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CFTC Issues Proposed Interpretation on Virtual Currency “Actual Delivery” in Retail Transactions

Washington, DC — The Commodity Futures Trading Commission (CFTC) today announced a Proposed Interpretation concerning its authority over retail commodity transactions involving virtual currency, such as bitcoin. Specifically, the Proposed Interpretation sets out the CFTC’s view regarding the “actual delivery” exception that may apply to virtual currency transactions. The Proposed Interpretation is open for public comment for 90 days from publication in the Federal Register.

Section 2(c)(2)(D) of the Commodity Exchange Act (CEA) provides the CFTC with direct oversight authority over “retail commodity transactions” – defined as agreements, contracts or transactions in any commodity that are entered into with, or offered to retail market participants on a leveraged or margined basis, or financed by the offeror, the counterparty or a person acting in concert with the offeror or counterparty on a similar basis. Such a transaction is subject to the CEA “as if” it were a commodity future. This statute contains an exception for contracts of sale that result in “actual delivery” within 28 days from the date of the transaction.

The Proposed Interpretation establishes two primary factors necessary to demonstrate “actual delivery” of retail commodity transactions in virtual currency:

- (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.

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