

Digital Assets: Clarifying CFTC Regulatory Authority & the Fallacy of the Question, "Is it a Commodity or a Security?"



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Disclaimer: The analysis presented below reflects the views of Commissioner Stump and not necessarily those of the CFTC nor other CFTC Commissioners

LEGAL AUTHORITIES OF THE COMMODITY FUTURES TRADING COMMISSION (CFTC) - THE BASICS

01 The definition of a "commodity" under the CFTC's governing statute, the Commodity Exchange Act (CEA), is extremely broad.

- Therefore, to say that a particular digital asset is a "commodity" is unremarkable.

02 The CEA provides the CFTC with 2 types of legal authority: **REGULATORY AUTHORITY** and **ENFORCEMENT AUTHORITY**



- The CFTC's Regulatory Authority includes registration requirements, day-to-day oversight, and principles-based regulation.
- The CFTC's Enforcement Authority is its ability to bring civil enforcement actions for violations of the CEA and the CFTC's rules.

CFTC REGULATORY AUTHORITY - COMMODITIES, SECURITIES, DERIVATIVES

03 The CFTC does not have **REGULATORY AUTHORITY** over cash commodities – that is, the CFTC does not regulate commodities (or those who buy, sell, or engage in activities relating to a cash commodity). Rather, the CFTC regulates futures contracts on commodities, and other derivatives products such as swaps.

- Examples that illustrate the distinction between commodities (which the CFTC does not regulate) and derivatives products (which the CFTC does regulate):



- Cattle are commodities, and the CFTC regulates futures contracts on cattle – but, the CFTC is not out regulating cash cattle markets, such as sale barns or video auctions.



- Natural gas is a commodity, and the CFTC regulates futures contracts and swaps on natural gas – but, the CFTC does not regulate the transmission and sale of natural gas for resale in interstate commerce (the Federal Energy Regulatory Commission does that).



- Interest rates are intangible commodities, and the CFTC regulates futures contracts and swaps on interest rates – but, the Federal Reserve Board of Governors manages the level of short-term interest rates through its monetary policy.

04 Therefore: Even if a digital asset is a commodity, it is not regulated by the CFTC.



However: The CFTC does regulate derivatives on digital assets, just like it regulates other derivatives.

- That includes the regulation of trading, clearing, etc., of futures contracts and swaps on digital assets (such as the futures contracts on Bitcoin and Ether listed for trading on various CFTC-regulated exchanges).

05 Just as the CFTC does not regulate cash commodities, it also does not regulate securities – the Securities and Exchange Commission (SEC) does that.

- Accordingly, if a digital asset is a security, the CFTC does not regulate it.

06 Because the CFTC is a regulator of derivatives, it may regulate derivatives on securities, such as it does today for futures on broad-based stock indexes.



- In the CEA and the federal securities statutes, Congress determined that futures contracts and other derivatives on securities may be regulated by the CFTC or the SEC, or jointly by both.
 - The answer depends on the specific characteristics of the product, and requires an analysis of Congress' statutory framework and CFTC and SEC rules.
- Therefore, if a digital asset is a security, further analysis is required to determine where Regulatory Authority lies for a derivatives product on that digital asset.

CFTC ENFORCEMENT AUTHORITY - DISTINCT & BROADER THAN CFTC REGULATORY AUTHORITY

07 Of course, the CFTC has **ENFORCEMENT AUTHORITY** over products that it regulates.

- For example, a trading platform that offers derivatives on digital assets to U.S. persons without registering, or in violation of CFTC trading rules, is subject to the CFTC's enforcement authority.
- That was the case in the recent CFTC enforcement action against BitMEX, and the CFTC has brought similar such actions dating back to 2015.

08 Notably, the CFTC's **ENFORCEMENT AUTHORITY** also includes a broader application for **anti-manipulation and anti-fraud authority** with respect to cash commodities (although the CFTC does not regulate those commodities).



- Why? Because well-functioning futures contracts (and other derivatives products) rely upon a sound underlying cash market and may reference cash market indexes in their pricing.
- Thus, the CFTC utilizes this particular enforcement authority to protect the integrity of the derivatives markets that it regulates.

09 For a number of years, the CFTC has aggressively used its broader **ENFORCEMENT AUTHORITY** to deter manipulation and fraud involving cash digital assets, even though the CFTC does not regulate them.



- Because this distinguishing point is absent from the considerable number of CFTC enforcement-related press releases, it may not be well-understood (to the detriment of the investing public).

SUMMARY

10 To determine the CFTC's **REGULATORY AUTHORITY** with respect to a digital asset, ask not whether the digital asset is a commodity or a security – ask whether a **futures contract or other derivatives product** is involved.



- The CFTC does not regulate a digital asset even if it is a commodity (and regardless of whether or not it is a security).
- As the agency's middle name suggests, the CFTC does regulate futures contracts and other derivatives that are based on a digital asset.
 - This could include, in some cases, derivatives on a digital asset that is a security. If the digital asset underlying a derivatives product is a security, further analysis is required to determine the allocation of regulatory authority over the derivatives product as between the CFTC and the SEC.