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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.

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