

CFTC Proposes Legal Interpretation of Actual Delivery Exception for Virtual Currency Regulation

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The **CFTC** proposed a legal interpretation outlining the meaning of actual delivery within the context of retail commodity transactions in virtual currency. Specifically, the interpretation focuses on the actual delivery exception under which retail virtual-currency trading would be exempted from compliance with **CFTC** rules.

On December 15, 2017, the **CFTC** proposed a [legal interpretation](#) outlining the meaning of actual delivery within the specific context of retail commodity transactions in virtual currency. Specifically, the interpretation clarifies that without actual delivery of virtual currency to a retail client within 28 days of the transaction, the person selling and either financing or arranging financing for the virtual currency would need to comply with **CFTC** registration and other requirements.

Section 2(c)(2)(D) of the [Commodity Exchange Act](#) (CEA) grants the **CFTC** direct oversight authority over “retail commodity transactions,” defined as agreements, contracts, or transactions in any commodity that are either:

- Entered into with, or offered to retail market participants 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.

The interpretation clarifies that the **CFTC** considers virtual currency, such as bitcoin, to be a commodity similar to other intangible commodities that the **CFTC** oversees and therefore views it as subject to applicable provisions of the CEA and **CFTC** regulations (see [Legal Update, CFTC: Bitcoin a “Commodity” Subject to Dodd-Frank Swaps Rules](#)). However, CEA section 2(c)(2)(D)(ii)(III)(aa) excepts contracts of sale that result in “actual delivery” of the underlying commodity within 28 days from the date of the transaction from being considered “commodity interests” subject to **CFTC** regulations.

The **CFTC's** proposed interpretation details two primary factors necessary to demonstrate “actual delivery” of retail commodity transactions in virtual currency:

- A customer must have the ability to:
 - take possession and control of the entire quantity of the commodity, whether it was purchased on [margin](#), or using [leverage](#), or any other financing arrangement; and
 - use it freely in commerce (both within and away from any particular platform) no later than 28 days from the date of the transaction.
- 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 or remain in 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 **CFTC's** legal interpretation is a response to requests for guidance regarding the meaning of the actual delivery exception in the specific context of virtual-currency transactions and the broad interpretation provided would result in the inclusion of more virtual-currency operators under the **CFTC's** direct oversight. In the legal interpretation, the **CFTC** stresses that it does not intend to impede market-enhancing innovation or otherwise harm the

evolving virtual-currency marketplace. Rather, the **CFTC** hopes that the interpretation will help support further market-enhancing innovation and protect the US retail market engaged in virtual currency.

The **CFTC's** proposed legal interpretation provides examples of cases where actual delivery has and has not occurred.

An example of a case where delivery of virtual currency has occurred is a situation in which within 28 days of entering into an agreement, contract or transaction, a record exists on the relevant public distributed ledger network or [blockchain](#) of the transfer of virtual currency. In this case:

- The entire quantity of the purchased virtual currency was transferred from the seller to the purchaser's blockchain wallet.
- The seller does not retain any interest or control over the transferred commodity.
- The seller transferred title of the commodity to the purchaser.

The **CFTC** proposed legal interpretation will remain open for public comment until March 20, 2018.

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