

# Clients & Friends Memo

## Are Payment Stablecoins Like Onions?

June 25, 2025

It is becoming increasingly likely that the “Guiding and Establishing National Innovation for U.S. Stablecoins Act of 2025” (the “**GENIUS Act of 2025**” or the “**Act**”) will become enacted and signed into law by the President in the summer of 2025.<sup>1</sup> As the contours of the regulatory regime for payment stablecoins (“**PSCs**”) in the United States (“**U.S.**”) take shape, a number of areas of uncertainty remain with how the Act will be implemented; what effect it will have on existing and future markets; and specifically what the future holds for “contracts for future delivery” on PSCs (*i.e.*, futures contracts).

The key to this analysis lies in examining the definition of a PSC, and determining whether it qualifies as a “commodity,” or if it is not a commodity, if that means trading in futures on PSCs will be prohibited. Because PSCs are intended to be used as collateral for commodity derivatives and securities trading, to ensure the safety and soundness of U.S. financial markets, it would seem appropriate for Federal civil market regulators to have anti-fraud and anti-manipulation enforcement jurisdiction. And, this result could be achieved by a simple fix in the language of the Act.

If, as currently proposed in the Act, PSCs would be carved from the definition of “commodity” in § 1a(9) of the Commodity Exchange Act of 1936 (the “**CEA**”),<sup>2</sup> the following would likely occur:

- (1) No U.S. or foreign exchange would be able to list, and make available for persons located in the U.S. futures contracts on PSCs. So, it would be impossible to hedge, or speculate on, price fluctuations in PSCs above or below their redemption value;
- (2) There would be no market regulator to police for fraud and manipulation involving futures trading in PSC because under the Act, the PSCs are neither “commodities” nor “securities,” and neither the U.S. Commodity Futures Trading Commission (“**CFTC**”) nor the U.S. Securities and Exchange Commission (“**SEC**”), respectively, will have any jurisdictional reach over such trading;

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<sup>1</sup> On June 17, 2025, the Act passed the Senate with a 68-30 vote and is now heading to the House for a reconciliation.  
<https://www.congress.gov/amendment/119th-congress/senate-amendment/2307/text>

<sup>2</sup> See 7 U.S.C. § 1a, *et seq.*

(3) State and Federal PSC bank regulators would likely not have the tools to police these markets nor do they have the expertise in market regulation. As such, they would have to defer to the Department of Justice (“**DOJ**”) for investigations into market abuse relating to digital assets, which they recently announced are a low priority.<sup>3</sup>

### **Defining PSC in the GENIUS Act**

The definition of PSCs starts off with outlining a very broad category of digital assets generally and then progressively tightening the characteristics of a PSC to also clarify what a PSC is not.

First, the Act defines PSC as a “digital asset,” *i.e.*, a “digital representation of value which is recorded on a cryptographically-secured distributed ledger.” This category is broad and could include securities, currencies, bank deposits and of course “digital commodities.” Second, the Act states that not all “digital assets” would become PSCs, but only those “designed to be used as a means of payment or settlement.” This category would normally and primarily include all sorts of national currencies and money. Third, the Act says that PSCs must be issued by the issuer that: i) is obligated to convert PSCs into a “fixed amount of monetary value”; and ii) represents that the issuer will maintain (or reasonably endeavor to maintain) a stable value relative to the PSCs. Finally, to clear any doubt, the Act specifically states what a PSC is not – *i.e.*, it is not a “national currency,” it is not a “deposit,” and not a “security.”<sup>4</sup>

Importantly, this list of definitional carveouts in § 2 of the Act does not say that a PSC is not a “commodity,” as that term is defined in the CEA. The Act only provides at the very end in § 17 that PSCs issued under the Act are not “commodities.” That section amends the CEA to state that “[t]he term ‘commodity’ does not include a [PSC] issued by a permitted [PSC] issuer, as such terms are defined in the [Act].”

There are several important implications arising from excluding PSCs from the definition of “commodity” in the CEA.

### **PSCs are like onions**

It is not the first time an otherwise qualifying commodity was specifically carved out from being a “commodity” under the CEA. Indeed, if something was not a commodity in the first place, there would have been no need to carve it from the definition of “commodity.”<sup>5</sup>

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<sup>3</sup> See Memorandum from the Deputy Attorney General, Ending Regulation by Prosecution (Apr. 7, 2025).

<sup>4</sup> Note that on April 4, 2025 SEC’s Division of Cop. Fin. has already stated that PSCs would not meet the Reves and Howey tests and would not qualify as securities. See <https://www.sec.gov/newsroom/speeches-statements/statement-stablecoins-040425>

<sup>5</sup> CFTC Chairman Rostin Behnam has repeatedly stated that fiat-backed stablecoins—like USDC, USDT, and BUSD—should be considered commodities under the Commodity Exchange Act. In a March 2023 appearance before the Senate

In response to a massive manipulation in onions in 1955, the U.S. Congress enacted the Onion Futures Act in 1958 (the “**Onion Futures Act**”)<sup>6</sup> that amended the definition of “commodity” in § 1a(9) of the CEA<sup>7</sup> to exclude onions and made trading in onion futures on commodity exchanges unlawful. At that time there was a populist belief that futures trading in onion contracts had exacerbated price fluctuations and made the manipulative scheme possible.

Half a century later, in 2010, under the Dodd Frank Act of 2010,<sup>8</sup> Congress amended the Onion Futures Act and the CEA to further carve out from the definition of “commodity” – “motion picture box office receipts (or any index, measure, value, or data related to such receipts)” and to make the trading in futures on commodity exchanges in motion picture box office receipts also unlawful.<sup>9</sup> The motivation was to eliminate “popcorn futures” as a potential gaming contract and in response to the motion picture association’s lobbying efforts.

Further, just last year, in 2024, U.S. Senator E. Warren reintroduced her proposed Future of Water Act of 2024 to also carve out from the definition of “commodity” – “water or water rights” as well as to prohibit trading of water futures on commodity exchanges by amending the Onion Futures Act.<sup>10</sup> Again, the motivation was to prevent manipulation and speculation of water as a public good.

Of note, the son of the farmer who had successfully lobbied Congress to carve onions out of the “commodity” definition now regrets that outcome because without a robust futures market in onions, prices are much more susceptible to fluctuation, and it is impossible to hedge one’s exposure to onions in the open market;<sup>11</sup> likewise, arguments are being made that the ban on movie futures hurts the industry and makes it impossible to hedge new movie releases.<sup>12</sup>

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Agriculture Committee, he emphasized that “notwithstanding a regulatory framework around stablecoins, they are going to be commodities, in [his] view”. *Also see*, Tether and Bitfinex CFTC enforcement actions where the CFTC has asserted that PSC issued by these issuers were “commodities.” <https://www.cftc.gov/PressRoom/PressReleases/8450-21> *Also see*, CFTC enforcement action involving Avraham Eisenberg and Mango Markets, CFTC Release No. 8647-23, Jan. 9, 2023, <https://www.cftc.gov/PressRoom/PressReleases/8647-23>

<sup>6</sup> 7 U.S.C § 13-1.

<sup>7</sup> See § 1a(9) of the CEA and § 1.3 of 17 C.F.R (“**CFTC Regulations**”).

<sup>8</sup> 124 STAT. 1376 Public Law 111–203 (July 21, 2010).

<sup>9</sup> See The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 85-839 (7 U.S.C. 13-1).

<sup>10</sup> See <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-rep-khanna-reintroduce-bill-to-stop-wall-street-from-profiting-off-water-and-water-rights>

<sup>11</sup> [https://money.cnn.com/2008/06/27/news/economy/The\\_onion\\_conundrum\\_Birger.fortune/index.htm](https://money.cnn.com/2008/06/27/news/economy/The_onion_conundrum_Birger.fortune/index.htm)

<sup>12</sup> In fact, prior to the enactment of the Dodd Frank Act in 2010, the CFTC had approved two DCMs that were intending to list motion picture futures and was about to approve the specific movie contract before the ban on these contracts went into effect when the Onion Futures Act was amended in 2010.

But, again, onions and box office receivables (and potentially water in the future) are not commodities and the trading in these futures is unlawful because of the populist belief that active trading in listed futures on these assets would result in excessive speculation and eventually cause greater volatility in these assets, as well as manipulation and fraud.<sup>13</sup>

It is not clear why legislators believe that there should be no market in PSC futures and that the prices of PSCs would become negatively impacted by the trading of PSC futures on commodity exchanges, especially given that PSCs, by design, are intended to maintain their stated value – *i.e.*, remain “stable.”

#### **Futures contracts on non-commodities are not allowed**

Removing a commodity from the “commodity” definition in § 1a(9) of the CEA will result in several consequences. *First*, this section itself states in reference to what a “commodity” is, that it is something “in which contracts for future delivery are presently or in the future dealt in.” *Second*, § 1a(27) of the CEA defines “future delivery” by exclusion stating “[t]he term “future delivery” does not include any sale of any cash commodity for deferred shipment or delivery...”, meaning that deliverable forward transactions do not qualify as futures (*i.e.*, contracts for a “commodity for future delivery”). Obviously, if there is no “commodity,” there would be no “commodity for future delivery” either. *Third*, it has been a foundational principle of U.S. regulation of commodity derivatives that all “contract[s] for purchase and sale of a commodity for future delivery” must be traded on a designated or registered “board of trade” – *i.e.*, a commodity exchange or a designated contract market (“DCM”).<sup>14</sup> Accordingly, under the Act, no futures contracts on PSCs will be allowed and no U.S. registered DCM will be able to list futures contracts on PSCs. *Fourth*, because retail participants (*i.e.*, the public)<sup>15</sup> may only trade derivatives in the form of futures and swaps traded on a registered DCM, retail participants will not be able to mitigate their commercial risks, hedge or speculate in PSC derivatives in the U.S.<sup>16</sup>

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<sup>13</sup> <https://www.theringer.com/2018/11/15/movies/box-office-futures-dodd-frank-mpaa-recession>

<sup>14</sup> See § 4(a) of the CEA.

<sup>15</sup> The CEA does not define a “retail participant,” however, any participant that is not qualified as an “eligible contract participant,” as defined in § 1a(18) (*e.g.*, regulated financial institutions and wealthy individuals) (“**ECP**”) and not an “eligible commercial entity,” as defined in § 1a(17) of the CEA, would be considered retail. *Also see* § 2(c)(2)(D) of the CEA – Retail Commodity Transactions.

<sup>16</sup> There have been instances when a stablecoin issuer was not able to redeem its PSCs <https://www.investopedia.com/sec-sues-terra-and-founder-for-fraud-7111256> or when the value of a PSC collapsed significantly below the stated redemption value. Holders of these PSCs would have been able to reduce the risks of the loss in value of their PSCs if they were able to hedge with PSC futures or swaps, similarly to hedging fluctuations in interest rates, currencies, gold or crude oil.

It is less clear whether the same prohibition will apply to “swaps”<sup>17</sup> on PSCs because the definition of “swap” only lists “commodities” among a list of other assets and economic indicators; which arguably could mean that a swap on a PSC would be still technically possible, especially if swaps on PSCs are not traded on a DCM. However, this may be a distinction without a difference because “swaps” are included in the definition of “commodity interests”<sup>18</sup> and most provisions of the CEA apply to transactions in “commodity interests.” Therefore, because “swaps” can only be entered into between Eligible Contract Participants, again, retail participation would be precluded (unless a swap is listed on a DCM while it is not clear whether a DCM can list swaps on non-commodities). Given these outcomes, a U.S. derivatives market (futures, options on futures, swaps and OTC options as well as security-based swaps<sup>19</sup>) on PSCs will be practically impossible, depriving retail and institutional users of PSCs of important protections.

Paradoxically, however, some customer-protection provisions in the CEA will not apply that otherwise would prohibit retail participation. Because leveraged and margined contracts on PSCs by definition will not be “contracts for future delivery of a commodity,” arguably retail participants will not be prohibited from trading these contracts under § 2(c)(2)(D) of the CEA. If there was fraud or manipulation in trading PSCs on spot or forward markets, the CFTC will have no jurisdiction to police these markets under § 180.1 of CFTC Regulations because PSCs would no longer be commodities. Therefore, there is a possibility that an active retail market in leveraged and margined PSC contracts may develop – and entirely outside the purview of any U.S. financial regulators.<sup>20</sup>

### **Can PSC derivatives be issued overseas?**

Non-U.S. markets, including U.S. registered “foreign boards of trade,”<sup>21</sup> are not restricted in the same way from trading futures on assets that are not “commodities” and, provided local law allows, may list derivatives on PSCs. This means that nothing will prevent non-U.S. markets from listing and trading futures and OTC derivatives on U.S.-issued PSCs (either deliverable or cash-settled).<sup>22</sup>

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<sup>17</sup> See § 1a(47) defining a “swap” generally as an agreement on various occurrences, events, outcomes as well as rates, currencies, commodities, etc.

<sup>18</sup> See § 1.3 of CFTC Regulations defining “commodity interests” to also include “swaps.”

<sup>19</sup> Security-based swaps (“**SBS**”) are defined in § 1a(42) of the CEA in reference to § 3(a) of the Securities Exchange Act of 1934. Because PSCs are also carved out from the definition of security, a SBS on a PSC will also be likely unlawful.

<sup>20</sup> See e.g., CFTC Release Number 8774-23, CFTC Issues Orders Against Operators of Three DeFi Protocols (Opyn, ZeroEx, Deridex), for Offering Illegal Digital Asset Derivatives Trading <https://www.cftc.gov/PressRoom/PressReleases/8774-23>. If none of the underlying digital assets were commodities, the CFTC would not have been able to bring these enforcement actions. Likewise, since PSCs are not securities either, the SEC also would not be able to police these markets.

<sup>21</sup> Part 48 of CFTC Regulations.

<sup>22</sup> § 3(e) of the Act provides that the Act has extraterritorial effect on offers and sales of PSCs to persons located in the U.S.; thus offering to U.S. persons deliverable futures on PSCs issued in violation of the Act will likely be prohibited.

Regardless of the language in the Act, U.S. persons will likely be able to trade PSC derivatives directly on local overseas trading platforms, as well as on U.S.-registered foreign boards of trade, even though § 30.1 of CFTC Regulations will prohibit U.S. futures commission merchants (“**FCMs**”) from facilitating trades on non-U.S. markets because “foreign futures” only include “commodity futures” on foreign boards of trade.

### **Who will prosecute fraud and manipulation in retail PSC derivatives?**

The CFTC has enforcement jurisdiction over spot or derivative transactions in interstate commerce to the extent fraud and manipulation is involved,<sup>23</sup> and exclusive regulatory jurisdiction over transactions involving “commodity interests.” Realizing that there is a jurisdictional gap over spot transactions for “digital assets,” each of the proposed bills in Congress addressing the infrastructure of digital commodity and digital assets trading, grants the CFTC additional exclusive jurisdiction over spot markets in digital commodities.<sup>24</sup>

Because PSCs are neither bank deposits, nor “national currencies,” nor “securities,” nor “commodities,” it will fall to the appropriate PSC State regulators as well as the Federal banking regulators to police the issuers of PSCs. Further, because neither the SEC nor the CFTC will have any jurisdictional reach over the markets in PSC derivative instruments, and State and Federal banking regulators have traditionally not acted as market regulators, the DOJ (primarily under the Wire Fraud Act)<sup>25</sup> would have to step up.

### **Will PSCs issued not in compliance with the Act be “commodities”?**

Section 3(a) of the Act states: “It shall be unlawful for any person other than a permitted payment stablecoin issuer to issue a payment stablecoin in the United States” and provides that PSCs not issued by permitted [PSC] issuer shall be subject to heavy fines and a referral to the DOJ for criminal sanctions. Because the carve-out in § 1a(9) refers only to PSCs issued by a “permitted PSC issuer,” arguably PSCs issued by a non-permitted issuer would still qualify as “commodities,”<sup>26</sup> however, these PSCs would nevertheless be illegal under § 3(a) of the Act at the expiration of three (3) years following enactment, so it is unlikely that at that time there will be a market in PSCs that would qualify as a “commodity” (or a “security,” for that matter).

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<sup>23</sup> See § 180.1

<sup>24</sup> See, e.g., the recently proposed The Digital Asset Market Clarity Act of 2025, introduced in the House as H.R. 3633 during the 119th Congress on May 29, 2025, by Representative J. French Hill (R-AR).  
[https://financialservices.house.gov/uploadedfiles/2025-05-29\\_-\\_sbs\\_-\\_clarity\\_act\\_of\\_2025\\_-\\_final.pdf](https://financialservices.house.gov/uploadedfiles/2025-05-29_-_sbs_-_clarity_act_of_2025_-_final.pdf)

<sup>25</sup> 18 U.S.C. § 1343.

<sup>26</sup> See CFTC enforcement actions against Tether, Bitfinex, and Mango Markets.

**What likely effects will there be on PSC markets?**

The Act would require all U.S. PSC issuers to either stop issuing PSCs or to qualify as “permitted PSC issuers” within three (3) years of enactment of the Act.<sup>27</sup> Likewise, any futures contract on PSCs would have to cease trading and be delisted from a DCM within that timeframe.<sup>28</sup> It is less clear whether non-U.S. platforms will be required to delist these contracts, and it is possible that a derivatives market on U.S.-issued PSCs will develop overseas should there be demand in PSC futures.

It appears clear that the lawmakers do not wish to see a derivatives market in PSCs to develop in the U.S., but it is less clear whether Congress also intended that there should be no futures trading on PSCs (again, it could have amended the Onion Futures Act as was done with respect to onions and box office receivables). The carveout in § 17 of the Act does not have a companion amendment to the Onion Futures Act by adding the prohibition on trading PSC futures on a “board of trade” (*i.e.*, a commodity exchange), as these prohibitions apply with respect to the trading of futures on onions, box office receivables, and as proposed to water.<sup>29</sup>

**An amendment to the Act would provide important protections**

A simple fix to this potential gap would be simply to remove the provision in § 17 of the Act so that the Act will remain silent as to whether a given PSC will qualify as a “commodity,” or to provide that PSCs would be qualified as an “excluded” commodity, akin to interest rates, exchange rates, currencies, etc.<sup>30</sup> Then, if U.S. market participants chose to develop a market in PSC futures, the CFTC and the DOJ will have the appropriate tools to regulate and police these markets in the future without further amendments to the Act.

If the language in the Act does not change as described, hopefully PSCs do not become the new onions. It is possible that the 1-to-1 redeemable requirement will ensure stability of PSC valuations and there will never be a need to hedge one’s exposure to PSC issuers in the U.S.<sup>31</sup>

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<sup>27</sup> § 3(b)(1) of the Act.

<sup>28</sup> As of the date of this writing, there are no U.S. DCMs where futures on PSCs are listed; however, there are non-U.S. platforms where futures on U.S.-issued PSCs are currently listed.

<sup>29</sup> To effectuate the prohibition on the trading of PSC futures, as discussed below, it would be necessary to also amend the Onion Futures Act because in the absence of the companion prohibition on trading of PSC futures, a secondary retail market in leveraged and margined PSC futures may develop completely outside of the regulatory reach.

<sup>30</sup> § 1a(19) of the CEA.

<sup>31</sup> Unfortunately, in 2022 several stablecoins had crashed and lost much of their value – demonstrating that hedging of stablecoins may be needed in the future as the history tends to repeat itself.

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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