

Judge: The CFTC Has Authority to Regulate All Cryptocurrencies as Commodities

On Sept. 26, 2018, Judge Rya Zobel, of the United States District Court of Massachusetts, held for the purposes of ruling on a pretrial motion that all crypto or virtual currencies are “commodities,” regardless of whether the actual currency itself is a commodities future, derivative, swap or other contract over which the U.S. Commodity Future Trading Commission (“CFTC”) has jurisdiction. This decision affirms the CFTC’s broad authority to crack down on fraud in the virtual currency industry.

Overview of the Case

In *CFTC v. My Big Coin Pay, Inc.* (Case No. 18-10077), the CFTC alleges that My Big Coin Pay, Inc. (the “Company”) and its founders, Randall Crater and Mark Gillespie, marketed a virtual currency, “MyBigCoin” (“MBC”), as backed by gold and raised \$6 million from investors. The founders misled investors to believe MBC was appreciating while they used investor funds to pay for lavish trips to Las Vegas and other personal expenses.

The CFTC alleges that MBC is a “commodity” and thus the defendants’ false marketing scheme violated the Commodities Exchange Act (“CEA”) and the implementing regulations, including 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1(a). More specifically, the CFTC alleges that since bitcoin is a commodity under the CEA because it is traded in connection with a futures contract, then by extension, any other virtual currency, including MBC, is a commodity and falls within the CFTC’s jurisdiction to prevent fraud and manipulation.¹

The defendants moved to dismiss the CFTC’s complaint, arguing that MBC is not a commodity under the CEA, and even if it is, the CEA was only intended to prohibit market manipulation, not other types of fraud. The court denied their motion to dismiss.

Legal Analysis: All Virtual Currencies Are Subject to the CEA

The CEA defines “commodity” explicitly to include 30 specific agricultural products as well as all goods, services, rights and interests “in which contracts for future delivery are presently or in the future dealt in.” See 7 U.S.C. §1a(9). Here, the court found that since bitcoin is a commodity traded in connection with a futures contract, and bitcoin, like MBC, is a type of virtual currency, the CEA covers all virtual currencies. Judge Zobel reasoned, “Congress’ approach to defining ‘commodity’ signals an intent that courts focus on categories—not specific items—when determining whether the ‘dealt in’ requirement is met.”

Notably, the court did not take up another possible avenue for finding that the CFTC has authority over the defendants on the basis that the CEA gives the CFTC enforcement authority over fraud and manipulation in spot transactions. Such a position would not have required finding that MBC is a commodity.

Thus, the *My Big Coin* empowers the CFTC to take an expansive view of whether it has jurisdiction over virtual currencies, regardless of whether the underlying currency itself is part of a futures contract, derivatives transaction, or similar transaction that triggers the CFTC’s jurisdiction. This case follows *CFTC v. Patrick K. McDonnell*,

CabbageTech, Corp. d/b/a Coin Drop Markets (CDM), Case No. 18-cv-00361, where the United States District Court of the Eastern District of New York sided with the CFTC's assertion that both bitcoin and litecoin are commodities.² However, this marks the first case where a court has found—albeit for the purposes of a Rule 12 motion—that the CFTC has jurisdiction over a virtual currency even when the specific virtual currency itself is not part of a futures contract.

Judge Zobel also denied the Company's second argument—that even if MBC is a commodity, the CEA is only aimed at preventing market manipulation—citing both Section 6(1) and Regulation 180.1, the latter of which explicitly bans the use of “any manipulative device, scheme, or artifice to defraud,” the making of “any untrue or misleading statement of a material fact,” or the use of “any act, practice, or course of business, which operates ... as a fraud or deceit” in connection with the sale of a commodity.

Looking Forward: What Does This Mean for Virtual Currency Businesses?

In the future, this case supports the CFTC's authority to police fraud in the virtual currency market. We have written previously about the number of different regulators on both the state and federal levels that have enforcement authority over virtual currencies business. See e.g., [Crypto Exchanges Could Be Next Regulatory Target](#).

The CFTC now clearly has a seat at the regulatory table regardless of whether the target currency is part of a futures contract itself.

So long as a virtual currency business does not engage in fraud, a decidedly high standard, they are unlikely to face a CFTC enforcement action based on this opinion alone. That said, there is some risk that the CFTC uses this opinion to bootstrap a basis for regulatory enforcement authority over all virtual currency businesses, including requiring them to register with the CFTC and submit to other CFTC regulations. Only time will tell whether Congress, or another regulator such as the SEC, takes steps to supplant or limit the CFTC's budding enforcement authority.

Sarah Auchterlonie

Shareholder
sja@bhfs.com
303.223.1228

Emily R. Garnett

Associate
egarnett@bhfs.com
303.223.1171

¹ The CFTC found in 2015 that bitcoin is a commodity. See, *In the Matter of: Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan*, CFTC Docket No. 15-29, available [here](#).

² Likewise, *In The Matter of Coinflip, Inc. d/b/a Derivabit and Francisco Riordan* (CFTC Docket No. 15-29) (Sept. 17, 2015), the CFTC took the position that a bitcoin-denominated option and futures contracts are commodities.

This document is intended to provide you with general information about FTC regulation of cryptocurrency as commodities. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.