

March 24, 2020

CFTC Issues Final Interpretive Guidance on Actual Delivery for Digital Assets

Washington, D.C. — The Commodity Futures Trading Commission today announced the Commission voted unanimously to approve final interpretive guidance concerning retail commodity transactions involving certain digital assets. Specifically, 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, colloquially known as “virtual currencies.”

“Providing clarity to market participants is one of the CFTC’s core values,” said CFTC Chairman Heath P. Tarbert. “This interpretive guidance not only fulfills that commitment, but it reflects my belief that the U.S. must be a leader in the digital asset space. These efforts are also especially critical when the hard-earned income of everyday Americans is at stake. Under my leadership, the CFTC will continue to do its part to encourage responsible fintech innovation through sound regulation.”

Background on CFTC’s Final Interpretive Guidance

CEA section 2(c)(2)(D) renders certain “retail commodity transactions” subject to enumerated provisions of the CEA, including on-exchange trading and broker registration requirements, “as if” the transactions are futures contracts. The statute contains an exception for contracts of sale that result in “actual delivery” within 28 days from the date of the transaction. This interpretive guidance is not meant to inhibit any particular activity. Rather, this guidance provides the CFTC’s views regarding when certain activity is subject to the regulatory provisions made applicable by CEA section 2(c)(2)(D).

The final interpretive guidance discusses two primary factors demonstrating “actual delivery” of retail commodity transactions in virtual currency:

- (1) a customer securing: (i) 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 (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 CFTC's Division of Market Oversight led the development of the final interpretive guidance, which was informed by significant CFTC engagement with the digital asset marketplace. Specifically, the final interpretive guidance reflects extensive insight gained by the agency through public input, advisory committee meetings on the evolution of digital asset and cryptocurrency markets, regulatory oversight of exchanges offering digital asset-based derivatives products, numerous LabCFTC and market interactions, as well as market surveillance in furtherance of the CFTC's enforcement responsibilities.

-CFTC-

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN Number 3038-AE62

Retail Commodity Transactions Involving Certain Digital Assets

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Interpretive Guidance.

SUMMARY: The Commodity Futures Trading Commission (the “Commission” or “CFTC”) is issuing this final interpretive guidance concerning the term “actual delivery” as set forth in section 2(c)(2)(D)(ii)(III)(aa) of the Commodity Exchange Act (“CEA”) pursuant to section 742(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). Specifically, this final interpretive guidance is being issued to inform the public of the Commission’s views when determining whether actual delivery has occurred in the context of retail commodity transactions in certain types of digital assets that serve as a medium of exchange, colloquially known as “virtual currencies.” The Commission issues this interpretive guidance after a 90-day comment period and a significant amount of time and effort further observing the development of the digital asset and virtual currency marketplace.

DATES: This final guidance is effective on [insert date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

I. Background

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With certain exceptions, the CFTC has been granted exclusive jurisdiction over commodity futures, options, and all other derivatives that fall within the definition of a swap.¹ Further, the Commission has been granted general anti-fraud and anti-manipulation authority over “any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity.”² The Commission’s mission is to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation; it does so, in part, by protecting the American public from fraudulent schemes and abusive practices in those markets and products over which it has been granted jurisdiction.

The Commission has long held that certain speculative commodity transactions involving leverage or margin are futures contracts subject to Commission oversight.³ However, certain judicial decisions called that view into question with respect to certain leveraged retail transactions primarily in foreign currencies.⁴ In 2008, Congress addressed this judicial uncertainty by providing that certain enumerated provisions of the CEA apply to certain retail foreign currency transactions pursuant to CEA section 2(c)(2)(C)(iv).⁵ This new statutory provision is subject to an exception for retail foreign currency transactions that result in “actual delivery” within two days.⁶ Two years later, in the Dodd-Frank Act, Congress similarly extended certain provisions of the CEA to apply to all other “retail commodity transactions” pursuant to CEA section 2(c)(2)(D)(iii).⁷

¹ 7 U.S.C. 2(a)(1)(A). The CFTC shares its swap jurisdiction in certain aspects with the Securities and Exchange Commission (“SEC”). See 7 U.S.C. 2(a)(1)(C).

² 7 U.S.C. 9(1).

³ See *In re Stovall*, CFTC Docket No. 75-7 [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,777 (CFTC Dec. 6, 1979) (applying traditional elements of a futures contract to a purported cash transaction).

⁴ See, e.g., *CFTC v. Zelener*, 373 F.3d 861 (7th Cir. 2004); *CFTC v. Erskine*, 512 F.3d 309 (6th Cir. 2008).

⁵ See Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1651 (2008).

⁶ 7 U.S.C. 2(c)(2)(C)(i)(II)(bb)(AA).

⁷ See Sec. 742 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203, 124 Stat. 1376 (2010); see also *Hearing to Review Implications of the CFTC v. Zelener Case Before the Subcomm. on General Farm Commodities and Risk Management of the H. Comm. on Agriculture*, 111th Cong. 52–664 (2009)

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Specifically, CEA section 2(c)(2)(D) applies to 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 neither an eligible contract participant⁸ nor an eligible commercial entity⁹ (“retail”), (ii) 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.¹⁰ CEA section 2(c)(2)(D) provides that such an agreement, contract, or transaction is subject to CEA sections 4(a),¹¹ 4(b),¹² and 4b¹³ “as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery” (*i.e.*, a futures contract).¹⁴ The statute, however, excepts certain transactions from its application. In particular, CEA section 2(c)(2)(D)(ii)(III)(aa)¹⁵ excepts a contract of sale that “results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved.”¹⁶

In connection with this statutory authority, the Commission previously issued a proposed interpretation of the term “actual delivery” in the context of CEA section 2(c)(2)(D),

(statement of Rep. Marshall, Member, H. Comm. on Agriculture) (“If in substance it is a futures contract, it is going to be regulated. It doesn’t matter how clever your draftsmanship is.”); 156 Cong. Rec. S5, 924 (daily ed. July 15, 2010) (statement of Sen. Lincoln) (“Section 742 corrects [any regulatory uncertainty] by extending the Farm Bill’s “Zelener fraud fix” to retail off-exchange transactions in *all* commodities.”) (emphasis added).

⁸ 7 U.S.C. 1a(18).

⁹ 7 U.S.C. 1a(17); *see also* 7 U.S.C. 2(c)(2)(D)(iv).

¹⁰ 7 U.S.C. 2(c)(2)(D)(i).

¹¹ 7 U.S.C. 6(a) (prohibiting the off-exchange trading of futures transactions by U.S. persons unless the transaction is conducted on or subject to the rules of a designated contract market).

¹² 7 U.S.C. 6(b) (permitting foreign boards of trade registered with the Commission with the ability to provide direct access to U.S. persons).

¹³ 7 U.S.C. 6b (prohibiting fraudulent conduct in connection with any contract of sale of any commodity in interstate commerce, among other things).

¹⁴ 7 U.S.C. 2(c)(2)(D)(iii). In addition, retail commodity transactions fall within the definition of “commodity interest,” which also includes futures, options, and swaps. 17 CFR 1.3 (defining “commodity interest”).

¹⁵ 7 U.S.C. 2(c)(2)(D)(ii)(III)(aa).

¹⁶ The Commission has not adopted any regulations permitting a longer actual delivery period for any commodity pursuant to this statute. Accordingly, the 28-day actual delivery period remains applicable to all commodities, while retail foreign currency transactions remain subject to a 2-day actual delivery period pursuant to CEA section 2(c)(2)(C). In addition, certain commercial transactions and securities are excepted pursuant to CEA section 2(c)(2)(D)(ii).

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accompanied by a request for comment.¹⁷ In that interpretation, the Commission provided several examples of what may and may not constitute actual delivery. After reviewing public comments, the Commission issued a final interpretation in 2013 (the “2013 Guidance”).¹⁸

The 2013 Guidance explained that the Commission will consider evidence “beyond the four corners of contract documents” to assess whether actual delivery of the commodity occurred.¹⁹ The Commission further noted that it will “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.”²⁰ The 2013 Guidance also included a list of relevant factors the Commission will consider in determining whether a transaction has resulted in actual delivery²¹ and again provided examples²² of what may and may not constitute actual delivery. The 2013 Guidance provided that satisfactory examples of actual delivery involve transfer of title and possession of the commodity to the purchaser²³ or a depository acting on the purchaser’s behalf.²⁴ Among other things, mere book entries and certain instances where a purchase is “rolled, offset, or otherwise netted with another transaction” do not constitute actual delivery.²⁵

¹⁷ Retail Commodity Transactions Under Commodity Exchange Act, 76 FR 77,670 (Dec. 14, 2011).

¹⁸ Retail Commodity Transactions Under Commodity Exchange Act, 78 FR 52,426 (Aug. 23, 2013).

¹⁹ *Id.* at 52,428.

²⁰ *Id.*

²¹ “Relevant factors in this determination include the following: Ownership, possession, title, and physical location of the commodity purchased or sold, both before and after execution of the agreement, contract, or transaction, including all related documentation; the nature of the relationship between the buyer, seller, and possessor of the commodity purchased or sold; and the manner in which the purchase or sale is recorded and completed.” *Id.*

²² In the 2013 Guidance, Examples 1 and 2 illustrate circumstances where actual delivery is made, while Examples 3, 4 and 5 illustrate circumstances where actual delivery is not made. In setting forth the examples, the Commission made clear that they are non-exclusive and were intended to provide the public with guidance on how the Commission would apply the interpretation. *Id.* at 52,427-28.

²³ The Commission notes that “purchaser” and “customer” may be used interchangeably throughout this interpretation in reference to the non-eligible contract participant counterparty that has engaged in a “retail commodity transaction” as defined by CEA section 2(c)(2)(D). This clarification is made, in part, to recognize that a “customer” may be attempting to engage in a “retail commodity transaction” as part of a short sale strategy.

²⁴ *Id.*

²⁵ *Id.*

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Within a year after the 2013 Guidance was released, the Eleventh Circuit issued an opinion affirming a preliminary injunction obtained by the Commission in *CFTC v. Hunter Wise Commodities, LLC*.²⁶ *Hunter Wise* was in line with the Commission’s interpretation of actual delivery in the 2013 Guidance.²⁷ Specifically, the Eleventh Circuit recognized that delivery “denotes a transfer of possession and control.”²⁸ Indeed, the Eleventh Circuit explained, “[i]f ‘actual delivery’ means anything, it means something other than simply ‘delivery,’ for we must attach meaning to Congress’s use of the modifier ‘actual.’”²⁹ Accordingly, the Eleventh Circuit stated that actual delivery “denotes ‘[t]he act of giving real and immediate possession to the buyer or the buyer’s agent,’” and constructive delivery does not suffice.³⁰ Recently, the Ninth Circuit agreed, finding the exception requires “some meaningful degree of possession or control by the customer.”³¹

Soon after the *Hunter Wise* decision, the Commission determined that virtual currency is a commodity as that term is defined by CEA section 1a(9).³² Subsequently, the Commission brought its first enforcement action against a platform that offered virtual currency transactions to retail customers on a leveraged, margined, or financed basis without registering with the Commission.³³ In the *Bitfinex* settlement order, the Commission found that the virtual currency platform violated CEA sections 4(a) and 4d because the unregistered entity “did not actually

²⁶ *CFTC v. Hunter Wise Commodities, LLC, et al.*, 749 F.3d 967 (11th Cir. 2014) (hereinafter, *Hunter Wise*).

²⁷ *Id.* at 980 (“While we need not defer to the agency’s interpretation because the statutory text is unambiguous . . . we note also that the interpretation the court adopts today harmonizes with the Commission’s own informal interpretation.”) (internal citations omitted).

²⁸ *Id.* at 978-79, (citing *Black’s Law Dictionary* 494 (9th ed. 2009)).

²⁹ *Id.* at 979.

³⁰ *Id.*

³¹ *CFTC v. Monex Credit Company, et al.*, 931 F.3d 966, 972-75 (9th Cir. 2019).

³² *In re Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan*, CFTC Docket No. 15-29, 2015 WL 5535736, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33,538 (CFTC Sept. 17, 2015) (consent order); *In re TeraExchange LLC*, CFTC Docket No. 15-33, 2015 WL 5658082, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33,546 (CFTC Sept. 24, 2015) (consent order).

³³ *In re BFXNA INC. d/b/a BITFINEX*, CFTC Docket No. 16-19 (June 2, 2016) (consent order) (hereinafter, *Bitfinex*).

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deliver bitcoins purchased from them.”³⁴ Rather, the entity “held the purchased bitcoins in bitcoin deposit wallets that it owned and controlled.”³⁵

As a result of several requests for additional guidance regarding this subject, the Commission published a proposed interpretation (the “Proposed Interpretation”) regarding the “actual delivery” exception of CEA section 2(c)(2)(D) within the specific context of retail commodity transactions in virtual currency on December 20, 2017.³⁶ The Commission provided a 90-day comment period and received many public comments.

The Proposed Interpretation set out two central tenets of the Commission’s view on when actual delivery of virtual currency has occurred:

(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 arrangement, 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

(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.

The Commission has thoroughly reviewed the comments received. Further, the Commission has gained considerable experience and expertise with respect to digital asset markets generally, through additional public input and advisory committee meetings on the

³⁴ *Id.*

³⁵ *Id.*

³⁶ Retail Commodity Transactions Involving Virtual Currency, 82 FR 60,335 (Dec. 20, 2017).

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evolution of digital asset and cryptocurrency markets,³⁷ regulatory oversight of exchanges offering derivatives products on certain digital assets,³⁸ numerous LabCFTC initiatives and market interactions,³⁹ and market surveillance in furtherance of its anti-fraud and anti-manipulation responsibilities. Applying this knowledge and expertise, as well as its experience in interpreting CEA section 2(c)(2)(D) (particularly in light of recent judicial decisions), the Commission has determined to finalize the Proposed Interpretation with certain revisions discussed herein.

As noted, while the CEA addresses several different types of transactions, this final interpretive guidance specifically concerns the “actual delivery” exception in CEA section 2(c)(2)(D) as it applies to digital assets that serve as a medium of exchange. Notably, CEA section 2(c)(2)(D) and its exceptions remain separate and distinct from application of the swap definition in CEA section 1a(47).⁴⁰

The Commission notes that this interpretive guidance is intended to provide an efficient and flexible way to communicate the agency’s current views on how the actual delivery exception in Section 2(c)(2)(D) may apply in various situations. Given the complex and dynamic nature of these markets, the Commission believes it is appropriate to take an adaptable

³⁷ See, e.g., Request for Input, Request for Input on Crypto-Asset Mechanics and Markets, 83 FR 64,563 (Dec. 17, 2018); CFTC, *Technology Advisory Committee*, https://www.cftc.gov/About/CFTCCommittees/TechnologyAdvisory/tac_meetings.html (last visited Mar 14, 2020).

³⁸ To date, four CFTC-registered futures exchanges have certified bitcoin-based futures contracts. A number of CFTC-registered swap execution facilities (“SEFs”) have offered bitcoin-based swaps, though some have since delisted these products or become dormant.

³⁹ See CFTC, *LabCFTC Events & News*, <https://www.cftc.gov/LabCFTC/News-Events/index.htm> (last visited Mar. 14, 2020).

⁴⁰ 7 U.S.C. 1a(47). For example, certain retail transactions that may involve leverage, such as contracts for difference (“CFDs”), are swaps. See Joint Final Rule, Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48,208 at 48,259 (Aug. 13, 2012). Pursuant to CEA section 2(e), U.S. retail persons are prohibited from entering into such swaps unless they are offered on a designated contract market (“DCM”).

approach while it continues to follow developments in this space and evaluate business activity on a case-by-case basis.

II. Comments Generally

Among the many comments submitted, the Commission received 18 substantive comment letters and two substantive comment website entries. These comments were submitted by entities and individuals representing a broad range of interests, including a self-regulatory organization,⁴¹ virtual currency exchanges or execution service providers,⁴² dealers or traders in virtual currency transactions,⁴³ industry trade or advocacy groups,⁴⁴ industry developers,⁴⁵ trade associations comprised of energy producers and suppliers,⁴⁶ and concerned individuals.⁴⁷

Several commenters expressed their general support for the Proposed Interpretation as written, with only minor suggested clarifications.⁴⁸ For example, NFA indicated that it “fully support[s] the Commission’s continued use of its jurisdiction to enhance the regulatory oversight of the nascent market for virtual currencies.”⁴⁹ HBUS believed that, once finalized, the Proposed Interpretation “will facilitate the growth of a transparent and fair marketplace for virtual currency, where legitimate business can thrive.”⁵⁰ Contrarily, certain commenters believed that the Commission should proceed with caution⁵¹ or take a different approach.⁵²

⁴¹ National Futures Association (“NFA”).

⁴² Coinbase, Inc. (“Coinbase”); Gemini Trust Company, LLC (“Gemini”); Decentralized Derivatives Association (“DDA”); dYdX Trading, Inc. (“dYdX”); HBUS Holdco Inc. (“HBUS”).

⁴³ 3 Degrees Group, Inc. (“3 Degrees”); Cable Car Capital LLC (“Cable Car”).

⁴⁴ Chamber of Digital Commerce (“Chamber”); Coin Center (“Coin Center”); Futures Industry Association (“FIA”).
⁴⁵ ConsenSys (“ConsenSys”).

⁴⁶ Commercial Energy Working Group (“CEWG”); International Energy Credit Association (“IECA”).

⁴⁷ Chris R. Barnard (“Barnard”); Paul Booth (“Booth”); Chris J. Dykzeul (“Dykzeul”); The Consumer Advocacy and Financial Regulation Organization at the University of Michigan Law School (“CAFRO”); Natalie Holland (“Holland”); Bruce A. Tupper (“Tupper”).

⁴⁸ 3 Degrees Letter at 1; Barnard Letter at 1-2; HBUS Letter at 1-2; NFA Letter at 1.

⁴⁹ NFA Letter at 1.

⁵⁰ HBUS Letter at 1.

⁵¹ FIA Letter at 1.

⁵² DDA Letter at 1.

However, the majority of commenters primarily focused their responses on issues raised by varying questions posed in the Proposed Interpretation.

III. Specific Comments

A. The Scope of the Interpretation

Several commenters submitted suggestions for further modification of the “virtual currency” meaning provided in the Proposed Interpretation.⁵³ In particular, Coin Center suggested that the term “digital commodities” would more accurately reflect all “digital currencies” since many “tokens” at issue contain utility beyond that as a medium of exchange.⁵⁴ Separately, 3 Degrees encouraged the Commission to define virtual currency pursuant to a rulemaking process similar to the one used to further define the term “swap.”⁵⁵ In addition, the firm suggested “virtual currency” be further defined to focus on the “extent to which a token is able to be used for its intended purpose at the time of evaluation” to determine whether it is within scope.⁵⁶ In this regard, 3 Degrees believed that a token that does not have a present use as a medium of exchange or is not otherwise “mimicking the attributes of fiat currency” should be excluded from “virtual currency.”⁵⁷ Similarly, ConsenSys urged the Commission to consider

⁵³ The Proposed Interpretation stated that “[t]he Commission interprets the term virtual currency broadly. In the context of this interpretation, virtual or digital currency: encompasses any digital representation of value ... that functions as a medium of exchange, and any other digital unit of account that is used as a form of a 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. However, the Commission notes that it does not intend to create a bright line definition at this time given the evolving nature of the commodity and, in some instances, its underlying public distributed ledger technology” Proposed Interpretation, 82 FR at 60,338 (footnotes omitted).

⁵⁴ Coin Center Letter at 1-2.

⁵⁵ 3 Degrees Letter at 5-7.

⁵⁶ *Id.*

⁵⁷ *Id.*

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further distinguishing “mainstream” virtual currencies (used as a medium of exchange generally) from other types of “virtual tokens.”⁵⁸

HBUS supported the Proposed Interpretation’s definition of virtual currency and primarily endorsed the “Commission’s avoidance of a bright line definition.”⁵⁹ IECA and CEWG requested certain products or transactions be specifically excluded from the term and scope of the Proposed Interpretation, including transfers of digital assets between eligible contract participants (“ECPs”) and eligible commercial entities (“ECEs”), other physical commodity transactions effected through blockchain technology, and the trading of environmental commodities (*e.g.*, renewable identification numbers and renewable energy certificates).⁶⁰ Separately, dYdX requested that their specific type of virtual currency-based derivative transaction, which utilizes “smart contract technology,” be included within the scope of the Proposed Interpretation and satisfy the actual delivery exception.⁶¹

After reviewing the comments, the Commission has decided to use the virtual currency definition stated in the Proposed Interpretation to delineate the scope of this final interpretation of the term “actual delivery” in CEA section 2(c)(2)(D). Primarily, the Proposed Interpretation intended to address a digital asset that is, or can be used as, a medium of exchange in commerce,⁶² including within a particular blockchain ecosystem.⁶³ The Commission believes it

⁵⁸ ConsenSys Letter at 2, note 2.

⁵⁹ HBUS Letter at 2.

⁶⁰ CEWG Letter at 2-3; IECA Letter at 2-4.

⁶¹ dYdX Letter at 2-7.

⁶² Although the scope of this interpretive guidance is sufficiently broad to capture digital assets that can be, but are not yet, used as a medium of exchange, a transaction nonetheless must first satisfy the plain language of CEA section 2(c)(2)(D) before analyzing the application of the actual delivery exception.

⁶³ For example, in the context of a “decentralized” network or protocol, the Commission would apply this interpretation to any tokens on the protocol that are meant to serve as virtual currency as described herein. In such instances, the Commission could, depending on the facts and circumstances, view “offerors” as any persons presenting, soliciting, or otherwise facilitating “retail commodity transactions,” including by way of a participation interest in a foundation, consensus, or other collective that controls operational decisions on the protocol, or any

is appropriate to retain this scope, as many facets of this interpretation focus on the customer’s ability to use commodities in this class as a medium of exchange.⁶⁴

The importance of the ability to use these commodities as a medium of exchange is apparent given the industry’s adoption of the terms “virtual currency” and “cryptocurrency.” Therefore, while this interpretive guidance incorporates several elements of the 2013 Guidance, the Commission views the examples provided herein as superseding the examples provided in the 2013 Guidance in the specific context of retail commodity transactions involving virtual currency. In regards to other digital assets that are commodities,⁶⁵ but do not serve as a medium of exchange or otherwise fall within the scope of this interpretive guidance at the time of the transaction, the Commission would continue to refer to the 2013 Guidance to determine whether actual delivery has occurred.

B. References to “Title”

As per the Proposed Interpretation’s question,⁶⁶ several commenters discussed the meaning of “title” in the context of virtual currency and retail commodity transactions. Chamber advocated for a flexible approach, whereby title is only evidenced by the ability of the purchaser to use the virtual currency “freely and without restriction by the seller or offeror at any time.”⁶⁷ CEWG recommended the Commission limit any further interpretation of “title” and “explicitly

other persons with an ability to assert control over the protocol that offers “retail commodity transactions,” as set forth in CEA section 2(c)(2)(D).

⁶⁴ Relatedly, the Proposed Interpretation asked whether the Commission should explore use of its exemptive authority in CEA section 4(c) to establish a distinct registration and compliance regime for retail commodity transactions in this class of commodities. 82 FR at 60,341. Commenters responding to this question generally did not believe a separate exemption or related regulatory regime was necessary or appropriate at this time. After reviewing the comments overall, the Commission currently believes that the development of such a separate regulatory regime is not appropriate.

⁶⁵ The Commission may, from time to time, further interpret the meaning of “actual delivery” in CEA section 2(c)(2)(D) regarding other digital assets that are commodities.

⁶⁶ 82 FR at 60,341 (Question 8).

⁶⁷ Chamber Letter at 6.

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state that other concepts and indicia of title could apply....”⁶⁸ Similarly, FIA urged the Commission to avoid developing a “prescriptive regime concerning what constitutes good title...”⁶⁹ Cable Car suggested the Commission consider whether there are instances in which title can attach before a transaction is memorialized on the relevant public ledger or blockchain.⁷⁰ In a similar manner, DDA asked the Commission to consider issues of internal transfers on “side-chains” that are separate from the general public ledger.⁷¹ In contrast, Mr. Tupper noted that it is unclear whether off-chain transactions could satisfy good title.⁷² ConsenSys argued that there is no acceptable equivalent to “title” that exists in the context of virtual currency.⁷³

After reviewing the comments, the Commission believes the concept of “title” has not fully developed in the context of virtual currency, but the Commission will continue to follow the term’s evolution. Indeed, the Commission agrees with the majority of commenters on this subject, and does not believe efforts to further define or utilize “title” in the examples of this interpretive guidance will provide appropriate clarity at this time. As recognized by existing judicial precedent,⁷⁴ the Commission believes that evidence of possession and control is most significant, while title may, in fact, connote elements of each, along with undetermined additional elements, such as transfer of ownership. Therefore, the Commission is not including an example illustrating transfer of title in this final interpretation. The Commission notes that, depending on the evolution of the term, it remains open to considering a customer’s ability to

⁶⁸ CEWG Letter at 5.

⁶⁹ FIA Letter at 5.

⁷⁰ Cable Car at 4.

⁷¹ DDA Letter at 6-7.

⁷² Tupper Letter at 6.

⁷³ ConsenSys Letter at 4.

⁷⁴ See, e.g., *CFTC v. Monex Credit Company, et al.*, 931 F.3d 966 (9th Cir. 2019); *CFTC v. Hunter Wise Commodities, LLC, et al.*, 749 F.3d 967 (11th Cir. 2014).

obtain title as part of the “functional approach” noted in this final interpretation, but the Commission does not seek to further define or interpret the concept at this time.

C. The 28-Day Actual Delivery Period

The Proposed Interpretation noted that, “absent Congressional action, the Commission is unable to reduce the actual delivery exception period,”⁷⁵ and provided the public an opportunity to provide feedback regarding this requirement. A majority of the commenters addressing this subject were in support of any effort by the Commission to decrease the 28-day actual delivery period for retail commodity transactions in virtual currency.⁷⁶ HBUS noted that “it generally takes much fewer than 28 days for a virtual currency transfer to complete.”⁷⁷ Chamber stated that a shorter delivery period “may be appropriate,” as long as uncontrollable technological factors were considered.⁷⁸ Ms. Holland and Mr. Booth each advocated for a 2-day delivery period as a more appropriate standard.⁷⁹ Mr. Booth stressed that a shorter delivery period would “provide a significantly larger impact on purchaser protection by decreasing the amount of time a virtual currency seller can hold currency paid for by the purchasing party.”⁸⁰ Gemini advocated for a 1-day delivery period, which “more accurately reflects the standard delivery time for spot transactions in virtual currencies.”⁸¹ Gemini noted that the delivery window is “unnecessarily long” and “may give rise to fraudulent activity.”⁸²

⁷⁵ 82 FR at 60,339.

⁷⁶ HBUS Letter at 3; NFA Letter at 1.

⁷⁷ HBUS Letter at 3 (citation omitted).

⁷⁸ Chamber Letter at 4.

⁷⁹ Booth Comment at 2; Holland Letter at 2.

⁸⁰ Booth Comment at 2.

⁸¹ Gemini Letter at 4.

⁸² *Id.* at 3.

Cable Car noted that “establishing a uniform maximum settlement cycle” for such retail transactions might be beneficial for future oversight.⁸³ CEWG urged the Commission to clarify that the delivery window would not be shortened for any digital transactions that fall outside CEA section 2(c)(2)(D).⁸⁴ FIA recommended that the Commission “allow the virtual currency markets to continue to develop” before determining whether to decrease the actual delivery period.⁸⁵

The Commission appreciates the comments received on this subject and agrees that the actual delivery period should correspond to the reality of a virtual currency “spot” transaction. The Commission continues to believe it is limited in its ability to shorten the 28-day delivery period specified in CEA section 2(c)(2)(D).⁸⁶ However, the Commission will continue to engage all relevant stakeholders regarding a more appropriate actual delivery period for purposes of the exception to CEA section 2(c)(2)(D) in the context of virtual currency.

D. Demonstration of Possession and Control

In Example 2 of the Proposed Interpretation, actual delivery could occur even if the retail customer utilizes a third-party depository as an agent to secure the purchased virtual currency.⁸⁷ However, in order to constitute actual delivery under this example, the customer must obtain “full control” over the commodity within 28 days following the date of the transaction.⁸⁸ The Proposed Interpretation asked for further examples of ways in which such control can be demonstrated,⁸⁹ and several commenters replied.

⁸³ Cable Car Letter at 2.

⁸⁴ CEWG Letter at 4-5.

⁸⁵ FIA Letter at 2.

⁸⁶ 82 FR at 60,340.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 60,341.

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Gemini noted that “possession of a private key, or in some instances multiple private keys or credentials, necessary for the transfer of the virtual commodity” would be sufficient proof of “full control.”⁹⁰ However, Gemini argued that book entries (which are inconsistent with actual delivery under Example 3 of the Proposed Interpretation) should be permitted to satisfy actual delivery where the purchaser’s depository is appropriately licensed and regulated for such a custodial purpose.⁹¹

Chamber suggested that “full control” can be demonstrated as long as the virtual currency is held at a depository “outside the reach of the seller.”⁹² Chamber noted that it did not believe requiring possession of private keys is necessary “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.”⁹³ Similarly, ConsenSys noted that purchaser control is the appropriate test, but one must look to the purchaser’s ability to “use” the commodity and existing functionalities of the virtual currency at the time of the transaction.⁹⁴ Coinbase believed that actual delivery can occur “once the customer is able to use the virtual currency to either trade on an exchange platform or transfer it off-platform to purchase goods or services.”⁹⁵ FIA argued that actual delivery should not require possession of a private key to demonstrate full control by the purchaser.⁹⁶

The Commission appreciates all comments received on this subject and believes actual delivery has occurred when a customer achieves both possession *and* control of the virtual currency that is underlying the transaction. To avoid further confusion, the Commission clarifies that the customer’s possession of a particular key or blockchain address will not be considered

⁹⁰ Gemini Letter at 8.

⁹¹ *Id.* at 8-9.

⁹² Chamber Letter at 5.

⁹³ *Id.*

⁹⁴ ConsenSys Letter at 4.

⁹⁵ Coinbase Letter at 7.

⁹⁶ FIA Letter at 4.

further in this interpretive guidance (except as described in Example 1), and has modified the final interpretation to focus on whether the customer has secured a meaningful degree of possession and control of the virtual currency, as discussed below.

E. Depository Independence

In order to satisfy Example 2 of the Proposed Interpretation, an acceptable third-party depository (acting as agent for the customer) cannot be affiliated with the counterparty seller.⁹⁷ The Proposed Interpretation did not explicitly extend this statement to the offeror or offeror's execution venue unless acting as a counterparty to the transaction.⁹⁸ However, under Example 3 in the Proposed Interpretation, mere book entries would not constitute actual delivery.⁹⁹ Therefore, the Proposed Interpretation sought feedback surrounding depository independence,¹⁰⁰ including whether the offeror or its affiliate may maintain some level of association with the depository in demonstration of actual delivery.

Several commenters expressed the view that independence of a third-party depository is an important factor in determining whether actual delivery has occurred. Ms. Holland stated that 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.”¹⁰¹ Similarly, Mr. Tupper stated that a virtual currency depository “should operate in an independent manner from execution platforms and market participants.”¹⁰² NFA expressed concern with virtual currency execution venues that purchase relevant commodities for their own

⁹⁷ 82 FR at 60,340.

⁹⁸ Similar to the Proposed Interpretation, actual delivery does not occur in Example 2 of this final interpretation if the offeror, an affiliate thereof, or someone acting in concert with such persons is also a counterparty to the retail commodity transaction at issue.

⁹⁹ 82 FR at 60,340.

¹⁰⁰ *Id.* at 60,341.

¹⁰¹ Holland Letter at 2.

¹⁰² Tupper Letter at 8.

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account and merely allocate purchases through internal bookkeeping.¹⁰³ NFA believes that such internal book entries are not subject to the same level of regulatory scrutiny that exists for traditional depositories authorized to hold customer funds.¹⁰⁴

On the other hand, certain commenters believed that independence of a third-party depository is not necessary as long as the depository is appropriately regulated. Gemini noted that acceptable depositories should be limited to those covered by the CEA’s definition of “financial institutions,”¹⁰⁵ which may include affiliates of the offeror or counterparty seller.¹⁰⁶ Chamber supported the idea of a federal licensing regime for virtual currency depositories.¹⁰⁷ Chamber argued that affiliation between offeror and depository should not be prohibited as long as appropriate controls and firewalls are in place to address potential conflicts of interest.¹⁰⁸ Coinbase noted that Commission guidance should “encourage digital assets to be held at regulated entities.”¹⁰⁹

ConsenSys and FIA believed that depository affiliation with the offeror or counterparty seller can be consistent with actual delivery.¹¹⁰ ConsenSys argued that treating depository affiliation as disqualifying may inadvertently expose the purchased virtual currency to higher cybersecurity risks by encouraging an external transfer away from the offeror and increase transaction costs since such transactions must be verified and recorded on the relevant public ledger.¹¹¹ ConsenSys and Coinbase also referenced the 2013 Guidance to argue that the Commission has said that actual delivery can occur even when affiliates of the offeror or seller

¹⁰³ NFA Letter at 2.

¹⁰⁴ *Id.*

¹⁰⁵ 7 U.S.C. 1a(21).

¹⁰⁶ Gemini Letter at 7-8.

¹⁰⁷ Chamber Letter at 5.

¹⁰⁸ *Id.*

¹⁰⁹ Coinbase Letter at 5.

¹¹⁰ ConsenSys Letter at 6; FIA Letter at 4.

¹¹¹ ConsenSys Letter at 6-7.

hold the physical commodity in limited circumstances.¹¹² However, Coinbase further acknowledged that such affiliation was found to be consistent with actual delivery only by way of the Commission’s reference to the regulated nature of the limited entities that would take delivery.¹¹³

After reviewing the variety of comments received and further considering the retail customer concerns at issue, the Commission is deciding to strike a balance. Primarily, the Commission generally believes the two central tenets of actual delivery are demonstrated when there is (i) a transfer of the virtual currency (that is the subject of the transaction) away from the counterparty seller, offeror, and any offeror execution venue ledger or digital account system and (ii) receipt by a separate blockchain address or depository that is chosen by the customer and allows the customer to use the virtual currency freely in commerce, where accepted, as soon as technologically practicable. Actual delivery may be found to have occurred even if there is some level of offeror affiliation with a depository that is a separate, independent legal entity, so long as there are certain safeguards to ensure that the customer receives actual possession and control over the purchased commodity within the 28-day actual delivery period, as described below.

The Commission believes that, in the context of virtual currency, such a transfer of the commodity to a separate entity from the offeror and the offeror’s execution venue, when applicable, establishes that a customer achieves meaningful possession and control, including the ability to use the virtual currency as a medium of exchange at any time. The Commission is not alone in treating such a demonstration as critical when such a transaction, bearing hallmarks of a derivative, would otherwise be conducted in an unregulated capacity.¹¹⁴

¹¹² ConsenSys Letter at 6-7; Coinbase Letter at 5, 7.

¹¹³ Coinbase Letter at 5.

¹¹⁴ See Canadian Securities Administrators, CSA Staff Notice 21-327, *Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto Assets* (Jan. 16, 2020),

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This final interpretive guidance includes a new Example 3 and revises Example 2 to describe an appropriate transfer of possession and control to the customer, notwithstanding that an offeror may maintain an affiliation with a depository, so long as the depository is completely separated from any execution venue services and additional safeguards are satisfied.

Accordingly, in order for offeror-depository affiliation not to disqualify a transaction from constituting “actual delivery” in Example 2, the Commission believes that an affiliated depository should be: (i) a “financial institution” as defined by CEA section 1a(21); (ii) a separate line of business from the offeror not subject to the offeror’s control;¹¹⁵ (iii) a separate legal entity from the offeror and any offeror execution venue; (iv) predominantly operated for the purpose of providing custodial services, including for virtual currency and other digital assets;¹¹⁶ (v) appropriately licensed¹¹⁷ to conduct such custodial activity in the jurisdiction of the customer; (vi) offering the ability for the customer to utilize and engage in cold storage of the virtual currency; and (vii) contractually authorized¹¹⁸ by the customer to act as its agent.

The Commission believes this balance will ensure that a retail customer receives meaningful possession and control over purchased virtual currency, while permitting the offeror

https://www.osc.gov.on.ca/documents/en/Securities-Category2/csa_20200116_21-327_trading-crypto-assets.pdf (finding that crypto assets traded on a platform would be subject to applicable Canadian securities legislation unless the transaction results in an “obligation to make immediate delivery of the crypto asset” and “is settled by the immediate delivery of the crypto asset” to the platform’s customer; and stating that “immediate delivery” involves transfer of “ownership, possession and control” of the crypto asset to the customer with no further involvement by the platform, including through any security interest or exposure to certain additional risks).

¹¹⁵ The Commission understands that an offeror and an affiliated depository may be under common control. The Commission believes that “control” would include the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. *See, e.g.*, Joint Final Rule, Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” 77 FR 30,596 at 30,631 n.437 (May 23, 2012); 17 CFR 49.2(a)(4).

¹¹⁶ The Commission recognizes that other custodial services may be provided as well.

¹¹⁷ The Commission appreciates that the regulation of digital asset custodial services is still evolving. However, the Commission will only consider those regulatory regimes that are implemented by state or federal authorities, or a self-regulatory organization that has been formally authorized by such state or federal authorities to carry out such purposes on their behalf.

¹¹⁸ The customer should be free to revoke such a contractual agency relationship at any time.

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to associate with additional services in relation to the transaction. Further, the Commission believes the factors set forth above for an offeror-affiliated depository would ensure an adequate transfer of possession and control is made to the customer's chosen depository so that the customer can use the commodity freely in commerce, as a medium of exchange.

As mentioned, the Commission believes these factors will demonstrate that the depository's business is focused on providing the customer with control over purchased digital assets, as opposed to control that may be asserted by an affiliated offeror. Specifically, the Commission agrees with certain commenters that a "financial institution," as defined by CEA section 1a(21), is one useful element to apply to an affiliated depository, as such institutions are already subject to supervision and are familiar with providing custodial services to customers.¹¹⁹ In furtherance of ensuring that the customer obtains possession and control free and clear from an offeror's execution venue service, the Commission believes that the depository's status as a separate line of business and a separate legal entity is highly critical to the determination of whether actual delivery has occurred. These barriers should forestall attempts by an offeror to assert control over digital assets transferred to an affiliated depository. Further, the Commission believes that requiring such depository services to be operated predominantly for custodial services would further ensure a focus on the customer's control over the purchased asset. While regulatory registrations around digital asset custody are still developing, the Commission believes such regulations should apply to an offeror-affiliated depository to the extent such regulations exist, as they will ensure additional customer protection. Similarly, proper segregation of customer assets pursuant to regulatory requirements for entities offering custodial

¹¹⁹ See 7 U.S.C. 1a(18).

services further demonstrates customer control and protection from the risks of commingling assets (which may frustrate usability).

Given the noted cybersecurity concerns raised regarding risks associated with external transfers and usage of hot storage, it is also important to consider the availability of cold storage options for the customer. While some external transfer risk may still exist, the option of cold storage will help mitigate the long term risk associated with the transfer. Lastly, the Commission will generally consider whether a customer has control over the contractual relationship regarding custodial services, similar to the custodial services available for other customer assets that are primarily used as a medium of exchange. Taken together, the Commission believes these safeguards would ensure that a customer receives meaningful possession and control in instances where a customer's chosen depository is affiliated with an offeror or an offeror's execution venue services.

F. Bucket Shops and Conflicts of Interest

The Commission specifically sought comment regarding potential “bucket shop” arrangements, whereby an offeror¹²⁰ may act as principal to a trade and take the opposite side of a retail commodity transaction, especially within a self-contained environment.¹²¹ The Commission believes these types of transactions have, in the past, often served as a vehicle for unscrupulous actors to take advantage of customers. Keeping this concern in mind, the Commission sought comment to further consider whether “actual delivery” occurs in instances

¹²⁰ The Proposed Interpretation acknowledges that an offeror may also be acting as counterparty seller. 82 FR at 60,339, n. 66.

¹²¹ 82 FR at 60,338; 60,340; *see also* Vitalik Buterin, *Bitfinex: Bitcoinica Rises From The Grave*, Bitcoin Magazine (Nov. 22, 2012), <http://bitcoinmagazine.com/articles/bitfinex-bitcoinica-rises-from-the-grave-1353644122> (describing a bucket shop arrangement whereby an execution venue “steps in and acts as the counterparty to some of its users,” creating “perverse incentives”).

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where an offeror is also a counterparty and the virtual currency remains within the offeror's blockchain address, execution venue, or affiliated depository, when applicable.

Several commenters expressed similar concerns, advocating that offerors should not take the opposite side of a customer transaction. Chamber noted that if an offeror acts as principal, it should not be permitted to rely on the actual delivery exception.¹²² Cable Car believed that no unregulated entity should be able to act as principal, especially regarding the potential for a bilateral market consisting of a bucket shop acting as counterparty to its customers.¹²³ Gemini also agreed that an offeror should not be permitted to take the opposite side of a retail commodity transaction.¹²⁴ Further, Gemini noted that “[a]llowing an exchange operator to take the opposite side of participant transactions may create incentives to influence prices and/or trading volumes as offerors would operate with an informational advantage with respect to its participants.”¹²⁵ No commenters directly advocated for the ability of an offeror to act as principal in retail commodity transactions.

The Commission appreciates the comments received on this subject and agrees that, in the context of virtual currency, the offeror's ability to take the opposite side of a retail commodity transaction may create situations in which actual delivery fails to occur. Since the plain language of CEA section 2(c)(2)(D) does not specifically address whether the offeror has taken the opposite side of the transaction, the Commission will, within the “functional approach” described in this interpretation, consider such activity as a factor weighing against demonstration of actual delivery.¹²⁶ Therefore, as originally stated in the Proposed Interpretation,¹²⁷ the

¹²² Chamber Letter at 4.

¹²³ Cable Car Letter at 3.

¹²⁴ Gemini Letter at 4.

¹²⁵ *Id.*

¹²⁶ This is most notable in Example 2, whereby the Commission will only consider the occurrence of actual delivery in instances where the counterparty seller is not associated with, or acting as, the depository.

Commission will not consider the scenario in Example 2 to constitute actual delivery if an offeror is also the counterparty to the particular transaction.

G. Liens, Third-Party Leverage, and Forced Sales

One of the central tenets of the Proposed Interpretation is that to achieve actual delivery in the context of digital assets serving as a medium of exchange, the offeror and counterparty seller (including any affiliates) cannot retain interest or control over any of the virtual currency in question at the expiration of 28 days from the date of the transaction.¹²⁸ This principle supports the other central tenet of actual delivery – a customer securing “possession and control” over the virtual currency and the ability to use it freely in commerce within 28 days from the date of the transaction for its primary purpose as a medium of exchange.¹²⁹ Essentially, if a customer cannot practically use the virtual currency freely in commerce as a medium of exchange (and the offeror or seller can essentially take it back), it is difficult to argue the customer truly received or secured control over it in the first instance.¹³⁰

The Proposed Interpretation noted that, in order to effect actual delivery, any liens on purchased virtual currency generally cannot extend beyond 28 days from the date of the

¹²⁷ 82 FR at 60,340.

¹²⁸ *Id.* at 60,339.

¹²⁹ *Id.*

¹³⁰ As a practical matter, an ongoing lien on purchased virtual currency generally results in a customer’s inability to freely use such virtual currency for its full purpose as a medium of exchange. If a customer cannot freely use a purchased virtual currency as a medium of exchange, then the Commission would generally view such a customer as lacking “possession and control” of the virtual currency. While the focus of this interpretive guidance is solely on virtual currency as described herein, this conclusion is distinguishable from other types of loan arrangements, such as those involving a car or house. In those other circumstances, a debtor may actually obtain meaningful possession and the ability to use those items for their primary purposes, even while encumbered and in an environment outside of the offeror or counterparty. A lien on a car allows the customer to use the vehicle as a means of transportation. A lien on a house allows the customer to use the house for shelter. By contrast, as noted above, a lien on virtual currency as a practical matter does not allow the customer to fully use the virtual currency for its purpose as a medium of exchange both within and away from a relevant execution venue service.

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transaction, and invited public comment on the forced sale scenarios that may result.¹³¹ In the context of this final interpretative guidance, the Commission views forced sale scenarios as any event in which the offeror or counterparty seller, or anyone acting in concert with such persons, retains a security interest or some other contractual ability to forcibly liquidate, sell off, claw back, or reacquire any portion of the virtual currency subject to the transaction in satisfaction of a lien, debt obligation, or other security interest related to the transaction, with or without the prior consent of the customer.

Cable Car advocated that the Commission not permit forced sale scenarios in finding actual delivery.¹³² They noted that it would be an “extremely grave error” if the Commission permitted a technical lien termination event on a margined trading platform to qualify for an exception from CEA section 2(c)(2)(D) jurisdiction.¹³³ Cable Car urged that “[t]he Commission should be on guard against proposed ‘lien scenarios’ that lack economic purpose or serve only to circumvent registration requirements.”¹³⁴ Chamber stated that, if there is a possibility of a forced sale event, such an event should not qualify for actual delivery.¹³⁵ In addition, Chamber argued that permitting forced sales would circumvent the purpose and intent of the Proposed Interpretation.¹³⁶ Further, Chamber noted that allowing such scenarios would be “tantamount to allowing rolling, netting, offsetting and/or cash settlement” – practices prohibited by Example 4 of the Proposed Interpretation.¹³⁷

¹³¹ 82 FR at 60,339-41.

¹³² Cable Car Letter at 4.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Chamber Letter at 5-6.

¹³⁶ *Id.*

¹³⁷ *Id.*

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Coinbase recognized that many digital asset spot exchanges offering margin trading operate like futures markets. Specifically, Coinbase noted its observation of exchanges offering margined or leveraged transactions, matching those orders and allowing netting or offsetting settlements – all while forcibly liquidating margin positions if the market moved against the margined position.¹³⁸ As Coinbase stated, “[a]ll of these are hallmarks of futures contracts and transactions with these qualities should be traded on regulated contract markets....”¹³⁹

The Commission agrees with the majority of comments that a forced sale scenario, as described herein, appears inconsistent with actual delivery in CEA section 2(c)(2)(D). As noted above, while the Commission will consider all relevant facts and circumstances, the presence of a lien, debt obligation, or other security interest on a virtual currency generally makes it impractical for the customer to use the virtual currency freely in commerce as a medium of exchange, thus frustrating actual delivery. Forced sale scenarios would equally prevent a customer from freely utilizing the full amount of the relevant virtual currency in commerce. Again, if a retail customer cannot practically use the virtual currency underlying the transaction freely in commerce as a medium of exchange (and the offeror or seller can essentially take it back), it is difficult to argue the customer truly received or secured control over it in the first instance.¹⁴⁰ The Commission has further revised Example 2¹⁴¹ and created Example 3¹⁴² in this

¹³⁸ Coinbase Letter at 8.

¹³⁹ *Id.*

¹⁴⁰ The Commission recognizes that a customer should have the ability to cover an outstanding debt obligation (unrelated to the initial retail commodity transaction) with their purchased virtual currency, but such a situation must be initiated freely by the customer only after the occurrence of actual delivery as described in this interpretive guidance. Before actual delivery (and associated transfer of possession and control) has occurred, such transactions would otherwise bear hallmarks of off-exchange derivatives as described herein. The difference is the freedom of the customer to decide how to use the digital asset once they have secured control over it.

¹⁴¹ Example 2 is revised in this interpretive guidance to address scenarios in which the offeror maintains an affiliated relationship with the depository or custodial services provider of the virtual currency subject to the retail commodity transaction.

¹⁴² Example 3 in this interpretive guidance is meant to express the view that actual delivery occurs when the virtual currency subject to the transaction is transferred away from the offeror and any offeror execution venue service

final interpretive guidance to reflect this view. The Commission notes that it does not intend to frustrate commercial transactions conducted in the normal course of business of the buyer and seller, which may be separately excepted by CEA section 2(c)(2)(D)(ii)(III)(bb).¹⁴³

IV. Commission Interpretation of Actual Delivery for Virtual Currency

A. Virtual Currency As a Commodity

As noted in the Proposed Interpretation, the Commission considers virtual currency to be a commodity as defined under Section 1a(9) of the Act,¹⁴⁴ like many other intangible commodities that the Commission has previously recognized (*e.g.*, renewable energy credits and emission allowances, certain indices, and certain debt instruments, among others).¹⁴⁵ Indeed, virtual currency structures, at times, have been compared to other long-standing classes of commodities.¹⁴⁶ In addition, multiple federal courts have held that virtual currencies fall within the CEA’s commodity definition.¹⁴⁷ As a commodity, virtual currency is subject to applicable provisions of the CEA and Commission regulations, including CEA section 2(c)(2)(D).

ledger or digital account and received by a depository or blockchain address that allows the customer to use the commodity freely in commerce for its primary purpose as a medium of exchange.

¹⁴³ CEA section 2(c)(2)(D)(ii)(III)(bb) creates an exception from section 2(c)(2)(D) for any “contract of sale” that “creates an enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with the line of business of the seller and buyer.” Further, CEA section 2(c)(2)(D)(i)(II) applies to transactions that are leveraged, margined, or financed by the offeror or counterparty seller. However, as noted within, this section would not apply to transactions financed by independent third parties.

¹⁴⁴ 82 FR at 60,337-38; *In re Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan*, CFTC Docket No. 15-29, 2015 WL 5535736, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33,538 (CFTC Sept. 17, 2015) (consent order); *In re TeraExchange LLC*, CFTC Docket No. 15-33, 2015 WL 5658082, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33,546 (CFTC Sept. 24, 2015) (consent order); *see also In re BFXNA Inc.*, CFTC No. 16-19, 2016 WL 3137612, at *5 (June 2, 2016) (consent order).

¹⁴⁵ *See generally* 77 FR 48,208 at 48,233 (discussing application of the swap forward exclusion to intangible commodities).

¹⁴⁶ Nick Szabo, *Bit gold*, Unenumerated (Dec. 27, 2008), <http://unenumerated.blogspot.com/2005/12/bit-gold.html>.

¹⁴⁷ *See CFTC v. McDonnell*, 287 F. Supp. 3d 213, 217 (E.D.N.Y. 2018) (“Virtual currencies can be regulated by CFTC as a commodity They fall well-within the common definition of ‘commodity’ as well as the [Act’s] definition of ‘commodities’ as ‘all other goods and articles . . . in which contracts for future delivery are presently or in the future dealt in.’”); *McDonnell*, 332 F. Supp. 3d at 650–51 (entering judgment against defendant following bench trial); *CFTC v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, 495–98 (D. Mass. 2018) (denying motion to

The Commission continues to interpret the term “virtual currency” broadly. In the context of this interpretation, virtual currency:¹⁴⁸ is 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. However, the Commission notes that it does not intend to create a bright line definition given the evolving nature of the commodity and, in some instances, its underlying public distributed ledger technology (“DLT” or “blockchain”).

B. The Commission’s Interest in Virtual Currency

The Commission continues to recognize that certain virtual currencies and their underlying blockchain technologies have the potential to yield notable advancements in applications of financial technology (“FinTech”). As noted in the Proposed Interpretation, the Commission launched the LabCFTC initiative¹⁴⁹ with this potential in mind. LabCFTC continues to engage the FinTech community and promote market-enhancing innovation in furtherance of improving the quality, resiliency, and competitiveness of the markets overseen by the Commission. As such, the Commission is closely following the development and continuing evolution of blockchain technologies and virtual currencies.

Moreover, since virtual currency may serve as an underlying component of derivatives transactions, the Commission maintains a close interest in the development of the virtual

dismiss; applying a categorical approach to interpreting “commodity” under the Act and determining that a non-bitcoin virtual currency is a “commodity” under the Act).

¹⁴⁸ As noted in the Proposed Interpretation, the term “virtual currency” for purposes of this interpretive guidance is meant to be viewed as synonymous with “digital currency” and “cryptocurrency” as well as any other digital asset or digital commodity that satisfies the scope of “virtual currency” described herein.

¹⁴⁹ See Press Release, Commodity Futures Trading Commission, CFTC Launches LabCFTC as Major FinTech Initiative (May 17, 2017), <http://www.cftc.gov/PressRoom/PressReleases/pr7558-17>.

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currency marketplace generally. Since publication of the Proposed Interpretation, several listed derivatives contracts based on virtual currency have been self-certified to be listed on CFTC registered entities¹⁵⁰ in accordance with the CEA and Commission regulations.

In addition, the Commission continues to closely follow the evolution of the cash or “spot” market for virtual currencies, including related execution venues, especially since such markets may inform and affect the listed derivatives markets. Many cash market execution venues offer services to retail customers that wish to speculate on the price movements of a virtual currency against other currencies. For example, a speculator may purchase virtual currency using borrowed money in the hopes of covering any outstanding balance owed through profits from favorable price movements in the future. Among other scenarios,¹⁵¹ this interpretation is meant to address the Commission’s concern with such “retail commodity transactions,” whereby an entity, platform or execution venue: (i) offers margin trading or otherwise facilitates¹⁵² the use of margin, leverage, or financing arrangements for their retail market participants; (ii) typically to enable such participants to speculate or capitalize on price movements of the commodity – two hallmarks of a regulated futures marketplace.¹⁵³

¹⁵⁰ 7 U.S.C. 1a(40).

¹⁵¹ For example, bilateral transactions could also fall within “retail commodity transactions” in CEA section 2(c)(2)(D).

¹⁵² As noted earlier, CEA section 2(c)(2)(D)(i) captures any such retail transaction “entered into, or offered ... 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 Commission views any financing arrangements facilitated, arranged, or otherwise endorsed by the offeror or counterparty to satisfy this statutory definition for purposes of this interpretive guidance.

¹⁵³ See, e.g., *CFTC v. Int’l Foreign Currency, Inc.*, 334 F. Supp. 2d 305, 310 (E.D.N.Y. 2004) (listing elements typically found in a futures contract); *In re Stovall*, CFTC Docket No. 75-7 [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,777 (CFTC Dec. 6, 1979) (describing how futures contracts, being traded on margin, “are entered into primarily for the purpose of assuming or shifting the risk of change in value of commodities, rather than for transferring ownership of the actual commodities.”); David J. Gilberg, *Regulation of New Financial Instruments Under the Federal Securities and Commodities Laws*, 39 Vand. L. Rev. 1599, 1603-04, n.14 (1986) (typically, futures “traders are interested only in obtaining cash payments of price differentials, not actual commodities”).

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Despite this concern, the Commission has sought to take a deliberative and measured approach in this area as supported by one commenter,¹⁵⁴ as the Commission does not wish to stifle nascent technological innovation. Accordingly, the Commission has carefully continued to monitor these markets and even sought additional comment on these markets more generally.¹⁵⁵ While these efforts have informed the Commission of the many potential uses of digital assets and related technology, they have also reinforced the Commission’s concern regarding potential risk to participants in retail commodity transactions involving virtual currency. The Commission highlighted a host of concerns in the Proposed Interpretation¹⁵⁶ regarding these nascent and speculative¹⁵⁷ markets. In setting forth this final interpretation, the Commission believes that many of the concerns raised remain justified¹⁵⁸ and the “actual delivery” exception from CEA section 2(c)(2)(D) cannot be interpreted in a way that would frustrate the protection for retail customers afforded by Congress.

C. Actual Delivery Interpretation

In consideration of the foregoing, the Commission issues the following final interpretive guidance to inform the public of the Commission’s views as to the meaning of the term “actual delivery” in the context of CEA section 2(c)(2)(D) transactions in virtual currency. The

¹⁵⁴ FIA Letter at 1-2.

¹⁵⁵ Request for Input on Crypto-Asset Mechanics and Markets, 83 FR 64,563 (Dec. 17, 2018).

¹⁵⁶ See, e.g., 82 FR at 60,338; Matt Levine, *How A Bank Should Be?*, Bloomberg View (Mar. 11, 2015), <https://www.bloomberg.com/view/articles/2015-03-11/how-should-a-bank-be> (“Just because you mumble the word ‘blockchain’ doesn’t make otherwise illegal things legal”).

¹⁵⁷ Paul Vigna, *BitBeat: Bitcoin Price Drops on Block-Size Debate, ‘Flash Crash,’* The Wall Street Journal (Aug. 20, 2015), <http://blogs.wsj.com/moneybeat/2015/08/20/bitbeat-bitcoin-price-drops-on-block-size-debate-flash-crash/> (“[B]itcoin’s speculative traders love this kind of stuff [margin trading]; these guys could easily give Wall Street’s casino hotshots a run for their money”).

¹⁵⁸ See, e.g., Paul Vigna and Eun-Young Jeong, *Cryptocurrency Scams Took In \$4 Billion in 2019*, The Wall Street Journal, Feb. 10, 2020, at B4 (“[T]here are plenty of inexperienced investors who have heard stories of bitcoin riches and think they can get rich, too.”); Shane Shifflett and Coulter Jones, *Hundreds of Cryptocurrencies Show Hallmarks of Fraud*, The Wall Street Journal, May 18, 2018, at A1; Andy Greenberg, *A ‘Blockchain Bandit’ Is Guessing Private Keys and Scoring Millions*, Wired.com (Apr. 23, 2019), <https://www.wired.com/story/blockchain-bandit-ethereum-weak-private-keys/>.

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Commission, in interpreting the term “actual delivery” for the purposes of CEA section 2(c)(2)(D)(ii)(III)(aa), will continue to follow the 2013 Guidance and “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.”¹⁵⁹

Further, the Commission will continue to assess all relevant factors¹⁶⁰ that inform an actual delivery determination.¹⁶¹ More specifically, in the Commission’s view, “actual delivery” has occurred within the context of virtual currency when:¹⁶²

(1) A customer secures:¹⁶³ (i) 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 (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 offeror¹⁶⁴ 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)¹⁶⁵ do not

¹⁵⁹ 78 FR at 52,428.

¹⁶⁰ This list includes, but is not limited to “[o]wnership, possession, title, and physical location of the commodity purchased or sold, both before and after execution of the agreement, contract, or transaction, including all related documentation; the nature of the relationship between the buyer, seller, and possessor of the commodity purchased or sold; and the manner in which the purchase or sale is recorded and completed.” *Id.*

¹⁶¹ As noted above, given the complex and dynamic nature of these markets, the Commission believes it is appropriate to take an adaptable approach while it continues to follow developments in this space and evaluate business activity on a case-by-case basis.

¹⁶² The Commission has slightly modified this sentence of the interpretive guidance, as compared to the Proposed Interpretation. This modification clarifies that this is a statement of when, in the Commission’s view, actual delivery has occurred.

¹⁶³ While this interpretation speaks to the customer, the burden of proof would always rest on the party that relies on this exception from the Commission’s jurisdiction in CEA section 2(c)(2)(D). *See CFTC v. Monex Credit Company, et al.*, 931 F.3d 966, 973 (9th Cir. 2019).

¹⁶⁴ The Commission views the term “offeror” broadly in this interpretation to encompass any persons that present, solicit, or otherwise facilitate a retail commodity transaction under the Act. As noted, an offeror may include those with operational control of a particular blockchain protocol. Separately, CEA section 2(c)(2)(D) captures any transaction that is financed by the offeror, among other things. Transactions financed solely by non-affiliated third

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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.¹⁶⁶

Consistent with the 2013 Guidance and the Proposed Interpretation, a sham delivery is not consistent with the Commission’s interpretation of the term “actual delivery.” As noted above, the Commission believes that actual delivery occurs when the offeror and counterparty seller, including their agents, cease to retain any interest, legal right, or control whatsoever¹⁶⁷ in the virtual currency acquired by the purchaser at the expiration of 28 days from the date of entering into the transaction or at any time prior to expiration of the 28-day period once “actual delivery” occurs. Indeed, in its simplest form, actual delivery of virtual currency connotes the ability of a purchaser to utilize the virtual currency purchased “on the spot” as a medium of exchange in commerce or within the entirety of its relevant blockchain ecosystem.

The Commission believes that, in the context of an “actual delivery” determination in virtual currency, physical settlement involving the entire amount of purchased commodity must occur. A cash settlement or offset mechanism, as described in Example 5 below, is not consistent with the Commission’s interpretation. The distinction between physical settlement

parties, such as a non-affiliated credit card network, are not traditionally considered within CEA section 2(c)(2)(D). However, the Commission may continue to view financing through a credit card that is endorsed, sponsored, or specifically affiliated with an offeror as a transaction that falls within CEA section 2(c)(2)(D).

¹⁶⁵ The Commission recognizes that the offeror of the transaction and the ultimate counterparty may be two separate entities or may be the same. For example, the Commission would consider as the offeror of the transaction a virtual currency execution venue that makes the transaction available to the retail customer or otherwise facilitates the transaction. That virtual currency execution venue could also be considered a counterparty to the transaction if, for example, the platform itself took the opposite side of the transaction or the purchaser of the virtual currency enjoyed privity of contract solely with the platform rather than the seller. Additionally, the Commission recognizes that some virtual currency execution venues may provide a purchaser with the ability to source financing or leverage from other users or third parties. The Commission would consider such third parties or other users to be acting in concert with the offeror or counterparty seller on a similar basis.

¹⁶⁶ Among other things, the Commission may look at whether the offeror or seller retain any ability to access or withdraw any quantity of the commodity purchased from the purchaser’s account or wallet.

¹⁶⁷ The Commission would continue to take this view even if the offeror maintains some level of affiliation with an independent, third-party depository, as described in Example 2.

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and cash settlement in this context is akin to settlement of a spot foreign currency transaction at a commercial bank or hotel in a foreign nation – the customer receives physical foreign currency, not U.S. dollars. As mentioned, actual delivery occurs if such physical settlement occurs within 28 days from the date on which the “agreement, contract, or transaction is entered into.”¹⁶⁸

Consistent with the interpretation above, the Commission provides the following non-exclusive examples to further clarify the meaning of actual delivery in the virtual currency context:

Example 1: Actual delivery of virtual currency will have occurred if, within 28 days after entering into an agreement, contract, or transaction, there is a record on the relevant public distributed ledger or blockchain address of the transfer of virtual currency, whereby the entire quantity of the purchased virtual currency, including any portion of the purchase made using leverage, margin, or other financing, is transferred from the counterparty seller’s blockchain address¹⁶⁹ to the purchaser’s blockchain address, over which the purchaser maintains sole possession and control. When an execution venue or other third party offeror acts as an intermediary, the virtual currency’s public distributed ledger should reflect the purchased virtual currency transferring from the counterparty seller’s blockchain address to the third party offeror’s blockchain address and, separately, from the third party offeror’s blockchain address to the purchaser’s blockchain address, over which the purchaser maintains sole possession and control.

Example 2: Actual delivery will have occurred if, within 28 days after entering into a transaction:

¹⁶⁸ 78 FR at 52,427.

¹⁶⁹ The source of the virtual currency is provided for purposes of this example. However, the focus of this analysis remains on the actions that would constitute actual delivery of the virtual currency to the purchaser.

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(1) the counterparty seller or offeror has delivered the entire quantity of the virtual currency purchased, including any portion of the purchase made using leverage, margin, or financing, into the possession of a depository¹⁷⁰ (*i.e.*, wallet or other relevant storage system) other than one owned, controlled, operated by, or affiliated with, the counterparty seller (including any parent companies, subsidiaries, partners, agents, affiliates, and others acting in concert with the counterparty seller)¹⁷¹ that has entered into an agreement with the purchaser to hold virtual currency as agent for the purchaser without regard to any asserted interest of the offeror, the counterparty seller, or persons acting in concert with the offeror or counterparty seller on a similar basis;

(2) the purchaser has secured full control over the virtual currency (*e.g.*, the ability to remove as soon as technologically practicable and use freely up to the full amount of purchased commodity from the depository at any time, including by transferring to another depository of the customer's choosing); and

(3) with respect to the commodity being delivered, no 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) resulting or relating to the use of margin, leverage, or financing used to obtain the entire quantity of the commodity delivered will continue after the

¹⁷⁰ As noted above, the offeror may associate with an affiliated depository in Example 2 that the customer chooses to utilize, but such an affiliated depository should be: (i) a “financial institution” as defined by CEA section 1a(21); (ii) a separate line of business from the offeror not subject to the offeror's control; (iii) a separate legal entity from the offeror and any offeror execution venue; (iv) predominantly operated for the purpose of providing custodial services for virtual currency and other digital assets; (v) appropriately licensed to conduct such custodial activity in the jurisdiction of the customer; (vi) offering the ability for the customer to utilize and engage in cold storage of the virtual currency; and (vii) contractually authorized by the customer to act as its agent.

¹⁷¹ The Commission recognizes that an offeror could act in concert with both the purchaser and the counterparty seller in the ordinary course of business if it intermediates a transaction. This level of association would not preclude the offeror from maintaining an affiliation with a depository in a transaction that otherwise results in actual delivery pursuant to this example. However, pursuant to this example, actual delivery does not occur if the offeror, the offeror's execution venue, or any of its subsidiaries or affiliates, is also the counterparty to the retail commodity transaction at issue.

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28-day period has elapsed.¹⁷² This scenario assumes that no portion of the purchased commodity could be subjected to a forced sale or otherwise removed from the customer’s control as a method of satisfying this example.

Example 3: Actual delivery will *not* have occurred if, within 28 days of entering into a transaction, the full amount of the purchased commodity is not transferred away from a digital account or ledger system owned or operated by, or affiliated with, the offeror or counterparty seller (or their respective execution venues) and received by a separate, independent, appropriately licensed, depository or blockchain address in which the customer maintains possession and control in accordance with Example 2.

Example 4: Actual delivery will *not* have occurred if, within 28 days of entering into a transaction, a book entry is made by the offeror or counterparty seller purporting to show that delivery of the virtual currency has been made to the customer, but the counterparty seller or offeror has *not*, in accordance with the methods described in Example 1 or Example 2, actually delivered the entire quantity of the virtual currency purchased, including any portion of the purchase made using leverage, margin, or financing, regardless of whether the agreement, contract, or transaction between the purchaser and offeror or counterparty seller purports to create an enforceable obligation¹⁷³ to deliver the commodity to the customer.

Example 5: Actual delivery will *not* have occurred if, within 28 days of entering into a transaction, the agreement, contract, or transaction for the purchase or sale of virtual currency is

¹⁷² Although it will consider all relevant factors and circumstances, the Commission believes that actual delivery would not occur if a lien or similar interest is retained upon the specific virtual currency purchased beyond the 28-day actual delivery period, as such a lien is likely to preclude the customer from using the virtual currency freely as a medium of exchange in commerce. However, the Commission understands that actual delivery may still occur when liens exist on other collateral, including virtual currency or digital assets *other than* the specific virtual currency that is the subject of the retail commodity transaction.

¹⁷³ As discussed earlier, this “enforceable obligation” language relates to an element of a separate exception to CEA section 2(c)(2)(D) that is limited by its terms to a commercial transaction involving two commercial entities with a pre-existing line of business in the commodity at issue that is separate and distinct from the business of engaging in a retail commodity transaction. See 7 U.S.C. 2(c)(2)(D)(ii)(III)(bb).

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rolled, offset against, netted out, or settled in cash or virtual currency (other than the purchased virtual currency) between the customer and the offeror or counterparty seller (or persons acting in concert with the offeror or counterparty seller).