

## CFTC ASSERTS JURISDICTION OVER BITCOIN DERIVATIVES

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On September 17, 2015, the Commodity Futures Trading Commission (“CFTC”) issued an order (“Coinflip Order”)<sup>1</sup> settling charges brought against Coinflip, Inc., the operator of an online trading platform that facilitated the trading of derivatives on Bitcoin and other digital currencies, also referred to by the CFTC and other regulators as “virtual currencies”<sup>2</sup> (“Bitcoin Derivatives”), including U.S. dollar cash-settled options. The CFTC found that Coinflip, Inc. had violated the Commodity Exchange Act (“CEA”) and CFTC rules by failing to register as a swap execution facility (“SEF”) or designated contract market (“DCM”). The direct impact of the Coinflip Order is minimal, as the platform itself had already shut down due to lack of volume. However, the Coinflip Order represents a watershed in the development of virtual currencies, as it is the first time that the CFTC has affirmatively asserted that Bitcoin and other virtual currencies are “properly defined as commodities”

and that the CFTC has jurisdiction over Bitcoin Derivatives.

The CFTC’s assertion that virtual currencies are commodities, by itself, should not be particularly surprising. The definition of “commodity” under the CEA is extremely broad,<sup>3</sup> and CFTC Chairman Timothy Massad has expressed the view that Bitcoin Derivatives are within his agency’s purview.<sup>4</sup> What is noteworthy, however, is the *type* of commodity the CFTC apparently views Bitcoin to be—i.e., not a currency, but more akin to a precious metal or physical asset. This has clear implications for how Bitcoin Derivatives markets may develop in the future. Moreover, the CFTC formally asserting its jurisdiction over Bitcoin Derivatives will trigger important compliance and registration obligations for market participants. As the CFTC’s Director of Enforcement recently commented, “while there is a lot of excitement surrounding Bitcoin and other virtual currencies, innovation does not excuse those acting in this space from following the same rules applicable to all participants in the commodity derivatives markets.”<sup>5</sup>

### What is Bitcoin?

Bitcoin is a de-centralized virtual currency, units of which are generated via “blockchain” computer software technology. Using the blockchain technology, computer users, called “miners,” use special mining software to solve certain



math problems as part of the processing of Bitcoin transactions and the maintenance of a related public ledger system. In doing so, miners create (or “mine”) Bitcoin, which effectively compensate the miners for their computer processing efforts. While there is growing interest in the application of blockchain technology beyond its use in support of Bitcoin as a currency,<sup>6</sup> its primary use, so far, has been to enable Bitcoin as a medium of exchange to buy and sell goods and services online and as a store of value that can be exchanged for U.S. dollars or other traditional currencies. The characterization of Bitcoin as a *virtual* currency is a significant one. As the CFTC points out in the Coinflip Order, “virtual currencies are distinct from ‘real’ currencies, which are the coin and paper money of the United States or another country that are designated as legal tender, circulate, and are customarily used and accepted as a medium of exchange in the country of issuance.”<sup>7</sup> In the Coinflip Order, the CFTC importantly indicates that it views virtual currencies to be “exempt” commodities (the term “exempt” is a misnomer, because this category of commodities is *not* exempt from regulation under the CEA by the CFTC), which has the regulatory effect under the CEA and CFTC rules of treating Bitcoin and other virtual currencies like precious metals, rather than like traditional currencies or financial instruments.<sup>8</sup>

This characterization is consistent with views previously expressed by the Internal Revenue Service, which has ruled that Bitcoin should be treated as property for tax purposes,<sup>9</sup> but it is at odds with the approach of other financial regulators and enforcement agencies, which continue to treat Bitcoin as a form of “money” or “currency,” albeit a virtual one. For example, the U.S. Treasury Department’s Financial Crimes En-

forcement Network (FinCEN), which regulates “exchangers” and “administrators” of convertible virtual currencies, focuses on the attributes of virtual currency that enable them to act as “a substitute for real currency.”<sup>10</sup> Accordingly, FinCEN regulates various virtual currency activities as “money transmission,” rather than as dealing in foreign exchange or any other financial activity. Similarly, state banking agencies continue to look to regulate various virtual currency activities as a form of money transmission, as evidenced by the recent release by the Conference of State Bank Supervisors of a model framework for such regulation<sup>11</sup> and by the “BitLicense” regulations adopted by the New York Department of Financial Institutions.<sup>12</sup> At the same time, the Department of Justice and the Securities and Exchange Commission (“SEC”) have each characterized Bitcoin as “money” in prosecuting alleged violations of federal criminal anti-money laundering statutes and federal securities laws.<sup>13</sup>

These varying approaches to regulation reflect the unique, hybrid attributes of Bitcoin and similar virtual currencies that make them difficult to categorize within traditional regulatory frameworks. Accordingly, participants in virtual currency ecosystems should continue to expect that regulators and enforcement agencies will seek to encompass Bitcoin and other virtual currencies within a range of regulatory frameworks by focusing on the attributes of those virtual currencies that most closely align with their particular regulatory framework.

### **What does this mean for those trading virtual currencies?**

The CFTC’s decision to classify Bitcoin as a “commodity” will have little direct impact on those currently trading, holding, or conducting

transactions involving *actual* Bitcoin or other virtual currencies, rather than transactions involving Bitcoin Derivatives. As set forth in the CEA, commodity transactions in the cash or spot (i.e., near immediate delivery) markets are generally excluded from the CFTC's jurisdiction. Nevertheless, those using or trading virtual currency should be aware that the CFTC does have the authority to investigate, bring a civil enforcement action, and impose monetary penalties for manipulative activity in a commodity's cash or spot markets, because the manipulation of a commodity's cash or spot price can affect the related commodity derivatives markets.<sup>14</sup>

Section 2(c)(2)(D) of the CEA, which was added by the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 ("Dodd-Frank Act"), also gives the CFTC enforcement jurisdiction over certain "retail commodity transactions." This provision has been used on many occasions by the CFTC to target fraudulent precious metals speculative investment schemes. Pursuant to Section 2(c)(2)(D), it is generally unlawful to enter into an off-exchange "leveraged, margined, or financed" transaction in any commodity with any person or entity that is not an "eligible contract participant" (e.g., a typical retail investor is not an eligible contract participant) or an "eligible commercial entity," unless the transaction results in actual delivery within 28 days. The CFTC's determination that virtual currencies are "commodities" raises the possibility that the CFTC may use Section 2(c)(2)(D) to bring enforcement cases for certain types of unlawful off-exchange transactions in virtual currency that target retail investors.

The CFTC's foray into regulating Bitcoin Derivatives, to the extent it encourages the devel-

opment of markets for such contracts, may also provide new opportunities for those who trade or use virtual currencies. With the failure of the Mt. Gox exchange and the related disappearance of millions of dollars' worth of Bitcoin still a fresh memory,<sup>15</sup> those interested in trading virtual currency may have concerns about its safety and security. Cash-settled Bitcoin Derivatives could provide an investor with synthetic exposure to the value of Bitcoin without also exposing the investor to custody risk with respect to the Bitcoin itself. Additionally, given the historically high volatility of Bitcoin and other virtual currencies, the growth of a market for Bitcoin Derivatives may provide Bitcoin users and investors with a means to efficiently hedge against this volatility. Being able to hedge against volatility and price risk through the use of Bitcoin Derivatives may also make accepting Bitcoin as a payment method more attractive for retailers and financial institutions.

### **What does this mean for those who trade Bitcoin Derivatives?**

The CFTC's determination to treat virtual currencies as commodities has significant regulatory implications for those who trade Bitcoin Derivatives, as this means Bitcoin Derivatives (i.e., options, futures, forwards, and/or swaps for which a unit of virtual currency is the underlying interest) will be treated as commodity interests for purposes of the CEA and CFTC rules. As a result, any collective investment vehicle that invests in Bitcoin Derivatives will be a commodity pool, and any operator of such a vehicle will be a commodity pool operator that may be subject to registration with the CFTC. Further, those who provide advice on Bitcoin Derivatives will be commodity trading advisors that may be subject

to registration with the CFTC. For those commodity pool operators relying on the *de minimis* trading exemption from commodity pool operator registration under CFTC Rule 4.13(a)(3), all positions in Bitcoin Derivatives will also need to be included as commodity interest positions for purposes of applying the thresholds under the limited trading tests. This contrasts with the treatment of foreign exchange (FX) swaps and forwards,<sup>16</sup> which are excluded from consideration under the Rule 4.13(a)(3) trading tests, provided they qualify under the so-called Treasury exemption.<sup>17</sup>

Although not qualifying for the Treasury exemption, certain Bitcoin forwards may qualify for the CFTC's "forward exclusion" from the swap definition.<sup>18</sup> But in the absence of that exemption, market participants that trade over-the-counter ("OTC") and certain listed Bitcoin Derivatives should also be aware that their trading activity will be subject to the CFTC's swaps regulations, under Title VII of Dodd-Frank, including, for example, clearing, reporting and recordkeeping requirements. Although the low volume of the Bitcoin Derivatives markets currently makes it unlikely that the CFTC would consider imposing a clearing mandate on Bitcoin Derivatives in the foreseeable future, Bitcoin swaps would be subject to swap data reporting and recordkeeping requirements. Moreover, once final rules are promulgated, Bitcoin Derivatives will be subject to margin requirements for uncleared swaps entered into between swap dealers and financial end users. Additionally, any market participants who make a market in Bitcoin swaps or regularly enter into Bitcoin swaps with counterparties should be aware that they may be acting as "swap dealers" and may be required to reg-

ister as such with the CFTC, unless an applicable exemption or exclusion applies.

### **What does this mean for those who facilitate the trading of Bitcoin Derivatives?**

As the operators of Coinflip learned, the CFTC's determination that virtual currencies are commodities means that any person that operates a "facility for the trading or processing" of Bitcoin swaps or options must be "registered as a swap execution facility or as a designated contract market."<sup>19</sup> Likewise, any person that operates a facility for the trading or processing of Bitcoin futures must be registered as a designated contract market.<sup>20</sup> Moreover, transactions in Bitcoin Derivatives executed on these facilities are subject to all of the CFTC's rules governing designated contract market and swap execution facility activities.<sup>21</sup>

Those who do not operate formal trading facilities, but nevertheless act as intermediaries in Bitcoin Derivatives transactions (e.g., soliciting or accepting orders for the purchase of Bitcoin Derivatives but not accepting any money, securities or property to margin, guarantee or secure any such trades) may be acting as "introducing brokers"<sup>22</sup> that are required to register as such with the CFTC.

### **What does this mean from a tax perspective?**

In March 2014, the IRS issued guidance in the form of answers to frequently asked questions on certain aspects of the federal tax treatment of Bitcoin and other virtual currencies.<sup>23</sup> The guidance provides that Bitcoin is treated as property for federal tax purposes.<sup>24</sup> As a result, gain or loss from the sale or exchange of Bitcoin generally

gives rise to capital gain or loss if the Bitcoin is held as a capital asset by the taxpayer.<sup>25</sup> However, various aspects of the federal tax treatment of Bitcoin and Bitcoin Derivatives are not addressed by the guidance. For example, certain federal income tax provisions apply to transactions in “commodities” or depend upon whether property is traded on a domestic board of trade (“BOT”) designated as a contract market by the CFTC.<sup>26</sup> The CFTC’s assertion that virtual currencies are commodities may influence the interpretation or applicability of such provisions.

The IRS’s treatment of virtual currency as property is in contrast with a recent decision by the European Union Court of Justice, which ruled that transactions involving virtual currency would be taxed as transactions involving currency rather than property.<sup>27</sup> This distinction is relevant, because in many European countries, transactions involving goods and services are subject to a value-added tax (“VAT”), while transactions relating to currency, bank notes and coins used as legal tender are exempt. Treating virtual currency as a currency permits users to exchange Bitcoin, or other virtual currencies, for traditional currency without incurring VAT.

### **What does this mean from an enforcement perspective?**

Any person who violates the CEA or CFTC rules with respect to transactions in Bitcoin Derivatives could be the subject of a CFTC civil enforcement action. If the CFTC staff becomes aware of possible violative conduct, including fraudulent, deceptive or manipulative practices, the CFTC may launch an investigation or commence an enforcement action before the agency’s administrative law judges or in federal court, seeking remedies including injunctions or cease-

and-desist orders against further violations, large civil monetary fines, disgorgement of gains, customer restitution, trading bans with respect to CFTC registrants and non-registrants and registration revocations. The CFTC can also refer possible criminal conduct to the Department of Justice or local prosecutors.

With respect to swap transactions, including those based on virtual currencies, the CEA prohibits any person from entering into a swap knowingly or recklessly disregarding the fact that its counterparty will use the swap as part of a scheme to defraud others.

With respect to Bitcoin Derivatives, as well as any contract of sale involving virtual currencies in interstate commerce, the CFTC has the authority to investigate attempted or actual manipulative schemes and fraudulent behavior, and in its civil enforcement actions the CFTC need prove only reckless conduct rather than bad intent.

### **Conclusion**

In a few short years, Bitcoin and virtual currencies have experienced rapid growth. With that growth comes regulatory scrutiny. The CFTC’s recent actions do more than just impose regulatory obligations on those who trade Bitcoin Derivatives - they send an unambiguous signal that the CFTC intends to be an active player in the evolution of the virtual currency markets.

### **ENDNOTES:**

<sup>1</sup>*In re* Coinflip, Inc., No. 15-29 (CFTC Sept. 17, 2015), available at: <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliporder09172015.pdf>.

<sup>2</sup>Contrary to industry parlance, the CFTC

uses the term “virtual currency” where many would use the term “digital currency,” defining it in the Coinflip Order as “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value, but does not have legal tender status in any jurisdiction.” This definition of “virtual currency” captures digital cryptocurrencies, like Bitcoin. For consistency with the CFTC and other regulators, we will use the term “virtual currency.”

<sup>3</sup>Section 1a(9) of the CEA defines “commodity” to include “all . . . goods and articles . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.” 7 U.S.C. § 1a(9).

<sup>4</sup>See Testimony of Chairman Timothy Massad before the Senate Committee on Agriculture, Nutrition & Forestry (Dec. 10, 2014), *available at*: <http://www.cftc.gov/pressroom/speeches/testimony/opamassad-6>.

<sup>5</sup>Press Release, Commodity Futures Trading Commission, CFTC Orders Bitcoin Options Trading Platform Operator and its CEO to Cease Illegally Offering Bitcoin Options and to Cease Operating a Facility for Trading or Processing of Swaps without Registering, Press Release 7231-15 (Sept. 17, 2015), *available at*: <http://www.cftc.gov/pressroom/pressreleases/pr7231-15>.

<sup>6</sup>The “blockchain” technology that underlies Bitcoin permits users to transmit information via a public ledger that functions as a triple entry bookkeeping system and operates without any central authority. This information is associated with monetary value, the ownership of which is tracked through the blockchain public ledger. While not addressed in the Coinflip Order, the CFTC is aware that some of the most intriguing aspects of Bitcoin are the protocols and public ledger technologies supporting it. That is, rather than Bitcoin merely being the underlying interest of a derivatives transaction, the blockchain technology that underlies Bitcoin may eventually transform how the derivatives markets themselves function, potentially facilitating nearly real-time settlement and minimizing the need for financial intermediaries. Applying these technologies to enhance the settlement services cur-

rently provided in the derivatives markets by exchanges and clearing organizations would require further regulatory action, and it can be expected that Congress, the CFTC, and other regulators will continue to explore the issues surrounding this in the future. See Testimony of Commissioner Mark Wetjen before the House Subcommittee on Commodity Exchanges, Energy, and Credit (April 14, 2015), *available at*: <http://www.cftc.gov/pressroom/speechestestimony/opawetjen-12>.

<sup>7</sup>Coinflip Order, *supra* note 1, at fn. 2.

<sup>8</sup>One such effect is that the CFTC views virtual currency as a commodity for purposes of applying its commodity options and “trade option” rules. The CFTC regulates commodity options as swaps and they are subject to the CFTC’s swaps transaction-level rules. Trade options are a subset of commodity options and would be treated as “swaps” under the CEA and CFTC rules (and therefore be subject to the full range of the CFTC’s swaps regulations) but for an exclusion from the swaps regulations pursuant to CFTC Rule 32.3, which relates to the commercial characteristics of trade options. The Rule 32.3 trade option exclusion requires that the offeror of the trade option be either an “eligible contract participant” or a particular kind of end-user—a “producer, processor, or commercial user of, or a merchant handling the commodity that is the subject of the commodity option transaction, or the products or by-products thereof, and such offeror is offering or entering into the commodity option transaction solely for purposes related to its business as such”—and that the offeree be a similar end-user. The trade option must also be “intended to be physically-settled, so that, if exercised, the option would result in the sale of an exempt or agricultural commodity for immediate or deferred shipment or delivery.” Although the CFTC cited Rule 32.3 in the Coinflip Order in finding that Coinflip had not complied with that rule, it is unclear how Rule 32.3 could be satisfied in the context of an option on Bitcoin. For example, it is not clear whether a Bitcoin miner would be considered as “a producer, processor, or commercial user of, or a merchant handling” Bitcoin, or how a Bitcoin transaction

would be “physically settled,” given that Bitcoin—unlike an exempt commodity such as gold—has no physical existence.

<sup>9</sup>Internal Revenue Bulletin IR-2014-36 (Mar. 25, 2014), available at: <https://www.irs.gov/uac/Newsroom/IRS-Virtual-Currency-Guidance>; see also IRS Notice 2014-21 (April 14, 2014), available at: [https://www.irs.gov/irb/2014-16\\_IRB/ar12.html](https://www.irs.gov/irb/2014-16_IRB/ar12.html). This IRS notice further provides that Bitcoin “is not treated as currency that could generate foreign currency gain or loss for U.S. federal tax purposes.”

<sup>10</sup>Interpretive Release, U.S. Dep’t of Treas., Financial Crimes Enforcement Network, Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies, Release FIN-2013-G001 (Mar. 18, 2013), available at: [http://fincen.gov/statutes\\_regs/guidance/html/FIN-2013-G001.html](http://fincen.gov/statutes_regs/guidance/html/FIN-2013-G001.html).

<sup>11</sup>See Conference of State Bank Supervisors, State Regulatory Requirements for Virtual Currency Activities CSBS Model Regulatory Framework (Sept. 15, 2015), available at: [https://www.csbs.org/regulatory/ep/Documents/CSBS-Model-Regulatory-Framework\(September%2015%202015\).pdf](https://www.csbs.org/regulatory/ep/Documents/CSBS-Model-Regulatory-Framework(September%2015%202015).pdf).

<sup>12</sup>See 23 NYCRR 200, available at: <http://www.dfs.ny.gov/legal/regulations/adoption/dfs200t.pdf>.

<sup>13</sup>In *U.S. v. Faiella*, the District Court for the Southern District of New York ruled that Bitcoin was money in a case involving the prosecution of the Bitcoin traders that supported the “Silk Road” black market. See Memorandum Order, *U.S. v. Faiella*, No. 14-cr-243 (SDNY Aug. 19, 2014). In *SEC v. Shavers*, the SEC successfully prosecuted a Bitcoin ponzi scheme where the defendant offered securities in exchange for Bitcoin. The defendant argued that there had been no investment of money covered by the statute, but the court ruled: “Bitcoin is a currency or form of money, and investors wishing to invest in BTCST provided an investment of money.” Memorandum Opinion, *SEC v. Shavers*, No. 4:13-cv-416 (EDTX Aug. 6, 2013), available at: <http://ia800904.us.archive.org/35/items/gov.uscourts.txed.146063/gov.uscourts.txed.146063.23.0.pdf>.

<sup>14</sup>CFTC Rules 180.1 and 180.2. See, e.g., *CFTC v. Atlantic Bullion & Coin, Inc.*, No. 8:12-1503-JMC (June 6, 2012), available at: <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfatlanticcomplaint060612.pdf> (CFTC bringing market manipulation charges involving the spot silver markets).

<sup>15</sup>See Investor Alert: Bitcoin and Other Virtual Currency-Related Investments (SEC May 7, 2014), available at: <http://investor.gov/news-alerts/investor-alerts/investor-alert-bitcoin-other-virtual-currency-related-investments>.

<sup>16</sup>Spot contracts on virtual currencies, like other spot commodity contracts (including spot FX), are not subject to Title VII and do not need to be included as commodity interests for purposes of CFTC Rule 4.13(a)(3).

<sup>17</sup>In 2012, the U.S. Department of Treasury acted pursuant to statutory authority to exempt physically-settled FX swaps and forwards from the definition of “swap.” See Dep’t of Treas., Determination of Foreign Exchange Swaps and Foreign Exchange Forwards under the Commodity Exchange Act, 77 Fed. Reg. 69694 (Nov. 20, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-11-20/pdf/2012-28319.pdf>.

<sup>18</sup>While Bitcoin forwards would count as “commodity interests” for purposes of Rule 4.13(a)(3), the CFTC’s implicit categorization of virtual currencies as “exempted commodities” means that Bitcoin forwards—provided that the parties intend for the Bitcoin to actually be physically delivered—would qualify for the “forward exclusion” from the swap definition and would not be subject to the Title VII requirements. Employing Bitcoin forwards that qualify for this forward exclusion may provide those market participants with significant exposure to virtual currencies—e.g., online retailers who accept Bitcoin as a payment, or even large-scale Bitcoin miners—with a means of hedging some of that exposure, while not triggering regulation under Title VII. This forward exclusion would not have been available if the CFTC did not choose to categorize virtual currencies as exempt commodities in the Coinflip Order. Those seeking to

rely on the forward exclusion should proceed with caution, however, as differentiating between a forward contract and a swap or a futures contract is not always straightforward and requires careful analysis of the facts and circumstances surrounding the transaction. For example, as noted above in footnote 8, it is not entirely clear how the CFTC would interpret the requirement for physical delivery in the context of a virtual currency.

<sup>19</sup>Coinflip Order, *supra* note 1, at 2. *See also* 7 U.S.C. § 7b-3(a)(1); 17 C.F.R. § 37.3(a)(1).

<sup>20</sup>*See* 7 U.S.C. § 7.

<sup>21</sup>*See, e.g.*, In re Tera Exchange LLC, No. 15-33 (CFTC Sept. 24, 2015), *available at*: <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfteraexchangeorder92415.pdf> (CFTC charging a swap execution facility for permitting a pre-arranged wash trade in a Bitcoin swap to be executed on its platform, in violation of § 4c(a) of the CEA and CFTC Rule 37.203(a)).

<sup>22</sup>*See* 7 U.S.C. § 1a(31).

<sup>23</sup>IRS Notice 2014-21, *available at*: <https://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

<sup>24</sup>*Id.* at § 4(Q-1).

<sup>25</sup>*Id.* at § (Q-7).

<sup>26</sup>*See, e.g.*, 26 U.S.C. §§ 475(e)-(f) (generally permitting dealers and traders in commodities to elect to mark to market their positions in commodities, with resulting gain or loss treated as ordinary income or loss); 26 U.S.C. § 864(b)(2)(B) (providing that certain trading activity in commodities does not give rise to a U.S. trade or business for a foreign taxpayer); 26 U.S.C. § 1256(a) (generally requiring that futures contracts and non-equity options traded on a qualified board or exchange be marked to market annually, with resulting gain or loss treated as 60 percent long-term capital gain or loss and 40 percent short-term capital gain or loss).

<sup>27</sup>Case C-264/14, *Skatteverket v. David Hedqvist*, E.U.:C:2015:498, *available at*: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd485905e203c74ad7a0a48e99f47edf42.e34KaxiLc3qMb40Rch0SaxuRbN90?text=&docid;=165919&pageIndex;=0&doclang;=EN&mode;=lst&dir;=&occ;=first&part;=1&cid;=491196>.