

March 20, 2018

Mr. Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Retail Commodity Transactions Involving Virtual Currency; Proposed Interpretation and Request for Comment (RIN 3038-AE62)

Dear Mr. Kirkpatrick:

The Chamber of Digital Commerce (the “Chamber”) appreciates the opportunity to submit comments to the U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”) regarding its proposed interpretation on the meaning of actual delivery within the specific context of retail commodity transactions involving virtual currency and its request for comment on the Commission’s treatment of virtual currency transactions (“Interpretation”).¹

I. Introduction

The Chamber is the world’s largest trade association representing the digital asset and blockchain industry. Our mission is to promote the acceptance and use of digital assets and blockchain-based technologies. Our membership is comprised of over 160 companies innovating with and investing in blockchain-based technology, including financial institutions, start-ups, exchanges, software companies, consultancies, and law firms. As a result, the Chamber is well positioned to provide a widely supported view on the impact of the Commission’s actions with regard to the blockchain industry.

We appreciate Chairman J. Christopher Giancarlo’s “do no harm”² regulatory approach in regard to virtual currencies and blockchain-based technologies in an effort to embrace these new

¹ *Retail Commodity Transactions Involving Virtual Currency*, 82 Fed. Reg. 60335 (Dec. 20, 2017).

² *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission, before the S. Comm. on Banking, Housing, and Urban Affairs*, 115 Cong. (Feb. 6, 2018) (written testimony of J. Christopher Giancarlo, Chairman, CFTC), available at https://www.banking.senate.gov/public/_cache/files/d6c0f0b6-757d-4916-80fd-a43315228060/A2A6C1D8DDBB7AD33EBE63254D80E9E3.giancarlo-testimony-2-6-18b.pdf.

technologies and encourage innovation in the United States. We also support the Commission's use of its existing enforcement tools to weed out bad actors who engage in fraud, manipulation, and other abusive practices that disrupt markets and harm consumers. We appreciate the Commission's careful and thoughtful approach in issuing the December 2017 Interpretation on the meaning of actual delivery of retail commodity transactions involving virtual currency to provide additional clarity and legal certainty to market participants.

II. Background

The CFTC's recent interpretation of the "actual delivery" exception to registration in the context of virtual currencies is an important issue for the Chamber's membership and the growing virtual currency industry. "Retail commodity transactions," as defined by Section 2(c)(2)(D) of the Commodity Exchange Act ("CEA" or "the Act"), are subject to oversight by the CFTC.³ This authority extends to all leveraged, margined, or financed transactions involving bitcoin and other virtual currency commodities.⁴ Absent an applicable exception, exchanges or market participants offering these types of virtual currency transactions are required to register with the Commission as a Futures Commission Merchant ("FCM"), and the transactions would be subject to the rules of a Designated Contract Market ("DCM").⁵ The actual delivery exception applies when a leveraged, financed, or margined transaction "results in actual delivery [of the commodity] within 28 days."⁶

The 2017 Interpretation explains that actual delivery of virtual currency requires:

- 1) A customer having the ability to: (i) take possession and control of the entire quantity of the commodity, whether it was purchased on margin, or using leverage, or any other financing agreement, and (ii) use it freely in commerce (both within and away from any particular platform) no later than 28 days from the date of the transaction; and

³ The term "retail commodity transactions" is largely defined by the people and types of transactions that are excepted or exempted from coverage under the otherwise broad category of a covered transaction. *See* 7 U.S.C. § 2(c)(2)(D). CEA Section 2(c)(2)(D) applies to any agreement, contract, or transaction in any commodity that is entered into with, or offered to, a person that is neither an eligible contract participant nor an eligible commercial entity 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. 7 U.S.C. § 2(c)(2)(D).

⁴ Virtual currencies have been defined as commodities in recent court and Commission orders and guidance. *See, e.g.,* Mem. & Order, *CFTC v. McDonnell, et. al.*, 18-CV-361 (E.D.N.Y. Mar 6, 2018); *In the matter of Coinflip, Inc., d/b/a/ Derivabit, and Francisco Riordan*, CFTC Docket No. 15-29 (Sept. 27, 2015), *available at* <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf>; *In re TeraExchange LLC*, CFTC Docket No. 15-33, 2015 WL 5658082 (Sept. 24, 2015), *available at* <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfteraexchangeorder92415.pdf>; *In re BFXNA INC. d/b/a/ BITFINEX*, CFTC Docket No. 16-19 (June 2, 2016), *available at* <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbfxnaorder060216.pdf>.

⁵ 7 U.S.C. §§ 6(a), 6d(a).

⁶ 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa).

- 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) not retaining any interest in 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.⁷

The Interpretation provides non-exclusive examples of situations that either satisfy or fail to satisfy the actual delivery requirement in the virtual currency context. Example 1 explains that actual delivery is satisfied if the virtual currency is transferred to a customer's wallet within 28 days of entering the agreement, contract, or transaction. Example 2 explains that actual delivery is satisfied when a depository or a storage facility wallet (i.e. a third party) has transferred the virtual currency to the customer within 28 days of entering the agreement, contract, or transaction. Example 3 explains that actual delivery is not satisfied by merely recording the transfer of the virtual currency in a book entry of the offeror or the third party seller. Example 4 explains that rolling, offsetting, or netting out or cash settlement of virtual currency (other than the purchased virtual currency) will not satisfy actual delivery.

III. Comments of the Chamber of Digital Commerce

The Chamber supports the Commission's objective for issuing the Interpretation to help advance a healthy ecosystem, support market-enhancing innovation, and protect U.S. retail market participants engaging in the virtual currency marketplace. As a general matter, the Chamber supports an interpretation that treats virtual currency similar to other asset classes in like circumstances, understanding that occasional variances may be required due to the unique attributes of virtual currencies. With that general principle in mind, the Chamber provides the following responses to the Commission's questions and seeks clarification and/or confirmation on other issues, to ensure that the Commission's final interpretation continues to promote these innovative technologies, while simultaneously protecting retail customers from abusive market behavior and practices of bad actors.

The Chamber's comments and requests for clarification are organized in two groups: (A) responses to the specific questions posed by the Commission, and (B) additional comments and requests for clarification.

⁷ 82 Fed. Reg. at 60339.

A. Responses to Commission Questions⁸

The Chamber's responses to each of the Commission's questions is as follows:

Question 1

Should the Commission engage Congress and seek to shorten the actual delivery period?

A shorter actual delivery period may be appropriate for virtual currency transactions. However, the Commission should carefully examine and analyze the different characteristics of each virtual currency, specifically with regard to various consensus mechanisms (*i.e.*, lag times, network congestion, etc.) that may cause delays in transaction confirmations onto each blockchain. Any proposal for a shortened delivery period should be flexible and avoid prescriptive delivery periods that do not account for uncontrollable technological factors.

Question 2

Are there additional examples of actual delivery?

Please see below Comments 1 and 2.

Question 3

How should the Commission deal with potential conflicts of interest and evaluate transactions that would otherwise be excepted from oversight due to actual delivery; for example, how should the Commission respond if the offeror (or an affiliate) seeks to avail itself of the "actual delivery" exception when it takes the opposite side of a customer transaction?

The Commission should confirm that actual delivery has not occurred in the above-referenced situation involving a conflict of interest because the offeror is also the counterparty-seller. More specifically, offerors should not take the opposite position from their customer in trades and, if they do, the offeror should not be permitted to rely on the actual delivery exception from oversight of retail commodity transactions.

Question 4

Should the Commission exempt certain entities from CEA registration requirements, even if those entities engage in retail commodity transactions without actual delivery?

The Chamber does not believe that the Commission should exercise its authority to offer a blanket exemption from CEA registration requirements at this point in time. Rather, exemptions

⁸ The Chamber has summarized each question rather than providing full quotes in the below section.

should be granted on a case-by-case basis. This issue may properly be revisited as the market continues to develop and if the facts suggest that a certain class of entity exists for which it would be inappropriate or particularly burdensome (with little consumer benefit) for the entities within that class to abide by the specified CEA registration requirements. In addition to consumer benefits, the Commission should consider whether or not the particular entity or class of entities is subject to any other regulatory regime that would render the CEA registration requirements duplicative.

Question 5

What are the appropriate requirements for depositories? Should the Commission impose a licensure requirement on depositories? Should the Commission issue a prohibition against depositories having any offeror affiliation?

We support a federal licensing solution, rather than a state-by-state licensing regime, when applicable to depositories. Any proposed federal solution should avoid duplicative requirements by preempting these entities from state money transmitter laws and other state or federal requirements governing such oversight. In this regard, the Commission should consider virtual currency specific regulations that take into account the unique attributes of virtual currencies. Association between the offeror and depository should not be prohibited specifically, so long as appropriate controls and firewalls, as applicable, are in place to protect the interests of retail purchasers.

Question 6

How should the Commission define “full control” for the purposes of actual delivery in the context of a depository?

Full control in the context of virtual currency should require that the seller, or offeror exchange (holding on behalf of the seller), to deliver the entire quantity of the virtual currency to the purchaser’s wallet or its depository/warehouse wallet away from the offeror or offeror’s platform. In the case of transfer to a depository/warehouse wallet owned by the purchaser, delivery should be deemed complete so long as the currency is held at the depository/warehouse on behalf of the purchaser and outside the reach of the seller. The Commission should not require that the purchaser hold the private key (or all private keys) for a depository wallet so long as the purchaser has access and the ability to move the virtual currency from the depository without restriction by the seller or offeror. There are many instances when a purchaser might prefer for a depository to maintain private keys on the purchaser’s behalf for purposes of security and this should not be discouraged.

Question 7

Should the Commission allow for forced sales as a means to satisfy a lien under Example 2?

The Commission should not permit the practice of forced sales as a means to satisfy a lien for the purposes of actual delivery. Permitting forced sales to satisfy collateral calls, or otherwise, would circumvent the purpose and intent of this guidance. Allowing a seller or offeror to effect a forced sale would be tantamount to allowing rolling, netting, offsetting and/or cash settlement and should be prohibited for purposes of meeting the actual delivery exception. Further, the Chamber believes, in general, that virtual currency should be afforded the same treatment as similarly situated asset classes, where feasible and appropriate, and the Chamber encourages such treatment in this case.

Question 8

Are there additional examples of how to evidence transfer of title, outside of the example provided by the Commission—whereby transfer of title is reflected by proof of ownership of the particular wallet or wallets that contain the purchased virtual currency?

With respect to the issue of transfer of “title”, the Chamber seeks confirmation that the transfer of title requirement in Examples 1 and 2 does not require ownership of the wallet into which the virtual currency was transferred; instead, the requirement may be satisfied by proof that the purchaser: (i) owns a sum of virtual currency within the wallet that reflects the newly added amount of the virtual currency that was transferred or delivered; (ii) that the newly added amount of virtual currency owned within that wallet is equivalent to the sum of virtual currency purchased by the purchaser; and (iii) that the purchaser can move the newly added sum of virtual currency freely and without restriction by the seller or offeror at any time.

Further examples are likely to develop as innovators and entrepreneurs continue advancing this technology, and the Commission should remain open to considering additional examples at future dates.

Question 9

What, if any, are the concerns relating to the exception from CFTC oversight, pursuant to section 2(c)(2)(D)(ii)(II), for tokens that constitute securities, including in the context of retail commodity transactions?

The Commission should carefully consider which tokens should appropriately fall under the CFTC’s jurisdiction. The line between a token that is a commodity and one that is also a security has yet to be clearly drawn. While some cases may be clear, others are not. Moreover, it is not yet clear how certain tokens will operate within a given ecosystem, potentially in support of (or as an essential part of) the service offering. For those reasons, the Commission should carefully weigh in favor of finding that tokens are properly deemed to be commodities that appropriately fall under its jurisdiction, absent an express determination to the contrary.

B. Additional Comments and Requests for Clarification

Comment 1

The Chamber seeks specific language confirming that actual delivery can be achieved under Example 1 when the virtual currency is delivered to a third-party wallet that is not associated with the offeror or the seller. In this scenario, the purchaser may not control the private keys, but has control over, and the ability to freely move, the virtual currency he or she owns.

Relatedly, the Chamber seeks confirmation that actual delivery occurs when the virtual currency is delivered to a multi-signature wallet, for which the buyer holds at least one of the associated private keys, and none of the remaining private keys are held by the offeror or the seller.

Comment 2

The Chamber seeks clarification as to whether actual delivery is satisfied in Example 2 when the seller's virtual currency is held in an omnibus wallet by a third party that also acts as the depository (but not the exchange-offeror), and the virtual currency is "transferred" from the seller to the purchaser within the third-party wallet by means of a book entry. In this example, both the seller and purchaser have an account with the same third-party depository and both the seller and purchaser trade on the same offeror-exchange (that is distinct from the third-party depository). In this scenario, the virtual currency would be moved within the depository via book entry rather than on a blockchain because it is already held in the same omnibus wallet away from the exchange-offeror.

Comment 3

The Chamber seeks clarification on whether actual delivery is satisfied when the trading platform or wallet hosting website that receives the virtual currency on behalf of the purchaser has daily or weekly withdrawal limits. In our view, the test should be whether the seller and offeror/exchange have any remnants of control over the virtual currency, not whether the purchaser vests others with limited authority over their newly purchased holdings.

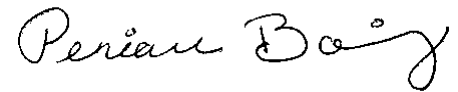
IV. Conclusion

We greatly appreciate the opportunity to provide comments and feedback on the Interpretation. Should you have any further questions about these or other topics, please do not hesitate to contact us by email at policy@digitalchamber.org or by phone at 202-765-3105.

Mr. Kilpatrick, Secretary, CFTC
March 20, 2018

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Respectfully submitted,

A handwritten signature in black ink that reads "Perianne Boring". The signature is written in a cursive, flowing style.

Perianne Boring
Founder & President
Chamber of Digital Commerce

cc: Amir Zaidi, Director, Division of Market Oversight
Philip W. Raimondi, Special Counsel, Division of Market Oversight
David P. Van Wagner, Chief Counsel, Division of Market Oversight