

January 31, 2018

CFTC Issues New Guidance Relating to Virtual Currency Regulations

CFTC Issues Guidance on “Actual Delivery” Requirements for Virtual Currency Retail Commodity Transactions and Releases Backgrounder on Virtual Currency Regulatory Framework

SUMMARY

On December 20, 2017, the Commodity Futures Trading Commission (the “CFTC”) published a proposed interpretation (the “Proposed Interpretation”) of the term “actual delivery” in the context of retail commodity transactions in virtual currency (“Retail Virtual Currency Transactions”).¹ The Proposed Interpretation follows previous CFTC guidance on actual delivery requirements for physical commodities and would determine when “actual delivery” has occurred within the context of Retail Virtual Currency Transactions, thereby largely exempting such transactions from CFTC regulation, if, within 28 days of the date of such transaction:

- the buyer has the ability to (a) take possession and control of the entire amount of virtual currency transferred through the transaction, regardless of whether the transaction involved a financing arrangement, and (b) use the transferred virtual currency freely in commerce; and
- the seller (including any affiliates or other persons acting in concert with the seller) does not retain any interest or control in the virtual currency transferred.

Comments on the Proposed Interpretation are due March 20, 2018.

Following the Proposed Interpretation, on January 4, 2018, the CFTC released the *CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets* (the “Backgrounder”), a memorandum addressing the sources of federal and state oversight of virtual currencies, the CFTC’s approach to virtual currency regulation, and the self-certification process for virtual currency futures.²

These releases come amid increased regulatory focus on virtual currency transactions, which was further highlighted in a joint statement from the CFTC and the Securities and Exchange Commission (the “SEC”) stating that, “[w]hen market participants engage in fraud under the guise of offering digital instruments – whether characterized as virtual currencies, coins, tokens, or the like – the SEC and the CFTC will look beyond form, examine the substance of the activity and prosecute violations of the federal securities and commodities laws. The Divisions of Enforcement for the SEC and CFTC will continue to address violations and bring actions to stop and prevent fraud in the offer and sale of digital instruments.”³ Both the CFTC and the SEC also announced additional enforcement actions related to cryptocurrency schemes following the joint CFTC/SEC statement,⁴ and the CFTC’s Market Risk Advisory Committee held a meeting on January 31, 2018 to further discuss the futures contract self-certification process and the underlying spot markets for virtual currencies. In addition, SEC Chairman Jay Clayton and CFTC Chairman Christopher Giancarlo, who are both scheduled to appear at an upcoming hearing of the Senate Committee on Banking, Housing, and Urban Affairs to discuss virtual currencies, co-authored a recent Wall Street Journal op-ed in which they said: “[t]he CFTC and SEC, along with other federal and state regulators and criminal authorities, will continue to work together to bring transparency and integrity to these markets and, importantly, to deter and prosecute fraud and abuse.”⁵

THE CFTC PROPOSED INTERPRETATION

The Commodity Exchange Act (the “CEA”) generally grants the CFTC regulatory jurisdiction over retail commodity transactions.⁶ However, the CEA removes from CFTC oversight any contract of sale that “results in actual delivery within 28 days or such other longer period as the [CFTC] may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved.”⁷

In 2016, following the CFTC’s declaration that virtual currency is a “commodity” under the CEA,⁸ the CFTC brought an enforcement action against Bitfinex, a virtual currency trading platform,⁹ alleging that Bitfinex facilitated the trading of bitcoin on a leveraged, margined or financed basis, but failed to meet the actual delivery requirements under the CEA and therefore was engaging in illegal commodity transactions and acting as an unregistered futures commission merchant.¹⁰ In response to requests for guidance following the Bitfinex enforcement action, the CFTC issued the Proposed Interpretation to provide clarity on the meaning of the term “actual delivery,” as defined under the CEA, in the context of Retail Virtual Currency Transactions.

Actual Delivery Requirements for Virtual Currencies

In 2013, the CFTC issued guidance (the “2013 Guidance”)¹¹ on what constitutes “actual delivery” for purposes of the CEA. The Proposed Interpretation expands upon the 2013 Guidance to interpret the actual delivery requirements in the specific context of Retail Virtual Currency Transactions. The Proposed Interpretation states that the CFTC will continue to follow the 2013 Guidance in defining actual

delivery and intends to “employ a functional approach and examine how the agreement, contract, or transaction is marketed, managed, and performed, instead of relying solely on language used by the parties in the agreement, contract, or transaction.”¹² The Proposed Interpretation notes that the CFTC would assess certain factors enumerated in the 2013 Guidance to determine whether actual delivery occurs.¹³ These factors include:

- ownership;
- possession;
- title and physical location of the commodity purchased or sold, both before and after execution of the agreement, contract, or transaction, including all related documentation;
- the nature of the relationship between the buyer, seller, and possessor of the commodity purchased or sold; and
- the manner in which the purchase or sale is recorded and completed.¹⁴

Specifically, the Proposed Interpretation provides that actual delivery in the context of Retail Virtual Currency Transactions would require:

- the purchaser having the ability to (a) take possession and control of the entire quantity of the virtual currency and (b) use the transferred virtual currency freely in commerce (both within and away from any particular platform), regardless of whether the transaction involved a financing arrangement, no later than 28 days from the date of the transaction; and
- the seller (including any affiliates or other persons acting in concert with the seller) not retaining any interest in or control over any of the virtual currency purportedly transferred within 28 days from the date of the transaction.¹⁵

The CFTC acknowledges in the Proposed Interpretation that assessing whether a buyer or seller has “control” of virtual currency differs from similar analyses for physical commodities. In fact, the Proposed Interpretation requests comments on the meaning of “control” in the context of Retail Virtual Currency Transactions.¹⁶

The Proposed Interpretation includes four non-exclusive examples intended to illustrate the CFTC’s proposed analysis of actual delivery in the context of Retail Virtual Currency Transactions.¹⁷

Examples 1 and 2 – Good Actual Delivery

In Example 1, actual delivery would occur when, within 28 days of entry into a Retail Virtual Currency Transaction:

- there is a record on the relevant blockchain or public ledger evidencing the transfer from the seller’s blockchain wallet to the buyer’s blockchain wallet¹⁸ (or, if an intermediary is used, showing the transfer from seller to the intermediary, and from the intermediary to buyer) of the total amount of virtual currency purchased, including any amounts purchased using leverage, margin or other financing;
- the seller retains no interest in or control over the virtual currency transferred; and
- the seller has transferred title of the virtual currency to the buyer.

Example 2 involves the use of a depository by the buyer. When using a depository, actual delivery would occur when, within 28 days of entering into a transaction, (a) the seller has transferred the entire quantity of virtual currency, including any amount purchased using margin, leverage or financing, into the possession of a depository who has agreed to hold the virtual currency on behalf of the buyer, (b) the seller has transferred title to the purchaser, (c) the purchaser has secured “full control”¹⁹ over the virtual currency and (d) the seller retains no liens over the virtual currency as a result of the buyer’s use of margin, leverage or other financing.

Examples 3 and 4 – Not Actual Delivery

In Example 3, the Proposed Interpretation illustrates that regardless of whether a contract or agreement imposes upon the seller an obligation to deliver virtual currency to the buyer, mere book entries made by the seller on its own books, purporting to show delivery of the virtual currency to the buyer, would not be sufficient, without more, to constitute actual delivery. In addition, Example 4 illustrates that actual delivery would not be deemed to have occurred if, within 28 days of entering into the transaction, such transaction is rolled, netted out, offset against, or otherwise settled in cash or virtual currency (other than the virtual currency transferred under the transaction).

Comments Requested

Comments on the Proposed Interpretation are due March 20, 2018, and the CFTC has focused its requests for comments on the following key issues (among others):

- whether the 28-day delivery window for retail commodity transactions should be shortened to more accurately reflect virtual currency market practices, citing as an example the two-day actual delivery period that currently applies to retail foreign exchange transactions;²⁰
- whether any additional examples of virtual currency transactions should be considered by the CFTC to satisfy the actual delivery requirements;
- whether, more generally, the CFTC should consider exempting from its regulatory authority virtual currency transactions or whether a distinct regulatory framework governing such transactions should exist;
- what considerations should be used when defining “depositories” and “full control” under the examples of actual delivery;
- the means by which liens over virtual currency are terminated; and
- the process by which virtual currency “title” is transferred.

BACKGROUNDER

On January 4, 2018, the CFTC released the Backgrounder to clarify the regulatory framework governing virtual currency transactions and the CFTC’s “heightened review” of the virtual currency futures self-certification process.²¹ The Backgrounder is comprised of five brief sections:

- a short description of the existing framework of federal and state oversight of virtual currencies;

- a summary of the CFTC's approach to virtual currency regulation;
- a description of virtual currency futures contracts self-certifications;
- an outline of the "heightened review" the CFTC imposes on virtual currency self-certifications by regulated futures exchanges; and
- a short review of the constituencies affected by self-certification of virtual currency futures.

With respect to self-certification, on December 1, 2017, the Chicago Mercantile Exchange Inc. and the CBOE Futures Exchange self-certified new contracts for bitcoin futures.²² The self-certification process under the CEA was designed to provide designated contract markets ("DCMs") flexibility to certify new products on an expedited basis and has limited provisions for CFTC oversight.²³ Specifically, the CFTC may halt a DCM's self-certification of new products only in limited circumstances, and the process does not allow for public input, a requirement to create a separate guaranty fund with respect to new contracts, or CFTC assessments of the underlying spot market for new products.²⁴

The Backgrounder notes that there currently is no comprehensive federal regulatory regime governing virtual currency spot markets.²⁵ Instead, the regulatory framework for virtual currencies in the United States "has evolved into a multifaceted, multi-regulatory approach."²⁶ Apart from the CFTC, other sources of virtual currency regulation include: (a) state banking regulators overseeing certain virtual currency spot exchanges, generally through state money transfer laws; (b) the Internal Revenue Service, which treats virtual currencies as property subject to capital gains tax; (c) the Financial Crimes Enforcement Network of the U.S. Treasury, which investigates money laundering activities involving virtual currencies; and (d) the SEC, which monitors and takes action against initial coin offerings.

The Backgrounder outlines the prominent role played by the CFTC in the virtual currency regulatory framework, including the development of an updated approach to virtual currency regulation that incorporates the following elements:

- consumer education;
- asserting legal authority over virtual currency derivatives and their underlying spot markets;
- gathering of market intelligence for regulatory and enforcement insights;
- robust enforcement of fraud in, and manipulation of, virtual currency spot markets; and
- coordination with other government agencies with oversight responsibility, including the SEC, Federal Bureau of Investigation, Justice Department and Financial Stability Oversight Committee.²⁷

Despite its limited authority under the CEA to contest self-certifications of new products offered by DCMs, the CFTC notes in the Backgrounder that it will engage in a "heightened review" of self-certifications relating to virtual currency.²⁸ Such heightened review will include increased margin requirements for cash-settled virtual currency futures, setting low thresholds for large trader reporting and extensive market surveillance and coordination – including requiring DCMs to enter into information sharing agreements

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with spot market platforms, monitor cash markets to identify discrepancies in the cash and futures markets, and coordinate with the CFTC with respect to trading activities and new product launches.²⁹ Chairman Giancarlo expanded on this process in a speech he gave at the ABA Derivatives and Futures Section Conference on January 19, 2018, and confirmed the CFTC's commitment to following this approach going forward.³⁰

The Backgrounder notes that the CFTC's heightened review of self-certifications for virtual currency products reveals three primary constituencies affected by virtual currency futures – market participants and consumers, the public interest and derivative clearing organizations (“DCOs”) – and details the CFTC's means of protecting these constituencies from the risks associated with virtual currency trading.³¹ The CFTC plans to protect consumers and market participants by promulgating educational materials describing the virtual currency markets and their associated risks,³² and continuing its enforcement activities. Likewise, the CFTC plans to protect the public interest through activities such as the formation of a virtual currency task force, heightened review protocols, and enforcement of the anti-fraud and anti-manipulation rules of the CEA.³³ Last, the Backgrounder notes that DCOs can take steps to protect against virtual currency risk by either setting high margin requirements that take into account the volatility inherent in the virtual currency markets, or avoiding virtual currency trading altogether.³⁴

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ENDNOTES

- ¹ *Retail Commodity Transactions Involving Virtual Currency*, 82 Fed. Reg. 60335 (Dec. 20, 2017), available at <http://www.cftc.gov/idx/groups/public/@lfederalregister/documents/file/2017-27421a.pdf>.
- ² The CFTC, *CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets* (January 4, 2018), available at http://www.cftc.gov/idx/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf.
- ³ Joint Statement of CFTC Enforcement Director James McDonald and SEC Enforcement Co-Directors Stephanie Avakian and Steven Peikin (January 19, 2018), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/mcdonaldstatement011918>. For examples of recent SEC and CFTC actions with respect to virtual currency, see our memos Sullivan & Cromwell LLP, *Company Halts “Initial Coin Offering” After SEC Issues Cease-and-Desist Order; SEC Chairman Issues Statement on Blockchain-Based Offerings* (December 13, 2017), available at <https://www.sullcrom.com/company-halts-initial-coin-offering-after-sec-issues-cess-and-desist-order-sec-chairman-issues-statement-on-blockchain-based-offerings>, and Sullivan & Cromwell LLP, *Regulators Increase Focus on Virtual Currency and Digital Tokens, Including ICOs* (August 8, 2017), available at <https://www.sullcrom.com/regulators-increase-focus-on-virtual-currency-and-digital-tokens-including-icos>.
- ⁴ See CFTC Charges Randall Crater, Mark Gillespie, and My Big Coin Pay, Inc. with Fraud and Misappropriation in Ongoing Virtual Currency Scam, available at <http://www.cftc.gov/PressRoom/PressReleases/pr7678-18>; SEC Halts Alleged Initial Coin Offering Scam, available at <https://www.sec.gov/news/press-release/2018-8>.
- ⁵ Jay Clayton and J. Christopher Giancarlo, *Regulators are Looking at Cryptocurrency*, The Wall Street Journal (January 24, 2018), available at <https://www.wsj.com/articles/regulators-are-looking-at-cryptocurrency-1516836363>.
- ⁶ 7 U.S.C. § 2(c)(2)(D). The CEA defines retail commodity transactions as “any agreement, contract, or transaction in any commodity that is – (I) entered into with, or offered to (even if not entered into with), a person that is not an eligible contract participant or eligible commercial entity; and (II) entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.” *Id.* It should also be noted that the CFTC has also been granted general anti-fraud and anti-manipulation jurisdiction over “any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.” 7 U.S.C. § 9(1).
- ⁷ 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa).
- ⁸ See Testimony of CFTC Chairman Timothy Massad before the U.S. Senate Committee on Agriculture, Nutrition and Forestry (Dec. 10, 2014), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-6>. Section 1a(9) of the CEA defines “commodity” to include, among other things, “all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.” 7 U.S.C. § 1a(9). See also *In the Matter of: Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan, Respondents*, 2015 WL 5535736, at *2, CFTC No. 15-29 (2015) (“Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.”); *In re TeraExchange LLC*, CFTC Docket No. 15-33, 2015 WL 5658082, CFTC No. 15-33 (2015) (“Further, Bitcoin is a commodity under Section 1a of the Act, 7 U.S.C. § 1a (2012), and is therefore subject as a commodity to applicable provisions of the Act and Regulations.”); *In the Matter of: BFXNA INC. d/b/a BITFINEX, Respondent*, 2016 WL 3137612, at *5, CFTC No. 16-19 (2016) (“Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities, and are therefore subject as a commodity to applicable provisions of the Act and Regulations.”).

ENDNOTES (CONTINUED)

- ⁹ *In the Matter of: BFXNA INC. d/b/a BITFINEX, Respondent*, 2016 WL 3137612, CFTC No. 16-19 (2016).
- ¹⁰ *Id.* The Bitfinex enforcement action alleged that the respondent “permitted users, including individuals and entities that did not meet the definition of an eligible contract participant or eligible commercial entity, to borrow funds from other users on the platform in order to trade bitcoins on a leveraged, margined, or financed basis...[but the respondent] did not actually deliver bitcoins purchased on a leveraged, margined, or financed basis to the traders who purchased them.” *Id.* The Bitfinex enforcement action was subsequently settled and Bitfinex was required to pay a \$75,000 civil penalty and stop all future violations under the CEA. See CFTC Release 7380-16, *CFTC Orders Bitcoin Exchange Bitfinex to Pay \$75,000 for Offering Illegal Off-Exchange Financed Retail Commodity Transactions and Failing to Register as a Futures Commission Merchant*, available at <http://www.cftc.gov/PressRoom/PressReleases/pr7380-16>.
- ¹¹ *Retail Commodity Transactions Under Commodity Exchange Act*, 78 Fed. Reg. 52426 (Aug. 23, 2013).
- ¹² 78 Fed. Reg. at 52428.
- ¹³ *Proposed Interpretation*, 82 Fed. Reg. at 60339.
- ¹⁴ 78 Fed. Reg. at 52428.
- ¹⁵ *Id.*
- ¹⁶ *Proposed Interpretation*, 82 Fed. Reg. at 60341.
- ¹⁷ The examples of actual delivery in the Proposed Interpretation follow and conform to the examples provided in the 2013 Guidance.
- ¹⁸ Virtual currency “wallets” are storage mechanisms that hold virtual currency private keys, *i.e.*, records of each virtual currency asset held by an investor. Wallets are encrypted and can be cloud-based or maintained on an investor’s hard drive, among other forms.
- ¹⁹ According to the Proposed Interpretation, “full control” means “the ability to immediately remove the full amount of the purchased commodity from the depository.” *Proposed Interpretation*, 82 Fed. Reg. at 60340.
- ²⁰ 7 U.S.C. § 2(c)(2)(C)(i)(II)(bb)(AA).
- ²¹ The CFTC Virtual Currency Resource Web Page, available at <http://www.cftc.gov/Bitcoin/index.htm> (last visited January 18, 2018).
- ²² The Cantor Exchange also self-certified a contract for bitcoin options on the same date. See *Backgrounder* at 2.
- ²³ See *Provisions Common to Registered Entities*, 76 Fed. Reg. 44776, 44779 (July 27, 2011), available at <http://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2011-18661>.
- ²⁴ *Backgrounder* at 2. See also 7 U.S.C. § 7a-2(c); 17 C.F.R. § 40.6.
- ²⁵ *Backgrounder* at 1.
- ²⁶ *Id.*
- ²⁷ *Id.* at 2.
- ²⁸ *Backgrounder* at 3.
- ²⁹ *Id.*
- ³⁰ Remarks of Chairman J. Christopher Giancarlo to the ABA Derivatives and Futures Section Conference, Naples, Florida, available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo34>.

ENDNOTES (CONTINUED)

31 *Backgrounder* at 3-4.

32 According to the *Backgrounder*, the CFTC has released the following educational materials regarding virtual currency markets: CFTC Virtual Currency Primer, *available at* http://www.cftc.gov/idc/groups/public/documents/file/labcftc_primercurrencies100417.pdf; the CFTC Bitcoin Consumer Advisory, *available at* http://www.cftc.gov/idc/groups/public/@customerprotection/documents/file/customeradvisory_urv_ct121517.pdf; the CFTC market advisory, *available at* <http://www.cftc.gov/PressRoom/PressReleases/pr7654-17>; the CFTC Virtual Currency Resource Web Page (see *supra*, note 17), analysis of bitcoin spot market data; the CFTC weekly publication of Bitcoin futures “Commitment of Traders” data, *available at* <http://www.cftc.gov/MarketReports/CommitmentsofTraders/index.htm>.

33 *Backgrounder* at 4.

34 *Id.*

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