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STEPTOE & JOHNSON LLP

July 1, 2016

Via Email and Courier

Mr. Chris Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: 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

Dear Mr. Kirkpatrick:

Step toe & Johnson LLP respectfully petitions the Commodity Futures Trading Commission (“CFTC” or “Commission”) under CFTC Regulation 13.2 to undertake a rulemaking, following an opportunity for public notice and comment, that sets forth the requirements for effectuating a transfer of an ownership interest in a commodity under the Commodity Exchange Act (“CEA”) in the context of cryptocurrency markets utilizing blockchain for executing transactions. As part of such rulemaking, the Commission is requested to promulgate the elements that are necessary to satisfy the requirements of “actual delivery” under CEA § 2(c)(2)(D)(ii)(III) as applied to leveraged or financed retail cryptocurrency transactions. We believe this is warranted because the Commission has not articulated these elements with respect to the newly developing cryptocurrency and blockchain marketplaces, which may have unique attributes that would suggest a different approach relative to the more traditional markets under the Commission’s jurisdiction. Absent a definitive Commission statement identifying the essential elements, market participants must attempt to discern what is lawful and what is problematic through assessments of enforcement orders, which are focused on a single entity at a time and may or may not be instructive.

The transfer of an ownership interest in a commodity is an essential concept that the Commission has yet to publicly consider in the context of the blockchain environment. The lack of regulatory clarity in this area not only impedes the ability to interpret statutory provisions such as CEA § 2(c)(2)(D)(ii)(III), but is also harmful to the further development of cryptocurrency markets and

blockchain modalities in general, which are in the nascent stages of growth and would benefit from legal certainty to flourish.

For the reasons set forth in this Petition, we request that the Commission undertake a rulemaking that provides the requirements for effectuating the transfer of an ownership interest with respect to blockchain transactions and cryptocurrency markets, as well as the elements of “actual delivery” under CEA § 2(c)(2)(D)(ii)(III).

I. Relevant Provisions

The Commission’s regulations do not currently address the requirements for transferring an ownership interest in a commodity utilizing the blockchain to execute transactions. This Petition requests that the Commission undertake a rulemaking to determine such requirements and provide market participants with needed legal certainty.

With regard to certain cryptocurrency transactions, CEA § 2(c)(2)(D)(ii)(III) can be read to provide that retail commodity transactions within the terms and intent of such provision are required to be traded on a Commission-regulated exchange, unless the transaction falls within one of the stated exceptions.¹ CEA § 2(c)(2)(D)(ii)(III)(aa) provides an exception for transactions that result in “actual delivery” of a commodity within 28 days:

(D) Retail commodity transactions

(i) Applicability. – Except as provided in clause (ii), this subparagraph shall apply 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 not an eligible contract participant or eligible commercial entity; and

(II) entered into, or offered (even if not entered into), on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis.

(ii) Exceptions. – This subparagraph shall not apply to—

* * *

(III) a contract of sale that—

(aa) *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[.]* [Emphasis added.]

¹ The Commission has declared digital currencies to be a “commodity” within the meaning of the CEA. *See In the Matter of Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan*, Before the CFTC, No. 15-29, Sept. 17, 2015.

In order to determine whether certain digital currency transactions that are subject to CEA § 2(c)(2)(D)(ii)(III) fall within one of the stated exceptions, regulatory clarity regarding the elements that satisfy the requirement of “actual delivery” as applied to such transactions is needed. Given the novelty of both the cryptocurrency market and the use of blockchain technology, engaging the public through a notice-and-comment rulemaking process would help to inform the Commission about the relevant considerations in developing the elements of “actual delivery” and the potential unintended consequences in rendering such an articulation.

II. Nature of Interest

Step toe & Johnson has been involved with numerous clients and others in various aspects of the development of cryptocurrency markets and blockchain modality and files this petition in a representative capacity. Step toe & Johnson believes a CFTC rulemaking is needed to address the important policy issues identified in this Petition in an open and comprehensive manner.

III. Supporting Arguments

The Commission should undertake a rulemaking as requested in this Petition in order to (1) clarify the current legal uncertainty with respect to the transfer of ownership and control in cryptocurrency and blockchain transactions; and (2) ensure fair competition among market participants.

The Commission’s order entered June 2, 2016—in *In the Matter of BFXNA INC. d/b/a Bitfinex*, Docket 16-19 (“Bitfinex Order”)—is the Commission’s first construction of the term “actual delivery” applied in the context of digital currency transactions. In the Bitfinex Order, the Commission found that Bitfinex, a Hong Kong based online platform for exchanging and trading cryptocurrencies, violated certain CEA provisions by engaging in retail-financed commodity transactions in bitcoin that did not result in “actual delivery” under CEA § 2(c)(2)(D)(ii)(III)(aa) to customers who traded on Bitfinex’s platform and by failing to appropriately register with the Commission.² Specifically, the Commission found that the margin transactions were within the scope of the Retail Commodity Transactions provision because the transfer of cryptocurrency from one person’s account to another’s did not satisfy the requirement of “actual delivery” to exclude the transactions from the jurisdictional reach of the CEA.

While the Bitfinex Order appears to have introduced new elements for assessing actual delivery, the legal discussion did not provide the public with sufficient notice of the standards for compliance with the “actual delivery” exception or a sufficiently clear roadmap for applying such standards to transactions in the bitcoin environment. Rather, the Bitfinex Order generated legal uncertainty within the cryptocurrency market as to the elements of “actual delivery” and raised broader questions regarding the transfer of ownership of a commodity in the blockchain context. The uncertainties generated by the Bitfinex Order highlight the imperative need for the Commission to undertake comprehensive policymaking with respect to these questions through a

² See *In the Matter of BFXNA INC. d/b/a Bitfinex*, Docket 16-19.

transparent rulemaking process, rather than on a piecemeal basis through discrete enforcement actions.

Clarification of Legal Uncertainty

The legal significance of the facts highlighted in the Bitfinex Order is unclear, and the legal discussion in the order does not provide the public with a roadmap in terms of compliance with CEA § 2(c)(2)(D)(ii)(III)(aa). In the Bitfinex Order, the Commission noted that the customers' "bitcoins were held in an omnibus settlement wallet owned and controlled by Bitfinex, and to which Bitfinex held the private keys needed to access the wallet."³ The Commission also stated that "Bitfinex's accounting for individual customer interests in the bitcoin held in the omnibus settlement wallet in its own database was insufficient to constitute 'actual delivery.'"⁴

The Bitfinex Order could be read to suggest that satisfying the requirement of "actual delivery" in some way requires that the cryptocurrency must be delivered to a deposit wallet for which the recipient controls the private keys. The statutory terms do not support such a requirement, however, and making control of private keys a prerequisite to having ownership and control of a cryptocurrency would be artificial and harmful to these markets because private keys have no innate legal significance with regard to the transfer, control, and possession of cryptocurrency on the blockchain. There is no attribute of the blockchain itself that defines how a private key may be used in order to authorize and effectuate a transaction. Rather, private keys are a modality to effectuate the parties' contractual agreements when they choose to transfer property via the blockchain, and the significance or lack of significance of private keys and personal addresses is determined entirely by the transacting parties. With respect to Bitfinex's customers, it appears that agreements between parties were clear that, when currency transferred from one customer account to another customer's account, the recipient received ownership of the currency. In brief, because private keys have no independent bearing on ownership, there is no legal foundation for making private keys a condition of actual delivery. To do so would (1) arbitrarily elevate the status of the control of private keys above the contractual agreements between parties to a transaction, which would proscriptively define and undermine the proper current functioning of the cryptocurrency market and blockchain modality; (2) raise significant policy issues affecting the use and development of blockchain and cryptocurrencies; and (3) potentially stifle innovation by placing artificial restraints on commerce that are contrary to the development and efficiency of cryptocurrency and other markets, which also rely on transacting without blockchain transfers. It bears noting that the resolution of these issues can bear as much on prerequisites for ownership and control of cryptocurrency in spot transactions as in margin transactions.

The Commission should carefully consider and define the elements in the blockchain system that are necessary to satisfy the "actual delivery" requirement under the CEA. Such consideration would best be conducted through a comprehensive rulemaking in which the Commission determines the elements necessary to constitute "actual delivery" and transfer of an ownership

³ *Id.* at 6.

⁴ *Id.*

interest based on the benefit of public feedback on the merits of different approaches and any potential unintended consequences.

Fair Competition

Undertaking a notice-and-comment rulemaking process would counter the potentially anti-competitive nature of providing regulatory guidance on a piecemeal basis to certain market participants through discrete enforcement actions and non-public approvals by the Commission or its staff. A rulemaking process, accordingly, would assist the Commission in endeavoring “to take the least anti-competitive means of achieving the objectives of the [CEA], as well the policies and purposes of the [CEA]” in accordance with its responsibilities under CEA §15.

Without being informed of the standards that must be met, market participants that have not received private guidance from Commission staff may be placed at a competitive disadvantage as compared to other participants that have received regulatory acceptance of their transactional protocols. Clear notice to all participants and competitors of the elements relating to the transfer of property—whether by blockchain or within a deposit wallet—that will constitute “actual delivery” will provide the basis for every participant to know the standards for compliance with the requirement and, therefore, for fair competition.

In order to ensure that all market participants understand their compliance obligations under the law, including the standards for compliance with the “actual delivery” exception, and to enable all market participants to compete with each other on a fair footing in terms of their understanding of applicable laws, the Commission should undertake a public rulemaking that benefits from the views of various stakeholders in the cryptocurrency and blockchain communities.

* * *

Steptoe & Johnson respectfully petitions the Commission to issue a rulemaking concerning the transfer of an ownership interest in a commodity and “actual delivery” under the CEA in the context of cryptocurrency and blockchain transactions, as described above.

Sincerely,



Michael Dunn



Micah Green

cc: The Honorable Timothy Massad, Chairman
The Honorable Sharon Bowen, Commissioner
The Honorable J. Christopher Giancarlo, Commissioner