Carl Kennedy on CFTC Regulation, Insider Trading and Perpetual Futures on *Prediction Markets Report* Podcast

July 1, 2026

Carl Kennedy, Partner and Co-Chair of Financial Markets and Regulation, appeared on the *Prediction Markets Report* podcast to discuss the Commodity Futures Trading Commission's (CFTC) forthcoming rulemaking on event contracts, the nuances of insider trading enforcement in prediction markets, state preemption challenges, and the classification of perpetual futures.

CFTC Regulatory Agenda

Drawing on his experience as a former CFTC rulewriter and Commissioner's office staffer, Carl said the CFTC is unlikely to address all 40 ANPRM questions in a single rulemaking. Instead, he expects at least two rules: a first step to harmonize Regulation 40.11 — the Commission's 2011 event contracts rule — with the Commodity Exchange Act as amended by Dodd-Frank. Resolving the current mismatch between the rule text and Commission practice, he noted, could also strengthen the CFTC's position in ongoing litigation.

On listing standards, Carl expects the rulemaking to focus on the CEA requirement that contracts not be readily susceptible to manipulation, particularly where a single actor or small group can determine the settlement outcome. He also anticipates more detailed guidance on Core Principle 3, potentially including a presumption that contracts with limited settlement determinants fail the standard unless an exchange can show otherwise. This likely requires early engagement with Commission staff before such products are listed.

Insider Trading Enforcement and Jurisdictional Challenges

Recent high-profile enforcement actions prompted Carl to explain how the CFTC's approach to insider trading differs from the securities law framework. Under the CEA and CFTC regulations, a violation requires not merely possession of material non-public information, but the misappropriation of that information by someone with a duty not to disclose it. "You need more than just having the material nonpublic information," he explained.

Turning to state preemption, Carl addressed Minnesota's legislation seeking to ban prediction markets, including weather contracts. Such efforts reflect a lack of awareness of the long history of federally regulated event and derivatives markets, he said, and expressed confidence they would not withstand legal challenge. The CFTC has already begun to push back, asserting its jurisdiction over these instruments in court for what he believes may be the first time.

Perpetuals: Futures or Swaps?

In the episode's closing segment, the conversation turned to perpetual futures (derivatives contracts with no expiration date), which were recently introduced on US exchanges. Proponents of classifying these instruments as futures argue that doing so brings offshore trading activity back to US markets, where participants benefit from the protections of the US regulatory regime, a priority explicitly championed by CFTC Chairman Selig. Critics, including some traditional derivatives market participants and a major exchange, contend that perpetual contracts more closely resemble swaps and that their classification as futures allows them to escape certain swap reporting and dealer registration requirements.

The CFTC has taken the position that nothing in the CEA requires futures contracts to have a termination date and that it is ultimately up to the exchange to make that determination. In his closing comments, Carl noted that a practical consequence of swap classification, often overlooked, is that traders exceeding the dealer de minimis threshold for notional swap trading volume may be required to register as swap dealers.

"CFTC Regulation, Insider Trading, and Perpetual Futures with Carl Kennedy," *Prediction Markets Report*, June 12, 2026

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