

CFTC Provides Final Guidance on Actual Delivery of Digital Assets

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On March 24, 2020, the Commodity Futures Trading Commission (“CFTC” or the “Commission”) unanimously approved its final interpretive guidance (“Final Guidance”) regarding retail commodity transactions involving certain digital assets. The guidance clarifies the CFTC’s views regarding the “actual delivery” exception to Section 2(c)(2)(D) of the Commodity Exchange Act (“CEA”) in the context of digital assets that serve as a medium of exchange, also known as “virtual currencies.

”Under CEA Section 2(c)(2)(D), certain retail commodity transactions are subject to certain provisions of the CEA, including on-exchange trading and broker registration requirements, as if the transactions are futures. However, there is an exception for contracts of sale that result in “actual delivery” within 28 days from the trade date. With respect to retail commodity transactions in digital assets, the interpretive guidance discusses the following factors which demonstrate “actual delivery”:

“(1) a customer securing: (i) possession and control of the entire quantity of the commodity, whether it has purchased on margin, or using leverage, or any other financing arrangement, and (ii) the ability to use the entire quantity of the commodity freely in commerce (away from any particular execution venue) no later than 28 days from the date of the transaction and at all times thereafter; and

(2) the offeror and counterparty seller (including any of their respective affiliates or other persons acting in concert with the offeror or counterparty seller on a similar basis) do not retain any interest in, legal right, or control over any of the commodity purchased on margin, leverage, or other financing arrangement at the expiration of 28 days from the date of the transaction.”

The Final Guidance largely follows the proposed guidance issued by the Commission over two years ago¹. As such, businesses that conduct digital asset transactions with retail customers using leverage, margin or other financing must take care to ensure they are not running afoul of CEA Section 2(c)(2)(D). In particular, the Commission notes in the Final Guidance that to fall within the exception for contracts of sale found in Section 2(c)(2)(D)(ii)(aa), “actual delivery” of the virtual currency must take place within 28 days.

Actual delivery will have occurred if, within 28 days after entering into the retail commodity transaction, (i) the virtual currency is transferred to the purchaser’s blockchain address over which the purchaser maintains sole possession and control or (ii) the virtual currency is transferred into the possession of a depository (subject to the conditions set forth below) and the purchaser has full control over the virtual currency.

Actual delivery will not have occurred if (i) the retail commodity transaction is cash settled, (ii) there are any liens (or other interests or legal rights of the offeror, counterparty seller, or persons acting in

concert with the offeror or counterparty seller on a similar basis) that remain after 28 days or (iii) mere book-entry is used to indicate a transfer to purchaser's account.

The Commission took a balancing approach with respect to actual delivery to a depository. Although some level of affiliation between a depository and the seller to a retail commodity transaction will not foreclose actual delivery, certain safeguards are applied to ensure the purchaser receives actual possession and control over the virtual currency. Specifically, the depository should be (i) a "financial institution" as defined by CEA Section 1a(21); (ii) a separate line of business from the offeror and not subject to the offeror's control; (iii) a separate legal entity from the offeror; (iv) predominantly operated for the purpose of providing custodial services; (v) appropriately licensed in the jurisdiction of the purchaser; (vi) offering the ability for cold storage; and (vii) contractually authorized by the purchaser to act as its agent.

The foregoing safeguards are particularly important for those depositories that also seek to offer execution services.

For more information or questions on the matters covered in this publication, please contact any of the lawyers below or a member of our [Finance or FinTech Virtual Currency and Blockchain Practice Groups](#).

¹ Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60335 (pub. Dec. 20, 2017) *available* at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2017-27421a.pdf>