www.reuters.com/business/coinbase-launch-cftc-compliant-perpetual-futures-trading-us-2025-06-12/.

3 *See* CFTC Staff Seek Public Comment Regarding Perpetual Contracts in Derivatives Markets, CFTC (April 21, 2025), https://www.cftc.gov/PressRoom/PressReleases/9069-25.

“Commenters provided a range of views regarding their support of this process as it relates to perpetuals, with some stating that the current regulatory process is sufficient and others urging the CFTC to review it.”

Some commenters also noted that the CFTC’s self-certification process[4] allows registered trading venues to list new products that comply with the CFTC’s associated regulations without additional affirmative substantive approval from the CFTC. The CFTC can stay a self-certification of a new product only in circumstances involving a false certification, or a petition to alter or amend contract terms and conditions pursuant to Section 8a(7) of the CEA. The review period can also be extended if a product raises novel or complex issues, presents major economic significance, contains incomplete submissions or untimely responses to CFTC questions, lacks adequate explanation or is potentially inconsistent with the CEA or CFTC regulations.[5] Commenters provided a range of views regarding their support of this process as it relates to perpetuals, with some stating that the current regulatory process is sufficient and others urging the CFTC to review it.[6]

Additionally, commenters provided information on both the anticipated challenges and benefits of perpetuals in the U.S. marketplace. A challenge for perpetuals is the risk for their prices to arbitrarily diverge from the spot price for the underlying asset, an occurrence seen in other derivatives products. However, commenters noted that the CFTC effectively handles this issue already and that the funding mechanism helps reduce such divergence. The frequent settlement of perpetuals also creates operational and technological challenges. The trading infrastructure being built for perpetuals supports settlement when traditional markets are closed, and certain market participants may not be able to support multiple collateral transfers or settlement payments throughout the day.

4 *See* 17 C.F.R. § 40.2 (available at: https://www.ecfr.gov/current/title-17/section-40.2).

5 *See* CFTC *supra* note 2.

6 Some commenters would like to see the CTFC establish clear and consistent guidelines for better market transparency and a fairer playing field for all market participants. Other commenters urged the CFTC to review whether the self-certification process adequately protects investors.

In terms of the benefits, commenters state that perpetuals mitigate costs and improve price discovery in a more efficient manner than fixed-maturity options or futures contracts that need to be rolled continuously. Commenters also anticipate that the spot markets will become more efficient with the additional real-time funding data that would become available through perpetuals trading.

Other commenters noted to the CFTC that the perpetuals products could have a disruptive effect on the market for futures contracts for physical commodities (if introduced into such markets). An unexpected shortage of liquidity for such contracts may have a harmful effect on the global market.

Potential Delay in a CFTC Final Rule

Following the end of the comment period, the CFTC has not yet given guidance on what (if any) next steps it intends to take with respect to the regulation of perpetuals beyond careful consideration of the input received. As noted in Acting Chairman Caroline Pham's remarks on June 5, at least one platform has already begun trading perpetuals via self-certification and several others are engaged in the self-certification process, so additional steps are not necessarily required for further development of this product by eligible parties.[7] If more rulemaking is envisioned, it is possible there could be significant delays or procedural issues due to the recent turnover among commissioners. The CFTC typically comprises five appointed commissioners; however, there are presently only two sitting commissioners due to recent resignations. Brian Quintenz, a former CFTC commissioner who was actively involved in the cryptocurrency industry after leaving the CFTC, has been nominated as incoming CFTC Chairman. However, if Acting Chairman Pham were to step down following Quintenz's appointment (which she has indicated is her intention[8]), and with Kristin N. Johnson's recent statement of her upcoming departure,[9] the CFTC would then have only one remaining active commissioner. Although the CFTC has no codified minimum quorum requirement, unlike the Securities and Exchange Commission, and some interpret the CEA to permit a sole commissioner to exercise the full authority of the Commission, it is unclear and debatable whether Commissioner Quintenz or the Trump administration would feel comfortable proceeding on such basis, in light of potential considerations regarding legitimacy or practical constraints (including in cases where the sole commissioner might have to recuse himself).[10]

7 *See* CFTC *supra* note 2.

8 *See Statement of Commissioner Caroline Pham, 100 Days: Keynote Address by Acting Chairman Caroline D. Pham, 39th ISDA Annual General Meeting, CFTC (May 15, 2025),* https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham15.

9 *See* Statement of Commissioner Kristin N. Johnson on Her Departure from the CFTC, CFTC (May 21, 2025), https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement052125.

10 The CEA states that "[a] vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission." *See* 7 U.S.C. § 2(a)(3) (available at: https://www.law.cornell.edu/uscode/text/7/2).

Protocol Staking Activities Are the Latest Crypto Carveout – Neil Issar

Nearly two months after issuing a statement that it did not view stablecoins as constituting securities offerings, the SEC's Division of Corporation Finance (the "Division") has added protocol staking activities to its list of crypto carveouts. On May 29, 2025, the Division issued a statement on its view that certain protocol staking activities do not involve the offer and sale of securities and are therefore not subject to the applicable registration requirements.

Any decentralized ledger technology network, like a blockchain, requires a process to validate transactions on the network, also known as a consensus mechanism. One of the most common consensus mechanisms is "proof of stake" ("PoS"), in which crypto asset holders (typically operators of the network's nodes) that want to participate in the network validation method (i.e., become validators) commit, or "stake," some of their crypto assets to attempt to validate new blocks of data being added to the network. In exchange, the crypto asset holders are eligible to earn monetary rewards. However, the staked crypto assets are "locked up" or bonded and cannot be transferred or removed from the network for a period of time. The operation of the network, including the selection of crypto assets for validation purposes as well as the distribution of rewards, is governed by an underlying software protocol. So, the staking of crypto assets on a PoS network is what the Division means when it refers to "protocol staking."

In particular, the Division's statement covers three categories of activities:

1. **The staking of crypto assets on a PoS network.**
2. **The activities undertaken by third parties involved in the protocol staking process, such as validators and custodians of crypto assets, including their roles in connection with the earning and distribution of rewards.**

3. Providing ancillary services that are administrative or ministerial in nature.

The first category is limited to both certain types of crypto assets and certain types of protocol staking. Specifically, the Division defines "crypto assets" to mean assets that are generated, issued, and/or transferred using a blockchain or similar distributed ledger technology network and that rely on cryptographic protocols. This could include assets commonly referred to as "tokens," "digital assets" or "virtual currencies." But the Division excludes crypto assets and activities that have intrinsic economic properties or rights, such as generating a passive yield or conveying rights to future income, profits or assets of a business enterprise.

In addition, the Division's statement only addresses three types of protocol staking:

- Self- (or solo) staking, which involves a node operator staking crypto assets it owns and controls using its own resources with the expectation of receiving rewards in exchange.
- Self-custodial staking directly with a third party, which involves a node operator being granted the validation rights of a crypto asset owner. In this scenario, rewards can go from the PoS network directly to the crypto asset owner or indirectly to them through the node operator (in which case, the node operator may subtract a fixed or percentile fee).
- Custodial arrangements, which involve a custodian staking crypto assets owned by others on their behalf.

The third category of covered protocol staking activities is limited to ancillary services that are merely administrative or ministerial in nature and do not involve entrepreneurial or managerial efforts. The Division states that such services include:

- Slashing coverage, where the service provider reimburses or indemnifies a staking customer against loss resulting from "slashing" (the deduction of rewards for conduct detrimental to the PoS network, such as network manipulation or being offline and thus being unavailable to participate in network validation).
- Early unbonding, where the service provider allows crypto assets to be returned to an owner before the end of the usual amount of time set by the network's protocol to "unstake" a crypto asset (the unbonding period).
- Alternate rewards payment schedules and amounts, where the service provider delivers earned rewards at a cadence and in an amount that differs from the protocol's set schedule and/or where the rewards are paid earlier or less frequently than the protocol awards them, provided the reward amounts are not fixed, guaranteed or greater than those awarded by the protocol.
- Aggregation of covered crypto assets, where the service provider offers the ability for crypto asset owners to aggregate their assets to meet the protocol's staking minimums.

“The Division concludes the protocol staking activities described above do not satisfy the ‘entrepreneurial or managerial efforts of others’ prong of the test, as it viewed all of the activities as being administrative or ministerial in nature.”

The Division explains that these categories of protocol staking activities do not constitute securities within the meaning of Section 2(a)(1) of the Securities Act of 1933 or Section 3(a)(10) of the Securities Exchange Act of 1934. Those statutory provisions provide a list of financial instruments that constitute “securities.” But that list does not include crypto assets. As such, the Division analyzed the protocol staking activities under the “investment contract” test outlined by the U.S. Supreme Court in S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946), in which a transaction qualifies as an “investment contract” if it involves (i) an investment of money (ii) in a common enterprise (iii) with a reasonable expectation of profits (iv) derived from the entrepreneurial or managerial efforts of others. The Division concludes the protocol staking activities described above do not satisfy the “entrepreneurial or managerial efforts of others” prong of the test, as it viewed all of the activities as being administrative or ministerial in nature.

Commissioner Caroline A. Crenshaw criticized the Division’s statement as ignoring applicable law, since the SEC had concluded in previous enforcement actions that staking-as-a-service programs were indeed investment contracts under Howey. Nonetheless, the statement serves as a positive development for crypto asset holders and staking service providers, and it is the latest indicator that the SEC is following the current administration’s deregulation goals and embracing of innovation involving digital assets.

Read the statement **here**.

Federal Bank Regulatory Agencies Propose Reforms to Enhanced Supplementary Leverage Ratio – Leel Sinai

On June 25, 2025, the Office of the Comptroller of the Currency (“OCC”), along with the Federal Reserve Board and the Federal Deposit Insurance Corporation (collectively, “the Federal Agencies”), announced a significant regulatory proposal to the Enhanced Supplementary Leverage Ratio (“eSLR”), a critical regulatory capital requirement applied to the largest and most systemically important bank holding companies and their insured depository subsidiaries. In addition, the proposal includes amendments by the Federal Reserve Board to Total Loss-Absorbing Capital and Long-Term Debt requirements.

Changes to the Enhanced Supplementary Leverage Ratio

The eSLR was originally intended as a backstop to risk-based capital standards, ensuring that banks maintained a minimum level of equity relative to their total leverage exposure, regardless of risk. However, in practice, the Federal Agencies assert that it has often functioned as a binding constraint, limiting lending and market activity even in low-risk areas. The proposed rule seeks to recalibrate the eSLR as it applies to global systemically important bank holding companies (“GSIBs”) and their depository institution subsidiaries so that it continues to protect the financial system without unnecessarily restricting such institutions’ capacity to support the real economy.

Under the proposed rule, the current uniform eSLR thresholds would be replaced with risk-sensitive requirements that better reflect the size, complexity and systemic importance of each bank. Rather than applying a flat 5 percent ratio at the holding company level and 6 percent at the insured depository institution level, the Federal Agencies suggest a tiered approach. The eSLR requirement would range between 3.5 and 4.25 percent, depending on a bank’s GSIB risk profile. This change is designed to align capital requirements more closely with actual risk while preserving the overall strength of the banking sector.

Equally important, the proposal reimagines the eSLR as a buffer rather than a hard trigger for regulatory action. Today, breaching the eSLR can automatically push a bank out of well-capitalized status, prompting so-called "prompt corrective action" measures. The proposed change would instead allow the eSLR to function as an early warning signal. This buffer approach is intended to give banks flexibility to draw down capital in times of stress without immediately triggering restrictions that could force them to cut lending or sell assets during periods when credit and liquidity are most needed.

The Federal Agencies believe these changes could have several positive effects. By easing capital constraints tied to low-risk, low-return activities, banks would have greater capacity to extend credit, provide more competitive financing and participate more actively in U.S. Treasury markets. The changes are expected to enhance market liquidity and reduce the likelihood that regulatory requirements contribute to market disruptions. In addition, by reducing the pro-cyclical effects of leverage requirements, the new framework could help ensure that banks continue to support the economy during downturns rather than pulling back when their lending is most needed.

Changes to Total Loss-Absorbing Capital and Long-Term Debt Requirements

The Federal Reserve Board requires GSIBs to maintain minimum levels of total loss-absorbing capacity ("TLAC") based on both risk-weighted and leverage-based measures, along with buffers to avoid limits on capital distributions and certain bonus payments. Currently, the leverage-based TLAC buffer is set at 2 percent above the 7.5 percent minimum leverage component of a GSIB's external TLAC requirement. This buffer aligns with the eSLR buffer standard.

The Federal Reserve Board is proposing to replace the 2 percent TLAC leverage buffer with a buffer equal to the eSLR buffer under the new proposal, maintaining the alignment between the TLAC leverage buffer and eSLR standards. The minimum TLAC level would remain unchanged.

GSIBs must also maintain a minimum leverage-based external long-term debt equal to 4.5 percent of total leverage exposure, designed to ensure sufficient debt to recapitalize the firm in resolution. The Fed proposes revising this minimum to reflect the new eSLR standard, reducing the required long-term debt leverage minimum to 2.5 percent plus the proposed eSLR buffer. Overall, these changes would reduce GSIBs' TLAC leverage buffer and long-term debt leverage requirement by 0.75 to 1.50 percentage points.

The Federal Agencies emphasized that this initiative reflects a broader regulatory philosophy focused on ensuring that capital requirements are effective in safeguarding the system without being excessive or unnecessarily limiting economic growth. Bank clients should review the proposal carefully and consider how these changes might affect their capital strategies, lending practices and market activities. Institutions may wish to engage in the comment process to help shape the final regulatory outcome. We will continue to monitor developments closely and are available to assist clients in assessing impacts or preparing responses.

Read the proposed rule **here**.

Federal Bank Regulatory Agencies Issue Request for Information on Potential Actions to Address Payments Fraud – **Leel Sinai**

The Federal Deposit Insurance Corporation ("FDIC"), the OCC and the Federal Reserve Board (collectively, "the Agencies"), issued a joint Request for Information ("RFI") on June 16, 2025, seeking public input on potential actions to address what they see as a growing problem of fraud in the U.S. payments system. Expressing a need for coordinated efforts to protect consumers, businesses and financial institutions, the Agencies identified fraud risks throughout numerous U.S. payments system avenues, including checks, Automated Clearing House ("ACH") transfers, wire transfers and instant payments.

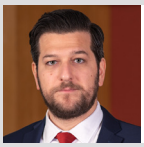
The Agencies are exploring a broad range of policy options and practical solutions. The RFI is structured around five key focus areas:

- Collaboration Among Stakeholders: The Agencies are seeking views on how regulators, financial institutions, payment networks, law enforcement and technology providers can better work together to detect and prevent fraud. They are particularly interested in models of successful multi-party cooperation, whether public-private or industry-led, and how such collaborations might be scaled or replicated.
- Consumer, Business and Industry Education: The RFI asks how public awareness campaigns and educational efforts can reduce fraud, particularly in the context of social engineering scams. The agencies seek insight into which types of education have been most effective and how outreach can be better targeted to specific audiences.
- Regulatory and Supervisory Approaches: The agencies are evaluating whether existing laws and regulations, such as Regulation E (electronic funds transfers), Regulation CC (availability of funds and check holds), Bank Secrecy Act ("BSA") requirements and Gramm-Leach-Bliley Act ("GLBA") provisions, are sufficient to deter or address payment fraud. The Agencies are also asking whether new guidance or updates to supervisory expectations are warranted.
- Fraud Data Collection and Information Sharing: The RFI explores the potential for more robust, standardized data collection on fraud incidents, possibly through shared platforms or registries. The Agencies seek comment on frameworks like the FraudClassifierSM and ScamClassifierSM and how industry-wide or interbank information sharing can help financial institutions and regulators stay ahead of evolving fraud tactics.
- Federal Reserve Banks' Tools and Services: The agencies are also soliciting feedback on how Federal Reserve Bank services might be improved to help mitigate fraud risks. This could include development of risk alerts, directory services or verification tools such as "confirmation of payee," which has been implemented in other jurisdictions.

Stakeholders, including banks, FinTechs, consumer advocacy groups, payment processors and cybersecurity firms, are encouraged to submit written comments by Sept. 18, 2025. The RFI presents the industry with an opportunity to stay ahead of fast-changing fraud patterns, particularly in an environment of rapid digital payments adoption.

Read the RFI **here**.

EDITOR



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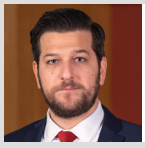

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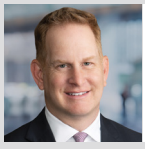

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