

CFTC Finalizes Guidance on the Actual Delivery Exception to Virtual Currency Retail Commodity Transactions

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On March 24, 2020, the Commodity Futures Trading Commission (“CFTC”) announced that it had unanimously approved final interpretive guidance addressing the application of the “actual delivery” exception to certain digital assets that are commodities (the “Interpretive Guidance”).¹ This Interpretive Guidance will be effective on the date it is published in the Federal Register, although Chairman Heath Tarbert suggested in his statement in support of the Interpretive Guidance that he “anticipate[s] that for a period of 90 days the CFTC will forbear from initiating enforcement actions addressing aspects of this guidance that were not plainly evident from prior CFTC guidance, enforcement actions, and case law.”²

Legislative Background

The Dodd-Frank Act added Section 2(c)(2)(D) to the Commodity Exchange Act (“CEA”), which granted the CFTC the authority to subject “retail commodity transactions” to certain enumerated provisions of the CEA “as if” such transactions were futures contracts.³ A retail commodity transaction is “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” (i.e., a retail customer); 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.”⁴

However, Section 2(c)(2)(D) also provides for certain exceptions from treating transactions that would otherwise qualify as “retail commodity transactions” as if they were futures contracts. One such exception is for transactions that “result[s] in actual delivery within 28 days,”⁵ but the CEA does not define the term “actual delivery” for purposes of this exception.

Prior CFTC Guidance

The CFTC therefore issued an interpretation of the term “actual delivery” in the context of CEA Section 2(c)(2)(D) in 2013 (the “2013 Guidance”),⁶ which focused on transactions involving traditional commodities. In that guidance, the CFTC explained that the CEA “requires consideration of evidence regarding delivery beyond the four corners of contract documents” in determining whether “actual delivery” has occurred.⁷ The CFTC noted that it would “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.”¹¹⁸ The CFTC also provided a list of relevant factors it may consider in making the determination that “actual delivery” had occurred and provided five examples to illustrate when the CFTC may or may not consider actual delivery to have occurred.¹¹⁹

However, the 2013 Guidance largely predated the proliferation of virtual currency transactions (and the CFTC’s determination that certain digital assets qualify as commodities), and therefore did not address any particularities related to the circumstances under which such transactions would or would not result in “actual delivery.” The CFTC therefore proposed an interpretation and request for comment on the subject in December 2017,¹²⁰ which the Interpretive Guidance finalizes.

The Interpretive Guidance

The Interpretive Guidance clarifies the CFTC’s position concerning whether “actual delivery” has occurred in the context of retail commodity transactions in certain digital assets commonly referred to as “virtual currencies.” For the purpose of the Interpretive Guidance, virtual currency is described as follows:

[A] digital asset that encompasses any digital representation of value or unit of account that is or can be used as a form of currency (*i.e.*, transferred from one party to another as a medium of exchange); may be manifested through units, tokens, or coins, among other things; and may be distributed by way of digital “smart contracts,” among other structures.¹²¹

The Interpretive Guidance then states that “actual delivery” will be deemed to have occurred for virtual currency transactions when: (1) a customer secures: (i) possession *and* control of the virtual currency, whether it was purchased on a leveraged or margined basis or subject to any other financing arrangement, and (ii) the ability to use the entire quantity of the virtual currency freely in commerce (*i.e.*, away from any particular execution venue) within 28 days of the transaction and at all times thereafter; and (2) the offeror and counterparty seller (including any affiliates thereof) no longer retain any interest in, legal right to, or control over any of the virtual currency purchased on a leveraged or margined basis or subject to any other financing arrangement, at the expiration of 28 days from the date of the transaction.¹²² Regarding the second prong, the CFTC stated that it may consider (among other things) whether the offeror or seller retains any ability to access or withdraw any quantity of the commodity purchased from the purchaser’s account or wallet.¹²³

The CFTC noted that it interprets the term “offeror” broadly such that the term encompasses “any persons that present, solicit, or otherwise facilitate a retail commodity transaction under the [CEA].”¹²⁴ This may include persons with operational control of a blockchain protocol that offers retail commodity transactions.¹²⁵

Like the 2013 Guidance, the Interpretive Guidance also provides a non-exhaustive list of five examples to illustrate the application of the Interpretive Guidance to virtual currency transactions to determine whether “actual delivery” has occurred.¹²⁶ Some notable aspects of the CFTC’s examples are that: (1) book entries that purport to show delivery will not (by themselves) be sufficient to establish actual delivery; (2) delivery to a purchaser’s wallet or blockchain address is not necessary to establish actual delivery; but (3) delivery to a depository that is affiliated with the offeror will only qualify as actual delivery if certain conditions are met.

Separately, the CFTC expressed concern about situations where an offeror is also a principal to a retail transaction, because “the offeror’s ability to take the opposite side of a retail commodity transaction may create situations in which actual delivery fails to occur.”¹²⁷ Specifically, the CFTC was concerned that such arrangements are indicative of “bucket shop” techniques, and that they could create incentives to influence prices. Therefore, the CFTC stated that it would consider such arrangements as a factor weighing against actual delivery.¹²⁸

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¹¹⁸ The text of the voting draft of the Interpretive Guidance can be found on the CFTC’s [website](#).

¹² Statement of Chairman Heath P. Tarbert in Support of Interpretive Guidance on Actual Delivery for Digital Assets (Mar. 24, 2020), [available here](#).

¹³ Section 742(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Pub. Law 111–203, 124 Stat. 1376 (2010).

¹⁴ 7 U.S.C. § 2(c)(2)(D)(i).

¹⁵ 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa).

¹⁶ *Retail Commodity Transactions Under Commodity Exchange Act*, 78 Fed. Reg. 52,426 (Aug. 23, 2013).

¹⁷ *Id.* at 52,428.

¹⁸ *Id.*

¹⁹ *Id.* at 52,428–29.

¹⁰¹ *Retail Commodity Transactions Involving Virtual Currency*, 82 Fed. Reg. 60,335 (Dec. 20, 2017).

¹¹¹ Interpretive Guidance at 27.

¹²² *Id.* at 30–31.

¹³³ *Id.* at 31 n.166.

¹⁴⁴ *Id.* at 30 n.164.

¹⁵⁵ *Id.*

¹⁶⁶ *Id.* at 32–35.

¹⁷⁷ *Id.* at 22.

¹⁸⁸ *See id.*

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