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VIRTUAL CURRENCY

Two attorneys from Skadden discuss issues surrounding the U.S. Commodity Futures Trading Commission’s role in regulating virtual currencies. Because the potential for innovation in the digital realm is virtually boundless, it is important to assess the regulatory angles continuously, the authors explain.

Deciphering CFTC Regulatory Issues for Cryptocurrencies



BY JONATHAN MARCUS AND PRASHINA GAGOOMAL

Digital or virtual currencies based on cryptography (commonly referred to as “cryptocurrencies”) have picked up steam, with a surge in trading and dramatic increase in market value over the past year, and have attracted interest from mainstream finance and regulators alike. The former Chairman of the U.S. Commodity Futures Trading Commission (CFTC or Commission)

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made clear in 2014 that derivative contracts based on a virtual currency, which fits within the broad statutory definition of “commodity,” are “within [the CFTC’s] responsibility.” See *The Commodity Futures Trading Commission: Effective Enforcement and the Future of Derivatives Regulation: Hearing Before the S. Comm. on Agric., Nutrition and Forestry*, 113th Cong. 36-60 (2014) (statement of Hon. Timothy G. Massad, Chairman, CFTC), available at <https://www.agriculture.senate.gov/imo/media/doc/S.%20Hrg.%20113-640%20-%20THE%20COMMODITY%20FUTURES.pdf>.

Since that announcement in 2014, the CFTC has sought to better understand the cryptocurrency space, along with FinTech innovations more generally, through its LabCFTC initiative launched in May 2017. See J. Christopher Giancarlo, Acting Chairman, CFTC, Address Before the NY FinTech Innovation Lab, “LabCFTC: Engaging Innovators in Digital Financial Markets” (May 17, 2017), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-23> (explaining that LabCFTC is designed both “to improve the quality, resiliency, and competitiveness” of the derivatives markets and “enable the CFTC to carry out its mission more effectively and efficiently in the new digital world”). Furthermore, over the past couple of years and as recently as July 2017, the CFTC has been making determinations regarding cryptocurrency trading platforms and clearinghouses; specifically, the CFTC has found that certain entities need to be registered with the CFTC and has considered and approved the registration applications of other entities. And on Oct. 17, 2017, LabCFTC released “A CFTC Primer on Virtual Currencies” which provides an overview of legal and market developments with respect to virtual currencies, discusses the CFTC’s role in regulating virtual currencies, and identifies risks in-

vesting in them. See LabCFTC Release (PR 7631-17), “A CFTC Primer on Virtual Currencies” (Oct. 17, 2017), available at http://www.cftc.gov/idc/groups/public/documents/file/labcftc_primercurrencies100417.pdf (LabCFTC Primer). As the CFTC continues to navigate the relatively uncharted waters of cryptocurrency and related derivatives, this article explores key regulatory issues that have surfaced and others that may appear on the horizon.

‘Actual Delivery’

The Dodd-Frank Act amended the CFTC’s governing statute (the Commodity Exchange Act or CEA) to give the CFTC authority not only over commodity derivatives such as futures, options, and swaps, but also over certain leveraged, margined, or financed commodity transactions offered to retail customers (i.e., customers who are not “eligible contract participants” or “eligible commercial entities,” as such terms are defined in the CEA). See 7 U.S.C. § 2(c)(2)(D)(i). Such retail financed commodity transactions are to be treated as if they were futures contracts subject to CFTC regulation for certain purposes—including the requirement to be traded on a CFTC-registered facility—unless the transactions result in “actual delivery [of the commodity] within 28 days” See 7 U.S.C. § 2(c)(2)(D)(iii) (providing that CEA sections 4(a), 4(b), and 4b apply to retail financed commodity transactions “as if the agreement, contract, or transaction was a contract of sale of a commodity for future delivery”); 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa) (setting forth the “actual delivery” exception from CFTC jurisdiction for retail financed commodity transactions). In June 2016, the CFTC analyzed the meaning of “actual delivery” in the context of retail financed cryptocurrency transactions being offered on an unregistered facility operated by Bitfinex. See *In re BFXNA Inc.*, CFTC No. 16-19, 2016 WL 3137612, Comm. Fut. L. Rep. (CCH) ¶ 33,766 (June 2, 2016) (Bitfinex Order) (relying largely on a 2013 interpretation that did not explicitly refer to cryptocurrencies, but rather endorsed a “functional approach” for determining whether any given transaction results in actual delivery within the meaning of the CEA). Since June 2016, the CFTC has been silent on this issue, leaving the derivatives industry scratching its collective head over some lingering regulatory uncertainty.

The upshot of the CFTC’s 2016 interpretation was that, in essence, “actual delivery” is equivalent to “physical delivery.” Specifically, the CFTC stated that “physical delivery of the entire quantity of the commodity, including the portion purchased using leverage, margin or financing, into the possession of the buyer, or a depository other than the seller, the seller’s parent company, partners, agents and affiliates[,] will satisfy the actual delivery exception” Bitfinex Order, 2016 WL 3137612 at *4 (citing CFTC’s 2013 interpretation). Applying this standard to cryptocurrency markets, the CFTC indicated that “actual delivery” of a cryptocurrency requires that the cryptocurrency be delivered to a deposit wallet for which the recipient controls the “private key”—that is, a “secret number . . . associated with a deposit wallet that allows [the cryptocurrency] in that wallet to be spent.” See *id.* at *2 n.4, 5. Because Bitfinex’s retail customers who purchased cryptocurrencies on a financed basis on the trading facility did not hold private keys to their deposit wallets (rather, Bit-

finex held the keys), the CFTC viewed the cryptocurrencies as not being “actually delivered” to the retail customers. See *id.* at 6. Accordingly, the CFTC found that the retail financed cryptocurrency transactions on Bitfinex did not qualify for the “actual delivery” exception from CFTC jurisdiction, and that Bitfinex had violated the CEA by not being registered in connection with such transactions. See *id.* at 6-7.

About a month after the CFTC’s Bitfinex Order, the law firm Steptoe & Johnson LLP filed a petition (Steptoe Petition) with the CFTC requesting a rulemaking to clarify the requirements for “actual delivery” in the context of cryptocurrency markets. See Letter, “Petition for Rulemaking Concerning the Requirements of ‘Actual Delivery’ and the Transfer of Ownership under the Commodity Exchange Act in the Context of Cryptocurrency Markets Utilizing Blockchain for Executing Transactions” from Michael Dunn & Micah Green, Steptoe & Johnson LLP, to Chris Kirkpatrick, Secretary, CFTC (July 1, 2016), available at [https://poloniex.com/press-releases/2016.10.18-Our-request-for-no-action-relief/Steptoe-Petition-for-CFTC-Rulemaking-\(07-01-2016\).pdf](https://poloniex.com/press-releases/2016.10.18-Our-request-for-no-action-relief/Steptoe-Petition-for-CFTC-Rulemaking-(07-01-2016).pdf). The Steptoe Petition expressed concern that the CFTC’s “actual delivery” interpretation in the Bitfinex case may be too narrow. In particular, the Steptoe Petition pointed out that:

[M]aking control of private keys a prerequisite to having ownership and control of a cryptocurrency would be artificial and harmful to [cryptocurrency] markets because private keys have no innate legal significance with regard to the transfer, control, and possession of cryptocurrency on the blockchain Rather, private keys are a modality to effectuate the parties’ contractual agreements . . . and the significance or lack of significance of private keys . . . is determined entirely by the transacting parties.

See *id.* at 4.

The Steptoe Petition also observed that—although the “actual delivery” language appears in a statutory provision for retail financed commodity transactions—the meaning of “actual delivery” could have implications for transactions beyond retail financed commodity transactions. Specifically, the Steptoe Petition said that the meaning of “actual delivery” “can bear as much on prerequisites for ownership and control of cryptocurrency in *spot transactions* as in margin transactions.” See *id.* (emphasis added). Unlike retail financed commodity transactions (or “margin transactions” as referred to in the Steptoe Petition), spot transactions (as well as contracts known as forwards) are not necessarily entered into on a leveraged or financed basis, they include as a defining feature the requirement to physically deliver the underlying commodity, and they are largely outside of the CFTC’s regulatory regime. For spot transactions, physical delivery is effected on an immediate or prompt basis; for forwards, physical delivery is accomplished on a specified future date. See CFTC Glossary’s Definition of “Spot”, available at <http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm#S>; CFTC Glossary’s Definition of “Forward Contract”, available at <http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm#F>. Insofar as the CFTC views “physical delivery” and “actual delivery” to be the same, the CFTC’s “actual delivery” interpretation may be relevant to assessing whether a cryptocurrency transaction involves “physical delivery”

and therefore could be characterized as a spot or forward. Thus, if the CFTC adopts a narrow interpretation of “actual delivery” that is interchangeable with “physical delivery,” a cryptocurrency transaction may be less likely to qualify as a spot or forward, which is largely excluded from CFTC oversight, and more likely to be considered a derivative contract (e.g., swap or future) subject to full-scale CFTC regulation.

Notwithstanding the well-founded concerns the Steptoe Petition raised in July 2016, the CFTC has not responded as this article goes to print. In the absence of further clarification, the CFTC’s 2016 interpretation could continue to be read to require that a cryptocurrency trader have control over private keys for there to be “actual delivery” of the cryptocurrency to that trader (and potentially to establish “physical delivery” for purposes of cryptocurrency spot/forwards). Such an interpretation, however, does not offer sufficient guidance to cryptocurrency trading platforms as they seek to address security issues, among other concerns. For instance, although Bitfinex adopted a new framework in the wake of the CFTC’s 2016 Order to allow users to receive private keys to individually enumerated cryptocurrency wallets, Bitfinex apparently had to reconfigure its system after a security hack in August 2016. As a result of Bitfinex’s system reconfiguration and other Bitfinex system changes since August 2016, Bitfinex staff (as opposed to users of Bitfinex’s platform) now seem to have control over private keys to omnibus wallets holding user cryptocurrency funds. See *HOW SECURE IS BITFINEX?*, available at <https://support.bitfinex.com/hc/en-us/articles/213892469-How-secure-is-Bitfinex> (last visited Nov. 9, 2017). Citing security reasons, several other cryptocurrency trading platforms (e.g., Gemini, Kraken, Coinbase) appear to be using essentially the same type of private key and wallet configuration as Bitfinex by vesting platform staff with control over private keys to omnibus wallets holding user cryptocurrency funds. See *GEMINI – OUR COMMITMENT TO SECURITY*, available at <https://gemini.com/security/>; *KRAKEN SECURITY PRACTICES*, available at <https://www.kraken.com/en-us/security/practices>; *COINBASE VAULT*, available at <https://www.coinbase.com/vault>. But see *THE MULTISIG VAULT* (Aug. 31, 2017), available at <https://support.coinbase.com/customer/portal/articles/1743782> (discussing Coinbase’s option of a Multisig Vault which is “designed for advanced users only” and allows a user to control two out of three private keys (with only two keys being needed to access the user’s funds)).

If and when the CFTC addresses the Steptoe Petition’s call for greater clarity, the CFTC’s interpretation of “actual delivery” (as applied to cryptocurrency markets) should take into account the unique features of those markets, including the need for wallet set-ups that address the very real risk of security breaches. Without a clarification of the meaning of “actual delivery” in cryptocurrency markets, those markets will continue to be fraught with regulatory uncertainty over whether certain cryptocurrency contracts are within the CFTC’s regulatory purview and, accordingly, whether the trading platforms for such contracts must be registered with the CFTC.

Susceptibility to Manipulation

As illustrated in the prior section, a trading facility for certain types of cryptocurrency transactions may run

into trouble for failing to register with the CFTC. A cryptocurrency trading platform contemplating registration will face its own set of challenges. A significant hurdle can involve meeting certain statutory requirements known as “core principles” to register and maintain registration with the CFTC as a designated contract market (DCM) or swap execution facility (SEF). Pursuant to one core principle, a DCM or SEF “shall list . . . only contracts that are *not* readily susceptible to manipulation.” See 7 U.S.C. § 7(d)(3) (DCMs) (emphasis added); 7 U.S.C. § 7b-3(f)(3) (SEFs) (emphasis added). Accordingly, if a trading facility for cryptocurrency derivatives were to apply to register with the CFTC as a DCM or SEF, it would have to demonstrate that the contracts it lists are not readily susceptible to manipulation.

The CFTC provides guidance on the “not readily susceptible to manipulation” requirement in appendices to its rules governing DCMs and SEFs. See Appendix C to 17 C.F.R. Part 38 (“Demonstration of Compliance That a Contract Is Not Readily Susceptible to Manipulation”); Appendix B to 17 C.F.R. Part 37 (“Guidance on, and Acceptable Practices in, Compliance with Core Principles”). The guidance recognizes that supply considerations—e.g., the “general availability of the commodity” underlying the contract and the “size and ownership of deliverable supplies”—“may cause a contract to become susceptible to price manipulation or distortion.” See Appendix B to 17 C.F.R. Part 37 (section (a)(2) under “Monitoring of Trading and Trade Processing”); Appendix C to 17 C.F.R. Part 38 (section (b)(1) & section (c)(2)). In traditional market manipulation cases involving “corners,” a market participant that obtains a near monopoly over the deliverable supply of a cash commodity (e.g., corn, gold, etc.) is positioned to manipulate the price of the commodity and the derivatives contract based on that commodity. See CFTC Glossary’s Definition of “Corner”, available at http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary_co.

Unlike traditional physical commodities like corn or gold, cryptocurrencies might be thought to have unlimited supply given their intangible nature. But this is not necessarily the case. The supply of most cryptocurrencies increases at a predetermined rate and, in the case of bitcoin (the cryptocurrency), supply is capped at 21 million. (Currently, there are about 16 million bitcoins in circulation. See *BITCOINS IN CIRCULATION – BLOCKCHAIN*, available at <https://blockchain.info/charts/total-bitcoins> (last visited Nov. 9, 2017).) Although the limited supply of bitcoin theoretically could make it possible for someone to “corner” the bitcoin market, the ultimate number of 21 million is still quite large. At least one academic commenter has not found evidence of a monopoly over the supply of bitcoin. In a February 2017 policy paper, that academic observed that:

There is . . . no compelling evidence to suggest that any single investor or group of investors successfully has acquired a dominant position in bitcoin. For example, certain individuals are known to have a significant cache of bitcoin, yet media estimates indicate that such holdings represent approximately just 1% of bitcoin currently in circulation.

See Craig M. Lewis, *SolidX Bitcoin Trust: A Bitcoin Exchange Traded Product*, commissioned by SolidX Management LLC (Feb. 2017), at 6, available at <https://www.sec.gov/comments/sr-nysearca-2016-101/nysearca2016101-1579480-131874.pdf>.

Purchasing bitcoin (or accepting bitcoin as payment) is not the only way to acquire bitcoin, however. Bitcoin “miners” can be rewarded within bitcoin for solving cryptographic puzzles to validate bitcoin transactions. Some of these miners have large-scale operations and may present a risk of monopolizing the bitcoin market. See Jeff John Roberts, *Does Bitcoin Have a Mining Monopoly Problem?*, FORTUNE (Aug. 25, 2017), available at <http://fortune.com/2017/08/25/bitcoin-mining/>.

Aside from a potential “corner” of the bitcoin market, there are other possible manipulation concerns relating to bitcoin derivatives. For instance, if an individual or entity were to engage in fraud or some other deceptive or manipulative conduct to affect the publicly reported spot price of bitcoin, such conduct could also have a manipulative effect on bitcoin derivatives that are listed on a DCM or SEF and that are priced by reference to the bitcoin spot price. Thus, the potential for misconduct in the bitcoin spot market is an important consideration in evaluating bitcoin derivatives’ susceptibility to manipulation.

The CFTC’s July 2017 approval of LedgerX, LLC’s (LedgerX) applications to be registered as a SEF for bitcoin options and as a derivatives clearing organization (DCO) for the bitcoin derivatives traded on LedgerX’s SEF signals that, at least for Ledger X’s bitcoin product, any manipulation concerns did not rise to the level that the CFTC felt compelled to deny registration. See Order of Registration, *In Re LedgerX LLC*, Comm. Fut. L. Rep. (CCH) ¶ 34,069 (July 6, 2017), available at <http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/orgledgerxord170706.pdf>; Order of Registration, *In Re LedgerX LLC*, Comm. Fut. L. Rep. (CCH) ¶ 34,075 (July 24, 2017), available at <http://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/ledgerxdcorder72417.pdf>. Notwithstanding that the CFTC’s approvals for LedgerX indicate that LedgerX adequately addressed the requirements to be registered (including a showing that the listed bitcoin derivatives are *not* readily susceptible to manipulation), the CFTC noted that the Commission’s authorization “does not constitute or imply a Commission endorsement of the use of digital currency generally, or bitcoin specifically.” See CFTC Release (pr7592-17), CFTC Grants DCO Registration to LedgerX LLC (July 24, 2017), available at <http://www.cftc.gov/PressRoom/PressReleases/pr7592-17>. LedgerX has begun its operations, with 176 bitcoin derivatives at a notional value of more than \$1 million traded during its launch week. See Michael del Castillo, *LedgerX Trades \$1 Million in Bitcoin Derivatives in First Week*, COINDESK (Oct. 20, 2017), available at <https://www.coindesk.com/ledgerx-trades-1-million-bitcoin-derivatives-first-week/>. In the wake of the CFTC’s approval of LedgerX as a SEF and DCO, regulated exchange operators CME Group Inc. and Cboe Global Markets, Inc. have announced plans for the listing of bitcoin futures by the end of 2017 or early 2018. See Nick Baker & Matthew Leising, *Bitcoin Surges After World’s Biggest Exchange Announces Plans for Futures*, BLOOMBERG (Oct. 31, 2017, 9:01 AM; last updated Oct. 31, 2017, 1:00 PM), available at <https://www.bloomberg.com/news/articles/2017-10-31/cme-group-world-s-biggest-exchange-plans-bitcoin-futures>.

Interestingly, the CFTC’s approval of LedgerX as a SEF and DCO may increase the likelihood that the Securities and Exchange Commission (SEC) will approve applications to list bitcoin ETFs. In a March 2017 deci-

sion regarding the bitcoin ETF proposed by Tyler and Cameron Winklevoss (Winklevoss ETF), the SEC noted that “a key consideration for the [SEC] in determining whether to approve or disapprove a proposal to list and trade shares of a new commodity-trust ETP [exchange-traded product] is the susceptibility of the shares or the underlying asset to manipulation.” See Order Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, To List and Trade Shares Issued by the Winklevoss Bitcoin Trust, 82 Fed. Reg. 14,076 (Mar. 16, 2017), *agency release available at* <https://www.sec.gov/rules/sro/batsbzx/2017/34-80206.pdf>. The SEC found that bitcoin underlying the Winklevoss ETF was susceptible to manipulation due to the overall lack of regulated markets in bitcoin and bitcoin derivatives at that time. See 82 Fed. Reg. at 14,084–87. As new regulated markets for bitcoin products (such as LedgerX) become operational and existing regulated markets list bitcoin derivatives, the SEC could change its position and determine that there are adequate regulatory deterrents to manipulation of bitcoin ETFs.

Position Limits

Market participants that trade in cryptocurrency derivatives—whether on CFTC-registered trading facilities or over-the-counter—may encounter the issue of limits being placed on the number of speculative positions that they can hold or control (“position limits”). Position limits are regulatory tools intended to address market harms such as manipulation and excessive speculation leading to sudden or unreasonable price fluctuations. See 7 U.S.C. § 4a(a). Currently, the CFTC imposes federal position limits on certain agricultural commodity futures and options on futures, while DCMs and SEFs establish, as “necessary and appropriate,” their own position limits (or more flexible position accountability levels) for contracts listed on their respective facilities. See 17 C.F.R. Part 150 (codifying the CFTC’s position limit regime); 7 U.S.C. § 7(d)(5) (codifying DCM position limit authority); 7 U.S.C. § 7b-3(f)(6) (codifying SEF position limit authority). In its most recent reproposal for position limits (issued in December 2016) (Reproposal), the CFTC has proposed to implement what it views as a “mandate” under the Dodd-Frank Act to expand its federal position limit regime to cover agricultural and exempt commodity futures and options and economically equivalent swaps. See Position Limits for Derivatives, 81 Fed. Reg. 96704 (Dec. 30, 2016). Specifically, the CFTC has proposed federal position limits relating to 25 agricultural and exempt commodities, with an intention to apply limits to other agricultural and exempt commodities in later phases. See *id.* at 96745 n.417, 96796 n.857.

Although the CFTC’s Reproposal does not explicitly refer to cryptocurrencies, the asserted statutory position limits “mandate” could apply to cryptocurrency derivatives (both exchange-traded and over-the-counter) if cryptocurrencies are considered “exempt commodities.” As a threshold matter, the term “commodity” is broadly defined to include “goods and articles . . . and all services, rights and interests” except for onions and motion picture box office receipts. See 7 U.S.C. § 1a(9). The CEA defines an “exempt commodity” as “a commodity that is not an excluded commodity or an agricul-

tural commodity.” 7 U.S.C. § 1a(20) (examples include metals and natural gas). The term “excluded commodity,” in turn, includes various financial commodities, such as interest rates, exchange rates, currencies, and securities. *See* 7 U.S.C. § 1a(19). Contrary to what these terms might suggest, both exempt and excluded commodities are currently subject to CFTC regulation.

In the CFTC’s 2015 enforcement action against Coinflip, Inc., an unregistered bitcoin options trading platform, the CFTC stated that “[b]itcoin and other virtual currencies are encompassed in the definition [of commodity] and properly defined as commodities.” *See In re Coinflip, Inc.*, CFTC No. 15-29, 2015 WL 5535736, Comm. Fut. L. Rep. (CCH) ¶ 33,538 (Sept. 17, 2015) (Coinflip Order). The agency also noted that bitcoin is “distinct from ‘real currencies’ ” of the United States or another country, and signaled that bitcoin falls into the category of exempt commodities. *See* Coinflip Order, 2015 WL 5535736 at *1 n.2, *2 & n.5. The CFTC chose to analyze the bitcoin options in question through the lens of the “trade option exemption”—an exemption that is only available to options in exempt or agricultural commodities, *not* excluded commodities. *See id.* at *2 & n.5; *see also* 17 C.F.R. § 32.3. Similarly, in analyzing bitcoin transactions in the 2016 Bitfinex case, the CFTC invoked the CEA provision concerning retail financed commodity transactions (which would cover exempt commodities), rather than the CEA provision relating to retail financed foreign currency transactions (which would not cover exempt commodities). *See* Bitfinex Order, 2016 WL 3137612 at *3.

Ultimately, if cryptocurrencies are considered exempt commodities such that cryptocurrency derivatives come within the CFTC’s asserted position limits “mandate,” then the CFTC may feel obliged to impose federal limits on cryptocurrency derivatives (and may seek to do so in a separate rulemaking from its Reproposal). In the absence of such federal limits on cryptocurrency derivatives, the Reproposal would make it an “acceptable practice” for DCMs and SEFs to impose position limits or position accountability levels on cryptocurrency derivatives pursuant to CFTC-specified guidelines. *See* 81 Fed. Reg. at 96970 (Reproposed Rule 150.5(b)).

Anti-Fraud Authority

The CFTC has referred to CEA Section 6(c)(1) and CFTC Regulation 180.1 as “giv[ing] the Commission broad enforcement authority to prohibit fraud and manipulation in connection with a contract of sale for *any commodity in interstate commerce.*” *See* Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Manipulation, 76 Fed. Reg. 41398, 41401 (July 14, 2011) (emphasis added). Recently, the CFTC invoked these provisions in bringing a complaint against a company and its head trader for engaging in an allegedly fraudulent scheme in connection with contracts of sale of bitcoin. *See* Complaint For Injunctive and Other Equitable Relief and For Civil Monetary Penalties Under the Commodity Exchange Act and Commission Regulations, *CFTC v. Gelfman Blueprint, Inc.*, No. 1:17-cv-07181 (S.D.N.Y. Sept. 21, 2017), ECF No. 1. The CFTC’s complaint refers to the bitcoin contracts as “contracts of sale of commodities in interstate commerce” (*see id.* at

paras. 1, 84, 85), and does not allege that any bitcoin derivatives (e.g., bitcoin futures or swaps) were involved in, or affected by, the scheme. Although not representing official CFTC policy, the LabCFTC Primer echoes the spirit of the CFTC’s complaint, stating that “[t]he CFTC’s jurisdiction is implicated . . . if there is a fraud or manipulation involving a virtual currency traded in interstate commerce.” LabCFTC Primer at 11.

The CFTC’s assertion of “broad enforcement authority” over fraud in connection with potentially any cryptocurrency in interstate commerce may lead to jurisdictional clashes with the SEC. For its part, the SEC has anti-fraud authority with respect to securities, including “investment contracts.” *See SEC v. W.J. Howey & Co.*, 328 U.S. 293, 298-99 (1946) (defining an “investment contract” as (1) an investment of money, (2) in a common enterprise, (3) with a reasonable expectation that profits will be derived from the entrepreneurial or managerial efforts of others). Based on the definition of “investment contract,” the SEC successfully asserted its anti-fraud authority over a cryptocurrency trading operation. *See SEC v. Shavers*, No. 4:13-cv-416, 2014 U.S. Dist. LEXIS 130781, Fed. Sec. L. Rep. (CCH) ¶ 98,186 (E.D. Tex. Sept. 18, 2014) (finding that the “investment contract” definition was met by investments of bitcoin in an operation for the trading of bitcoin against the U.S. dollar, and that such investment contracts are subject to federal securities laws). And having recently stated that, depending on the facts and circumstances, digital tokens offered and sold in an initial coin offering (ICO) may be investment contracts, the SEC has laid the groundwork for asserting its anti-fraud authority over ICOs. *See* Securities and Exchange Commission, “Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO” (July 25, 2017), at 10, 17-18, *available at* <https://www.sec.gov/litigation/investreport/34-81207.pdf> (referring to an ICO as the offering or sale of digital tokens, through the use of distributed ledger technology, to raise capital, and noting that whether an ICO involves securities depends on the “economic realities of the transaction”). In fact, the SEC has already done so in one specific case. *See* Complaint, *SEC v. REcoin Grp. Found., LLC*, No. 17 Civ. __ (E.D.N.Y. filed Sept. 29, 2017), *available at* <https://www.sec.gov/litigation/complaints/2017/comp-pr2017-185.pdf> (SEC complaint alleging securities fraud violations in the context of a pair of ICOs involving the purported issuance of digital tokens or coins to investors who were promised returns from investments in real estate and diamonds). Given these recent enforcement developments, it seems fair to predict that, to the extent a fraudulent scheme involves the solicitation and use of investors’ money for trading in cryptocurrencies, the CFTC and SEC might each seek to assert its respective anti-fraud authority over commodities and investment contracts.

Conclusion

Each of these issues is illustrative of some of the important CFTC regulatory matters arising in the developing cryptocurrency space. Because the potential for innovation in the digital realm is virtually boundless, it is important to assess the regulatory angles continuously, including possible action by other federal agencies as well as state regulators and foreign governments.