March 18, 2018

Christopher Kirkpatrick

Secretary of the Commission

Commodity Futures Trading Commission

Three Lafayette Center, 1155 21st Street NW

Washington, DC 20581

RE: Retail Commodity Transactions Involving Virtual Currency Proposed Interpretation

Dear Secretary Kirkpatrick:

I respectfully submit the following comments to the Commodity Futures Trading Commission regarding its proposed interpretation of the term “actual delivery” as the term is used in Commodity Exchange Act section 2(c)(2)(D) when applied to retail commodity transactions involving virtual currency.

I commend the Commission for proposing an interpretation that accounts for both the protection of the consumer and the space necessary for innovative developments in the virtual currency market and blockchain technology. The CFTC’s mission is “to foster open, transparent, competitive and financially sound markets; and protect the American public from fraudulent schemes and abusive practices in those markets and products over which it has been granted jurisdiction.”[[1]](#footnote-1) The CFTC’s mission can be best achieved by allowing blockchain technology to flourish where possible while continuing to regulate transactions like those regulated under the CFTC’s proposed interpretation of “actual delivery” as illustrated in the *Bitfinex* settlement.[[2]](#footnote-2)

Blockchain is a public ledger based on the decentralized “trust, recordation, and verification” of blockchain participants.[[3]](#footnote-3) Because of its decentralize nature, blockchain can be applied to other activities like “transaction processing, medical records management, or land recording.”[[4]](#footnote-4) This means that developments in blockchain have the potential to impact “records management, finance, and professional services.”[[5]](#footnote-5) The shipping, healthcare, insurance, and music industries are already experimenting with blockchain technology.[[6]](#footnote-6) Altogether, blockchain could be incredibly innovative and world changing if it is not overregulated.

However, virtual currencies should be regulated to the extent that they have the potential to harm consumers. As established in the proposed interpretation, customers are harmed by “flash crashes and other market disruptions, delayed settlements, alleged spoofing, hacks, alleged internal theft, alleged manipulation, smart contract coding vulnerabilities, bucket shop arrangements and other conflicts of interest.”[[7]](#footnote-7) Recently, the Commission issued warnings regarding “Pump and Dump” scams perpetuated by “fake news” and advertisements on social media.[[8]](#footnote-8) Additionally, we saw Japanese cryptocurrency exchange Coincheck was hacked in January 2018 resulting in a loss of $534 million in NEM tokens; the Bitfinex hack resulting in a loss of 120,000 Bitcoins in August 2016; the July 2017 CoinDash ICO hack work $7 million – just to name a few recent events.[[9]](#footnote-9)

While these issues are not necessarily addressed under the “actual delivery” proposed interpretation, they do demonstrate the importance of regulation. The CFTC’s classification of virtual currencies as commodities and the incorporation of the “actual delivery” interpretation is a good move forward. Actual delivery cannot and should not be satisfied where the offering party, counterparty seller, or any of their agents retain any interest or control over the token at the conclusion of 28 days. While I do commend the Commission on its interpretation, I would add that a 2-day actual delivery period may be more appropriate given the realities of these virtual transactions. The Commission should conduct further analysis on average transaction times to determine a fair actual delivery period.

Finally, I would like to specifically address question nine. Where tokens have met the stringent requirements of the *Howey* test to be considered securities (and are traded in a manner that qualifies as a retail commodity transaction) they should be excepted from the retail commodity transaction definition pursuant to section 2(c)(2)(D)(ii)(II). Any further guidance on when a token would be considered under the security exception should relate to the *Howey* investment contract test: an investment contract is created when “the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.”[[10]](#footnote-10) As explained in the proposed interpretation, the SEC used this test recently in an investigative report involving tokens offered and sold by The DAO.[[11]](#footnote-11) However, what still requires guidance, is greater application of *Howey* to virtual currencies. Some contemporary analysis shows that Bitcoin itself (as an example) would not be considered a security[[12]](#footnote-12) and would thus fall under CFTC regulation as a commodity (if traded in a manner that qualifies as a retail commodity transaction) under the CEA. The delineation between commodity and security seems to still be unclear for those involved in the virtual market. Further guidance from the CFTC and the SEC on the classifications of virtual currencies as securities is incredibly important for how those involved in the virtual currency market should lawfully move forward.

Thank you in advance for considering these suggestions.

Respectfully,

Natalie Holland

1. Retail Commodity Transactions Involving Virtual Currency, 17 C.F.R. pt. 1 (2017). [↑](#footnote-ref-1)
2. Press Release, Commodity Futures Trading Commission, 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 (June 2, 2016), http://www.cftc.gov/PressRoom/PressReleases/pr7380-16. [↑](#footnote-ref-2)
3. Alexander Lindgren, Blockchain Regulation: Growing Pains of a Financial Revolution, 59 Orange Cty. Law. 38, 38 (2017). [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. *See* *Hacked Coincheck Exchange Will Refund Users, Resume Trading ‘Next Week*’*, Says CEO*, CoinTelegraph (Mar. 9, 2018), https://cointelegraph.com/news/hacked-coincheck-exchange-will-refund-users-resume-trading-next-week-says-ceo; *Blockchain Technology: Use Cases and Potential Global Impacts*, Medium (Jan. 31, 2018), https://medium.com/@bitrewards/blockchain-technology-use-cases-and-potential-global-impacts-6e1e91af4751. [↑](#footnote-ref-6)
7. Retail Commodity Transactions Involving Virtual Currency, 17 C.F.R. pt. 1 (2017). [↑](#footnote-ref-7)
8. John Wasik, *How To Avoid Crypto, Bitcoin ‘Pump and Dump’ Scams*, Forbes: #IfIOnlyKnew (Feb. 23, 2018) https://www.forbes.com/sites/johnwasik/2018/02/23/how-to-avoid-crypto-bitcoin-pump-and-dump-scams/#19e90c6710b0. [↑](#footnote-ref-8)
9. *List of High Profile Cryptocurrency Hacks So Far (August 24th 2017)*, Store of Value (Aug. 24, 2017) http://storeofvalueblog.com/posts/cryptocurrency-hacks-so-far-august-24th/. [↑](#footnote-ref-9)
10. *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). [↑](#footnote-ref-10)
11. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (July 25, 2017). [↑](#footnote-ref-11)
12. Jeffrey E. Alberts & Bertrand Fry, *Is Bitcoin a Security?*, 21 B.U. J. Sci. & Tech. L. 1, 14 (2015). [↑](#footnote-ref-12)