

# The CFTC's Approach to Virtual Currencies

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## Virtual Currencies as Commodities

In recent years, the U.S. Commodity Futures Trading Commission (CFTC or the Commission) has taken a role as one of the regulators of cryptocurrency in the United States. In this article, we review the CFTC's regulatory and enforcement approach in this space.

In December 2014, the CFTC stated that virtual currencies are encompassed under the definition of a "commodity" in the Commodity Exchange Act (CEA), and thus subject to its jurisdiction.<sup>1</sup> Nine months later, in September 2015, the CFTC brought its first enforcement action against an unregistered Bitcoin option trading platform.<sup>2</sup> With its first action, the CFTC declared that "Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities."<sup>3</sup>

The advent of virtual currencies has presented new challenges for the CFTC. In the CFTC's 2021 Budget, the Division of Enforcement summary stated, "substantial activity in the virtual currency markets take[s] place outside the United States and any fraudulent or manipulative conduct is likely to take place across markets on multiple exchanges, including largely unregulated cash exchanges."<sup>4</sup>

In a backgrounder issued in early 2018, the CFTC worked on explaining its oversight of and approach to virtual currencies.<sup>5</sup> It stated that "[a]sserting legal authority over virtual currency derivatives in support of the CFTC's anti-fraud and manipulation efforts, including in underlying spot markets, is a key component in the CFTC's ability to effectively regulate these markets."<sup>6</sup>

In March 2018, *CFTC v. McDonnell and CabbageTech Corp. d/b/a Coin Drop Markets* confirmed the CFTC's virtual currency jurisdiction. In entering a preliminary injunction order against Patrick McDonnell and his company CabbageTech Corp. for allegedly operating a deceptive and fraudulent virtual currency scheme, Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York found that virtual currencies are commodities and are subject to CFTC jurisdiction under the CEA.<sup>7</sup>

The defendants argued that the CFTC lacked authority to regulate cryptocurrency as a commodity or exercise its jurisdiction over fraud that does not directly involve the sale of futures or derivative contracts.<sup>8</sup> Judge Weinstein ruled that, since virtual currencies were "goods" exchanged in a market for a uniform quality and value, they fell within the common definition of "commodity" under the CFTC's jurisdiction.<sup>9</sup>

In October 2018, a Massachusetts district court in *CFTC v. My Big Coin Pay Inc.* confirmed the CFTC's authority to regulate virtual currencies as a "commodity" under the CEA, even when there were no futures contracts over the relevant virtual currency.<sup>10</sup>

## Regulatory Approach

Despite three chairpersons having passed the baton since the CFTC's initial involvement in the cryptocurrency space, the Commission has continued to encourage innovation.<sup>11</sup>

In his 2014 testimony before the U.S. Senate Committee on Agriculture, Nutrition and Forestry, then-CFTC Chairman Timothy Massad affirmed that "[i]nnovation is a vital part of our markets, and it is something that our regulatory framework is designed to encourage."<sup>12</sup> In 2016, then-Commissioner Christopher Giancarlo expressed his admiration for blockchain technology and the distributed ledger technology (DLT) that has the potential to "revolutionize the world of finance."<sup>13</sup> To avoid impeding innovation, he encouraged other regulators to take a "do no harm" approach.<sup>14</sup>

Once he took the reins of the CFTC in 2017, Mr. Giancarlo affirmed a continued commitment in facilitating market-enhancing innovation. Mr. Giancarlo, at the time the Acting Chairman, announced the launch of *LabCFTC*,<sup>15</sup> an internal FinTech lab intended to make the CFTC accessible to innovators, while enhancing the CFTC's understanding of new technologies for upcoming policy initiatives in the space.<sup>16</sup>

Consistent with the "do no harm" regulatory approach of his predecessor,<sup>17</sup> current CFTC Chairman Heath Tarbert has recently declared the importance of U.S. leadership in development of digital assets because "whoever ends up leading in this technology will end up writing the rules of the

road for the rest of the world.”<sup>18</sup> Mr. Tarbert called for a principles-based approach that would allow the market to develop “under sound regulation but with market participants, not the regulator.”<sup>19</sup>

## Enforcement

The CFTC has taken the position to apply “robust enforcement” to “prosecute fraud, abuse, manipulation, or false solicitation in markets for virtual currency derivatives and underlying spot trading.”<sup>20</sup>

As documented in our prior publication, “Trends in CFTC Virtual Currency Enforcement Actions—2015–Q2 2020,” the CFTC has brought nineteen enforcement actions from 2015 to the end of June 2020,<sup>21</sup> with an uptick in 2018 after its Division of Enforcement formed a specialized *Virtual Currency Task Force*. More recently, the CFTC has brought three more additional enforcement actions.<sup>22</sup> In general, the enforcement actions have mostly fallen into one or more of the five categories of *allegations* below:

- **Fraudulent schemes** involving virtual currencies allegedly marketed to retail customers, such as Bitcoin Ponzi schemes.<sup>23</sup>
- **Failure to register with the CFTC** as a Swap Execution Facility (SEF), Futures Commission Merchant (FCM), Commodity Pool Operator (CPO), or Commodity Trading Advisor (CTA), for example, in the case of a domestic platform or facility allegedly trading virtual currency futures, option contracts, or swaps.<sup>24</sup>
- **Illegal off-exchange transactions**, such as off-exchange financed commodity transactions with persons who allegedly failed to register with the CFTC.<sup>25</sup>
- **Price manipulation** of a virtual currency allegedly traded in interstate commerce, or pre-arranged wash trading in an exchange-traded virtual currency swap or futures contract.<sup>26</sup>
- **Gatekeepers' violations** such as alleged failures to implement know-your-customer and customer-identification programs (KYC/CIP).

In addition to enforcement matters, media outlets report that the CFTC issued subpoenas to Bitfinex and Tether in December 2017,<sup>27</sup> and to Bitstamp, Coinbase, itBit, and Kraken in June 2018,<sup>28</sup> as part of a market manipulation probe.

## Government-Wide Coordination

The CFTC has reportedly coordinated with regulators both within the United States, including the Securities and Exchange Commission (SEC), Federal Bureau of Investigation (FBI), Department of Justice, and Financial Stability Oversight Council (FSOC), and internationally with the Financial Stability Board. The CFTC also reportedly coordinated with state entities, including state attorneys general, in addition to working with the White House, Congress, and other policymakers.<sup>29</sup>

On January 24, 2018, SEC Chairman Jay Clayton and then-CFTC Chairman Giancarlo jointly authored an article in the *Wall Street Journal*, stating that “[t]he CFTC and SEC, along with other federal and state regulators and criminal authorities, will continue to work together to bring transparency and integrity to these [cryptocurrency] markets and, importantly, to deter and prosecute fraud and abuse.”<sup>30</sup> This statement of coordination in virtual currency enforcement actions echoed the statement issued a week earlier by the SEC and CFTC Enforcement Directors.<sup>31</sup>

More recently, on October 11, 2019, the leaders of the CFTC, Financial Crimes Enforcement Network (FinCEN), and the SEC issued a joint statement to remind persons engaged in activities involving digital assets of their anti-money laundering and countering the financing of terrorism (AML/CFT) obligations under the Bank Secrecy Act (BSA).<sup>32</sup>

## Recent and Future Developments

The Director of the SEC Division of Corporation Finance, William Hinman, stated in a speech in June 2018 that Ether is not a security and likened it to Bitcoin.<sup>33</sup> This statement on Ether had implications for the CFTC, which had not yet taken an official position on Ether at that time.

Speaking at the Yahoo Finance All Markets Summit in October 2019, CFTC Chairman Tarbert declared that *Ether is a commodity*: “We’ve been very clear on bitcoin: bitcoin is a commodity. We haven’t said anything about ether – until now. . . . It is my view as chairman of the CFTC that ether is a commodity.”<sup>34</sup> He also suggested that the CFTC may allow Ether futures to trade on U.S. markets.<sup>35</sup>

In preparation for future interest in *derivatives on Ether*, the LabCFTC issued a request for input (RFI) in December 2018, requesting public feedback on the underlying technology, opportunities, risks, mechanics, use cases, and markets related to Ether and the Ethereum network. The RFI also sought to understand similarities and distinctions between Ether and Bitcoin.<sup>36</sup> In May 2020, ErisX, a cryptocurrency derivatives platform, announced the launch of the first futures contract on Ether.<sup>37</sup>

Moreover, another important issue that may require the CFTC's attention and coordination with other agencies in the future is the potential mechanics of "*morphing*" from security to utility token. Introduced as a possibility by Mr. Hinman of the SEC in his June 2018 speech, the issue may require additional coordination between the CFTC and SEC.<sup>38</sup>

Finally, Congress is considering bills intended to resolve some regulatory uncertainty in the cryptocurrency space. For example, the *CFTC Reauthorization Act of 2019* for the first time makes explicit reference to digital commodities.<sup>39</sup> If passed in Congress, the bill will give the CFTC the mandate to adopt rules detailing the content and availability of trade and trader data that boards of trade and swap execution facilities must be able to access from a cash market in a digital commodity in order to meet their respective obligations to prevent disruption of their markets.<sup>40</sup> A recent bill, the *Crypto-Currency Act of 2020*, creates new definitions for three categories of crypto-assets—"crypto-commodity," "crypto-currency," and "crypto-security"—and assigns jurisdiction over them to the CFTC, FinCEN, and the SEC, respectively.<sup>41</sup>

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The views expressed herein are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cornerstone Research.

## Appendix A: Relevant CFTC Press Releases Related to Virtual Currencies

December 15, 2014	<a href="#">CFTC Requests Public Comment on Related Applications Submitted by LedgerX, LLC for Registration as a Derivatives Clearing Organization and Swap Execution Facility</a>
February 4, 2015	<a href="#">CFTC Extends Period for Public Comment on Related Applications Submitted by LedgerX, LLC for Registration as a Derivatives Clearing Organization and Swap Execution Facility</a>
September 17, 2015	<a href="#">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</a>
September 24, 2015	<a href="#">CFTC Settles with TeraExchange LLC for Failing to Enforce Prohibitions on Wash Trading and Prearranged Trading in Bitcoin Swap</a>
November 6, 2015	<a href="#">CFTC Releases Annual Enforcement Results for Fiscal Year 2015</a>
June 2, 2016	<a href="#">CFTC Orders Bitcoin Exchange Bitfinex to Pay \$75,000 for Offering Illegal Off-Exchange Financed Retail Commodity Transactions and Failing to Register as a Futures Commission Merchant</a>
November 21, 2016	<a href="#">CFTC Releases Annual Enforcement Results for Fiscal Year 2016</a>
May 17, 2017	<a href="#">CFTC Launches LabCFTC as Major FinTech Initiative</a>
July 10, 2017	<a href="#">CFTC Acting Chairman Giancarlo Appoints Daniel Gorfine as LabCFTC Director and Chief Innovation Officer</a>
July 24, 2017	<a href="#">CFTC Grants DCO Registration to LedgerX LLC</a>
September 21, 2017	<a href="#">CFTC Charges Nicholas Gelfman and Gelfman Blueprint, Inc. with Fraudulent Solicitation, Misappropriation, and Issuing False Account Statements in Bitcoin Ponzi Scheme</a>
October 17, 2017	<a href="#">CFTC's LabCFTC Releases Primer on Virtual Currencies</a>
November 22, 2017	<a href="#">CFTC Releases Annual Enforcement Results for Fiscal Year 2017</a>
December 1, 2017	<a href="#">CFTC Statement on Self-Certification of Bitcoin Products by CME, CFE and Cantor Exchange</a>
December 15, 2017	<a href="#">CFTC Issues Proposed Interpretation on Virtual Currency "Actual Delivery" in Retail Transactions</a>
December 15, 2017	<a href="#">CFTC Launches Virtual Currency Resource Web Page</a>
January 19, 2018	<a href="#">CFTC Charges Colorado Resident Dillon Michael Dean and His Company, The Entrepreneurs Headquarters Limited, with Engaging in a Bitcoin and Binary Options Fraud Scheme</a>
January 19, 2018	<a href="#">CFTC Charges Patrick K. McDonnell and His Company CabbageTech, Corp. d/b/a Coin Drop Markets with Engaging in Fraudulent Virtual Currency Scheme</a>
January 24, 2018	<a href="#">CFTC Charges Randall Crater, Mark Gillespie, and My Big Coin Pay, Inc. with Fraud and Misappropriation in Ongoing Virtual Currency Scam</a>
January 25, 2018	<a href="#">CFTC and SEC Chairmen in Joint Op-Ed: In Support of Market-Enhancing Innovation, We Will Continue to Bring Transparency and Integrity to Markets</a>
February 15, 2018	<a href="#">CFTC Issues First Pump-and-Dump Virtual Currency Customer Protection Advisory</a>
February 19, 2018	<a href="#">US CFTC and UK FCA Sign Arrangement to Collaborate on FinTech Innovation</a>

March 6, 2018	<a href="#">Federal Court in New York Enters Preliminary Injunction Order against Patrick K. McDonnell and His Company CabbageTech, Corp. d/b/a Coin Drop Markets in Connection with Fraudulent Virtual Currency Scheme</a>	July 3, 2019	<a href="#">CFTC Issues Social Media Customer Protection Advisory</a>
April 18, 2018	<a href="#">CFTC Charges Multiple Individuals and Companies with Operating a Fraudulent Scheme Involving Binary Options and a Virtual Currency Known as ATM Coin</a>	July 10, 2019	<a href="#">Federal Court Permanently Enjoins Defendants and Orders Them to Pay Penalties and Restitution for Bitcoin Solicitation Fraud, Impersonating a CFTC Investigator, and Sending Forged CFTC Documents</a>
April 24, 2018	<a href="#">CFTC Asks Innovators for Competition Ideas to Advance FinTech Solutions</a>	July 29, 2019	<a href="#">ICYMI: Chairman Tarbert Lays Out Priorities in Fox Business Op-Ed</a>
May 21, 2018	<a href="#">CFTC Staff Issues Advisory for Virtual Currency Products</a>	August 2, 2019	<a href="#">CFTC's Gorfine to Depart Agency</a>
May 21, 2018	<a href="#">CFTC, NASAA Sign Agreement for Greater Information Sharing Between Federal Commodities Regulator and State Securities Regulators</a>	September 30, 2019	<a href="#">CFTC Charges Individual with Multi-Million Dollar Bitcoin Fraud</a>
July 16, 2018	<a href="#">CFTC Issues Customer Advisory on Digital Tokens</a>	October 10, 2019	<a href="#">Chairman Tarbert Announces New LabCFTC Director</a>
July 23, 2018	<a href="#">Federal Court Orders Commodity Pool Operator and Its Principal to Pay More Than \$1.9 Million for Bitcoin and Binary Options Fraud Scheme</a>	October 10, 2019	<a href="#">Chairman Tarbert Comments on Cryptocurrency Regulation at Yahoo! Finance All Markets Summit</a>
August 24, 2018	<a href="#">CFTC Wins Trial against Virtual Currency Fraudster</a>	October 16, 2019	<a href="#">CFTC Charges Nevada Company and Its Owner in \$11 Million Cryptocurrency Fraud and Misappropriation Scheme</a>
September 27, 2018	<a href="#">CFTC Charges Trading Platform with Illegal Transactions Margined in Bitcoin, Failing to Implement Procedures to Prevent Money-Laundering, and Failing to Register with the CFTC</a>	October 24, 2019	<a href="#">Chairman Tarbert Announces Elevation of LabCFTC</a>
September 28, 2018	<a href="#">CFTC Announces Agenda for FinTech Forward 2018 Conference</a>	October 31, 2019	<a href="#">CFTC Charges Foreign Trading Platform for Failing to Register with the CFTC</a>
September 28, 2018	<a href="#">CFTC Charges Two Defendants with Fraudulent Solicitation, Impersonation of a CFTC Investigator, and Forging CFTC Documents, All in Attempt to Steal Bitcoin</a>	November 1, 2019	<a href="#">Federal Court Orders Defendants to Pay More than \$4.25 Million for Fraud and Misappropriation</a>
September 28, 2018	<a href="#">CFTC Files Three Enforcement Actions Addressing Insider Trading; Forex Fraud; and Fraudulent Solicitation, Impersonation of a CFTC Investigator, and Forging CFTC Documents, All in Attempt to Steal Bitcoin</a>	November 19, 2019	<a href="#">ICYMI: Fintech Regulation Needs More Principles, Not More Rules</a>
October 3, 2018	<a href="#">CFTC's Technology Advisory Committee Announces Agenda for Its October 5 Public Meeting</a>	November 20, 2019	<a href="#">Chairman Tarbert Discusses U.S. Leadership in Digital Assets on CNBC</a>
October 3, 2018	<a href="#">Federal Court Finds That Virtual Currencies Are Commodities</a>	January 30, 2020	<a href="#">ICYMI: Chairman Tarbert Discusses Position Limits on Bloomberg TV</a>
October 18, 2018	<a href="#">Federal Court Orders Trading Firm and CEO to Pay More Than \$2.5 Million for Fraudulent Bitcoin Ponzi Scheme</a>	March 24, 2020	<a href="#">CFTC Issues Final Interpretive Guidance on Actual Delivery for Digital Assets</a>
November 9, 2018	<a href="#">CFTC Orders Former Virtual Currency Trader to Pay More Than \$1.1 Million for Fraudulent Bitcoin and Litecoin Scheme</a>	June 30, 2020	<a href="#">Supreme Court Denies Defendants' Challenge to CFTC's Enforcement Authority</a>
November 15, 2018	<a href="#">CFTC Division of Enforcement Issues Report on FY 2018 Results</a>		
November 27, 2018	<a href="#">CFTC's LabCFTC Releases Primer about Smart Contracts</a>		
December 11, 2018	<a href="#">CFTC Seeks Public Comments on Crypto-asset Mechanics and Markets</a>		
February 12, 2019	<a href="#">CFTC Divisions Announce Examination Priorities</a>		
March 11, 2019	<a href="#">Foreign Trading Platform and Its CEO to Pay \$990,000 for Illegal Bitcoin-Related Transactions with U.S. Customers</a>		
April 26, 2019	<a href="#">CFTC, SEC Issue Investor Alert: Guidance Warns of Websites Related to Digital Assets</a>		
June 18, 2019	<a href="#">CFTC Charges Company and its Principal in \$147 Million Fraudulent Bitcoin Trading Scheme</a>		
June 27, 2019	<a href="#">CFTC Announces LabCFTC Accelerator and Second FinTech Conference</a>		
July 1, 2019	<a href="#">CFTC Grants DCO Registration to Eris Clearing, LLC</a>		

**Appendix B: Relevant CFTC Public Statements and Remarks Related to Virtual Currencies**

October 9, 2014	<i>Opening Statement [of] Chairman Timothy G. Massad before the Global Markets Advisory Committee Open Meeting</i>
October 9, 2014	<i>Statement of Commissioner Mark Wetjen before the Global Markets Advisory Committee Open Meeting</i>
December 10, 2014	<i>Testimony of Chairman Timothy Massad before the U.S. Senate Committee on Agriculture, Nutrition &amp; Forestry</i>
February 12, 2015	<i>Testimony of Chairman Timothy G. Massad before the U.S. House Committee on Agriculture</i>
April 14, 2015	<i>Testimony of Commissioner Mark Wetjen before the U.S. House Committee on Agriculture Subcommittee on Commodity Exchanges, Energy, and Credit Subcommittee</i>
October 19, 2015	<i>Keynote Address of Chairman Timothy Massad before the World Federation of Exchanges Annual Meeting</i>
December 1, 2015	<i>Guest Lecture of Commissioner J. Christopher Giancarlo, Harvard Law School, Fidelity Guest Lecture Series on International Finance</i>
February 23, 2016	<i>Opening Statement of Commissioner J. Christopher Giancarlo before the CFTC Technology Advisory Committee Meeting</i>
February 23, 2016	<i>Statement of Commissioner Bowen before the Technology Advisory Committee Meeting</i>
February 23, 2016	<i>Opening Statement of Chairman Timothy Massad before the CFTC Technology Advisory Committee Meeting</i>
March 29, 2016	<i>Special Address of CFTC Commissioner J. Christopher Giancarlo before the Depository Trust &amp; Clearing Corporation 2016 Blockchain Symposium</i>
April 12, 2016	<i>Keynote Address of CFTC Commissioner J. Christopher Giancarlo before the Cato Institute, Cryptocurrency: The Policy Challenges of a Decentralized Revolution</i>
May 10, 2016	<i>Keynote Address of Commissioner J. Christopher Giancarlo before the Markit Group, 2016 Annual Customer Conference New York</i>
September 21, 2016	<i>Address of CFTC Commissioner J. Christopher Giancarlo to the American Enterprise Institute</i>
December 9, 2016	<i>Keynote Address of CFTC Commissioner J. Christopher Giancarlo before the ISDA's Trade Execution Legal Forum</i>
January 18, 2017	<i>Keynote Address of CFTC Commissioner J. Christopher Giancarlo before SEFCON VII</i>
May 17, 2017	<i>Address of CFTC Acting Chairman J. Christopher Giancarlo before the New York FinTech Innovation Lab</i>
June 8, 2017	<i>Testimony of J. Christopher Giancarlo, Acting-Chairman, Commodity Futures Trading Commission, before the U.S. House of Representatives Committee on Appropriations Subcommittee on Agriculture, Rural Development and Related Agencies</i>
June 27, 2017	<i>Testimony of J. Christopher Giancarlo, Acting-Chairman, Commodity Futures Trading Commission, before the U.S. Senate Committee on Appropriations Subcommittee on Financial Services and General Government</i>

September 12, 2017	<i>Remarks of Chairman J. Christopher Giancarlo before the Global Forum for Derivatives Markets 38th Annual Bürgenstock Conference</i>
October 4, 2017	<i>Keynote Remarks of Commissioner Brian Quintenz before the Symphony Innovate 2017 Conference</i>
October 11, 2017	<i>Testimony of J. Christopher Giancarlo, Chairman U.S. Commodity Futures Trading Commission, before the House Committee on Agriculture</i>
October 19, 2017	<i>Keynote Address of Daniel Gorfine, Director of LabCFTC and Chief Innovation Officer, before the 33rd Annual FIA Futures &amp; Options Expo, Chicago, IL</i>
November 15, 2017	<i>Remarks of Chairman J. Christopher Giancarlo at the Singapore FinTech Festival</i>
November 30, 2017	<i>Remarks of Commissioner Brian Quintenz at the Technology and Standards: Unlocking Value in Derivatives Markets Conference London, United Kingdom</i>
December 11, 2017	<i>Giancarlo Commends SEC Chairman Clayton on ICO Statement</i>
January 4, 2018	<i>Chairman Giancarlo Statement on Virtual Currencies</i>
January 19, 2018	<i>Remarks of Chairman J. Christopher Giancarlo to the ABA Derivatives and Futures Section Conference</i>
January 19, 2018	<i>Joint Statement from CFTC and SEC Enforcement Directors Regarding Virtual Currency Enforcement Actions</i>
January 31, 2018	<i>Opening Statement of Commissioner Brian Quintenz before the CFTC Market Risk Advisory Committee</i>
January 31, 2018	<i>Remarks of Chairman J. Christopher Giancarlo before the Market Risk Advisory Committee Meeting</i>
January 31, 2018	<i>Opening Statement of Commissioner Rostin Behnam before the Market Risk Advisory Committee</i>
February 6, 2018	<i>Written Testimony of Chairman J. Christopher Giancarlo before the Senate Banking Committee</i>
February 8, 2018	<i>Remarks of Commissioner Rostin Behnam before the FIA/SIFMA Asset Management Group, Asset Management Derivatives Forum 2018, Dana Point, California</i>
February 14, 2018	<i>Opening Statement of Chairman J. Christopher Giancarlo before the Technology Advisory Committee Meeting</i>
February 14, 2018	<i>Opening Statement of Commissioner Rostin Behnam before the Technology Advisory Committee Meeting</i>
February 14, 2018	<i>Opening Statement of Commissioner Brian Quintenz before the Technology Advisory Committee</i>
February 15, 2018	<i>Written Testimony of Chairman J. Christopher Giancarlo before the U.S. Senate Agriculture, Nutrition, and Forestry Committee</i>
March 7, 2018	<i>Keynote Address of Commissioner Brian Quintenz before the DC Blockchain Summit</i>
March 7, 2018	<i>Written Testimony of Chairman J. Christopher Giancarlo before the U.S. House Committee on Appropriations Subcommittee on Agriculture, Rural Development and Related Agencies, Washington, D.C.</i>
March 14, 2018	<i>Keynote Address of Chairman J. Christopher Giancarlo before FIA Annual Meeting, Boca Raton, Florida</i>

March 15, 2018	<i>Remarks of Commissioner Rostin Behnam at the FIA Boca 2018 International Futures Industry 43rd Annual Conference, Boca Raton, Florida</i>	March 27, 2019	<i>Opening Statement of Commissioner Brian Quintenz before the CFTC Technology Advisory Committee</i>
April 13, 2018	<i>Remarks of Chairman J. Christopher Giancarlo before the Sims Lecture At Vanderbilt Law School, Nashville, Tennessee</i>	April 4, 2019	<i>Remarks of Chairman J. Christopher Giancarlo at the Eurofi Financial Forum, Bucharest, Romania</i>
April 26, 2018	<i>Remarks of Commissioner Brian Quintenz before the Eurofi High Level Seminar 2018</i>	May 1, 2019	<i>Testimony of Chairman J. Christopher Giancarlo before the House Committee on Agriculture Subcommittee on Commodity Exchanges, Energy and Credit, Washington, D.C.</i>
May 2, 2018	<i>Remarks of Commissioner Brian Quintenz at FIA's 40th Annual Law and Compliance Conference</i>	May 8, 2019	<i>Testimony of Chairman J. Christopher Giancarlo before the Senate Committee on Appropriations Subcommittee on Financial Services And General Government, Washington, DC</i>
May 3, 2018	<i>Keynote of Commissioner Rostin Behnam at the FIA 40th Annual Law &amp; Compliance Division Conference on the Regulation of Futures, Derivatives and OTC Products, Washington, DC</i>	June 3, 2019	<i>Remarks of Chairman J. Christopher Giancarlo at Commissione Nazionale per le Societa e la Borsa (CONSOB), Rome, Italy</i>
May 21, 2018	<i>Remarks of Chairman J. Christopher Giancarlo at the North American Securities Administrators Association (NASAA) Conference, Washington, D.C.</i>	June 11, 2019	<i>Remarks of Daniel Gorfine, Director of LabCFTC at ISDA</i>
June 4, 2018	<i>Remarks of Commissioner Rostin Behnam at the BFI Summit "Fostering Open, Transparent, Competitive, And Financially Sound Markets" United Nations Plaza New York, NY</i>	September 25, 2019	<i>Keynote Address of Director of Enforcement James M. McDonald at the Practising Law Institute's White Collar Crime 2019 Program</i>
June 5, 2018	<i>Testimony of Chairman J. Christopher Giancarlo before the Senate Committee on Appropriations Subcommittee on Financial Services and General Government, Washington, D.C.</i>	October 3, 2019	<i>Statement of Commissioner Dawn D. Stump Regarding the CFTC Technology Advisory Committee Meeting</i>
July 18, 2018	<i>Written Testimony of Daniel S. Gorfine before the U.S. House Committee on Agriculture</i>	October 3, 2019	<i>Opening Statement of Chairman Heath P. Tarbert before the Technology Advisory Committee Meeting</i>
July 25, 2018	<i>Testimony of Chairman J. Christopher Giancarlo before the House Committee on Agriculture, Washington, D.C.</i>	October 3, 2019	<i>Opening Statement of Commissioner Brian Quintenz before the CFTC Technology Advisory Committee</i>
August 20, 2018	<i>Statement of CFTC Commissioner Brian Quintenz Regarding the Virtual Commodity Association</i>	October 3, 2019	<i>Opening Statement of Commissioner Dan M. Berkovitz before the CFTC Technology Advisory Committee Meeting</i>
September 27, 2018	<i>Remarks of Daniel Gorfine Regarding DLT and the Next Generation of Computing Infrastructure, Finovate, NYC</i>	October 11, 2019	<i>Leaders of CFTC, FinCEN, and SEC Issue Joint Statement on Activities Involving Digital Assets</i>
October 2, 2018	<i>Remarks of Chairman J. Christopher Giancarlo at Economic Club of Minnesota, Minneapolis, Minnesota</i>	October 24, 2019	<i>Remarks of Chairman Heath P. Tarbert at the 2019 Annual Robert Glauber Lecture at Harvard University's Institute of Politics</i>
October 5, 2018	<i>Opening Statement of Commissioner Brian Quintenz before the CFTC Technology Advisory Committee</i>	October 24, 2019	<i>Remarks of Chairman Heath P. Tarbert at Fintech Forward 2019: Exploring the Unwritten Future</i>
October 16, 2018	<i>Keynote Remarks of CFTC Commissioner Rostin Behnam at the Federal Reserve Bank of Chicago's Fifth Annual Conference on CCP Risk Management, Chicago, Illinois</i>	February 10, 2020	<i>Statement of DSIO Director Joshua B. Sterling on Supporting Innovation in Digital Asset Products, Including Pooled Investment Vehicles</i>
October 16, 2018	<i>Remarks of Commissioner Brian Quintenz at the 38th Annual GITEX Technology Week Conference</i>	February 26, 2020	<i>Opening Statement of Commissioner Brian Quintenz before the CFTC Technology Advisory Committee</i>
October 25, 2018	<i>Remarks of CFTC Commissioner Rostin Behnam at the 2018 ISDA Annual Japan Conference, Shangri-La Hotel, Tokyo</i>	March 24, 2020	<i>Statement of Commissioner Rostin Behnam Regarding COVID-19 and CFTC Digital Assets Rulemaking</i>
October 31, 2018	<i>Remarks of CFTC Commissioner Rostin Behnam at the ASIFMA 2018 Annual Conference: Developing Asia's Capital Markets, Singapore</i>	March 24, 2020	<i>Statement of Commissioner Brian Quintenz in Support of Final Interpretive Guidance: Retail Commodity Transactions Involving Certain Digital Assets</i>
November 7, 2018	<i>Keynote Address of Chairman J. Christopher Giancarlo at FinTech Week, Georgetown University Law School</i>	March 24, 2020	<i>Statement of Chairman Heath P. Tarbert in Support of Interpretive Guidance on Actual Delivery for Digital Assets</i>
November 14, 2018	<i>Speech of Enforcement Director James M. McDonald Regarding Enforcement Trends at the CFTC, NYU School of Law: Program on Corporate Compliance &amp; Enforcement</i>		
March 6, 2019	<i>Remarks of Chairman J. Christopher Giancarlo at the 4th Annual DC Blockchain Summit</i>		
March 13, 2019	<i>Remarks of Chairman J. Christopher Giancarlo at 44th Annual International Futures Industry Conference</i>		

## Endnotes

- 1 "Testimony of CFTC Chairman Timothy Massad before the U.S. Senate Committee on Agriculture, Nutrition & Forestry," CFTC, December 10, 2014, <http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-6>. See also "CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets," CFTC, January 4, 2018, [https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder\\_virtualcurrency01.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf).
- 2 "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," CFTC, September 17, 2015, <https://www.cftc.gov/PressRoom/PressReleases/7231-15>, stating that "Bitcoin and other virtual are properly defined as commodities."
- 3 Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions, In the Matter of Coinflip, Inc. d/b/a Derivabit, and Francisco Riordan, September 17, 2015, <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcement/actions/documents/legalpleading/enfcoinfliporder09172015.pdf>
- 4 "President's Budget: FY 2021," CFTC, February 2020, [https://cftc.gov/sites/default/files/2020-02/Final\\_Budget\\_2021PB\\_w\\_Cover2.pdf](https://cftc.gov/sites/default/files/2020-02/Final_Budget_2021PB_w_Cover2.pdf).
- 5 "CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets," CFTC, January 4, 2018, [https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder\\_virtualcurrency01.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf).
- 6 "CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets," CFTC, January 4, 2018, [https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder\\_virtualcurrency01.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf).
- 7 "Federal Court in New York Enters Preliminary Injunction Order against Patrick K. McDonnell and His Company CabbageTech, Corp. d/b/a Coin Drop Markets in Connection with Fraudulent Virtual Currency Scheme," CFTC, March 6, 2018, <https://www.cftc.gov/PressRoom/PressReleases/pr7702-18>. See Memorandum & Order, *CFTC v. Patrick K. McDonnell and CabbageTech, Corp. d/b/a Coin Drop Markets*, March 6, 2018, ¶ 24, <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcement/actions/documents/legalpleading/enfcoindroporder030618.pdf>.
- 8 See Memorandum & Order, *CFTC v. Patrick K. McDonnell and CabbageTech, Corp. d/b/a Coin Drop Markets*, March 6, 2018, p. 3, <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcement/actions/documents/legalpleading/enfcoindroporder030618.pdf>.
- 9 Memorandum & Order, *CFTC v. Patrick K. McDonnell and CabbageTech, Corp. d/b/a Coin Drop Markets*, March 6, 2018, p. 3, <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcement/actions/documents/legalpleading/enfcoindroporder030618.pdf>. Judge Weinstein also stated that the jurisdictional authority of the CFTC does not prevent other agencies from exercising their regulatory power when appropriate. He acknowledged that no one agency is granted full regulatory authority over virtual currency spot market transactions. Thus, the decision should not be viewed as increasing the CFTC's authority or the beginning of more aggressive enforcement, but merely as an affirmation of the same contours to the CFTC's jurisdiction that it has previously asserted its authority over.
- 10 "Federal Court Finds That Virtual Currencies Are Commodities," CFTC, October 3, 2018, <https://www.cftc.gov/PressRoom/PressReleases/7820-18>. See also Nicholas J. Wendland, "Another Court Rules Virtual Currencies are Commodities Subject to CFTC," *National Law Review*, October 9, 2018, <https://www.natlawreview.com/article/another-court-rules-virtual-currencies-are-commodities-subject-to-cftc-oversight>.
- 11 "Former Commissioners," CFTC, <https://www.cftc.gov/About/Commissioners/FormerCommissioners/index.htm>.
- 12 "Innovation is a vital part of our markets, and it is something that our regulatory framework is designed to encourage. At the same time, our regulatory framework is intended to prevent manipulation and fraud, and to make sure our markets operate with transparency and integrity."
- 13 "Testimony of CFTC Chairman Timothy Massad before the U.S. Senate Committee on Agriculture, Nutrition & Forestry," CFTC, December 10, 2014, <http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-6>.
- 14 "Special Address of CFTC Commissioner J. Christopher Giancarlo before the Depository Trust & Clearing Corporation 2016 Blockchain Symposium," CFTC, March 29, 2016, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-13>. See also "Keynote Address of Commissioner J. Christopher Giancarlo before the Markit Group, 2016 Annual Customer Conference New York," CFTC, May 10, 2016, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-15>.
- 15 "Keynote Address of Commissioner J. Christopher Giancarlo before the Depository Trust & Clearing Corporation 2016 Blockchain Symposium," CFTC, March 29, 2016, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-13>. See also "Special Address of CFTC Commissioner J. Christopher Giancarlo before the Depository Trust & Clearing Corporation 2016 Blockchain Symposium," CFTC, March 29, 2016, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-15>.
- 16 "CFTC Launches LabCFTC as Major FinTech Initiative," CFTC, May 17, 2017, <https://www.cftc.gov/PressRoom/PressReleases/7558-17>.
- 17 Since its inception, LabCFTC has served as a focal point of the CFTC's efforts to engage with the FinTech community and other regulatory authorities to facilitate innovation. It also promoted education on emerging technologies by publishing primers on virtual currencies, smart contracts, and artificial intelligence in financial markets. See "LabCFTC," CFTC, <https://www.cftc.gov/LabCFTC/index.htm>.
- 18 "Special Address of CFTC Commissioner J. Christopher Giancarlo before the Depository Trust & Clearing Corporation 2016 Blockchain Symposium," CFTC, March 29, 2016, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-13>.
- 19 "I want the United States to lead, particularly in the blockchain technology that underlies digital assets. ...[U]ltimately I could see it overtaking the internet or being effectively parallel to the internet in using a variety of different kinds of transactions, not just the financial system, but in other types of transactions as well.... I think whoever ends up leading in this technology will end up writing the rules of the road for the rest of the world. My emphasis is on making sure that the United States is a leader." "Chairman Tarbert Discusses U.S. Leadership in Digital Assets on CNBC," CFTC, November 20, 2019, <https://www.cftc.gov/PressRoom/PressReleases/8082-19>. See also Philip Rosenstein, "America Needs to Lead" on Crypto, CFTC Chairman Says," *Law360*, November 12, 2019, <https://www.law360.com/articles/1219189-america-needs-to-lead-on-crypto-cftc-chairman-says>.
- 20 "ICYMI: Fintech Regulation Needs More Principles, Not More Rules—Op-ed by Chairman Tarbert Featured in Fortune," CFTC, November 19, 2019, <https://www.cftc.gov/PressRoom/PressReleases/8081-19>.
- 21 "CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets," CFTC, January 4, 2018, p. 2, [https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder\\_virtualcurrency01.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf).
- 22 "Trends in CFTC Virtual Currency Enforcement Actions—2015–Q2 2020," Cornerstone Research, <https://www.cornerstone.com/Publications/Reports/Trends-in-CFTC-Virtual-Currency-Enforcement-Actions-2015-Q2-2020>.
- 23 Recently, the CFTC has brought charges against two firms offering digital asset-based swaps for illegal off-exchange trading and registration violations; a foreign trading platform for offering illegal leveraged transactions in Ether, Litecoin, and Bitcoin; and BitMEX owners for illegally operating a cryptocurrency derivatives trading platform and anti-money laundering violations. See *In the Matter of Plutus Financial, Inc. (d/b/a Abra)* and *Plutus Technologies Philippines Corp. (d/b/a Abra International)*, July 13, 2020, <https://www.cftc.gov/media/4191/enfplutosfinancialorder071320/download>;

Complaint, CFTC v. Laino Group Limited d/b/a Paxforex, September 24, 2020, <https://www.cftc.gov/media/4796/enflainocomplaint092420/download>; and Complaint, CFTC v. HDR Global Trading Limited et al., October 1, 2020, <https://www.cftc.gov/media/4886/enfhdrglobaltradingcomplaint100120/download>.

<sup>23</sup> For example, Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties under the Commodity Exchange Act and Commission Regulations, *CFTC v. Nicholas Gelfman and Gelfman Blueprint, Inc.*, September 21, 2017, <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfgelfmancomplaint09212017.pdf>.

<sup>24</sup> For example, Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions, In the Matter of Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan, September 17, 2015, <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliporder09172015.pdf>. A Swap Execution Facility (SEF) is a trading system or platform created by the Dodd-Frank Act in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce. The Dodd-Frank Act imposed different statutory provisions on SEFs than on designated contract markets. Futures Commission Merchants (FCMs) are individuals, associations, partnerships, corporations, and trusts that solicit or accept orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any exchange and that accept payment from or extend credit to those whose orders are accepted. A Commodity Pool Operator (CPO) is a person engaged in a business similar to an investment trust or a syndicate and who solicits or accepts funds, securities, or property for the purpose of trading commodity futures contracts or commodity options. The CPO either makes trading decisions on behalf of the pool or engages a Commodity Trading Advisor (CTA) to do so. Managers at hedge funds or their advisors are often registered with the CFTC as CPOs or CTAs. See "Futures Glossary," CFTC, <https://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm>. See also "Written Testimony of Chairman J. Christopher Giancarlo before the Senate Banking Committee," February 6, 2018, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo37>.

<sup>25</sup> For example, Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as Amended, Making Findings and Imposing Remedial Sanctions, *In the Matter of: BXFNA Inc. d/b/a Bitfinex*, June 2, 2016, <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbfxnaorder060216.pdf>.

<sup>26</sup> For example, Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act Making Findings and Imposing Remedial Sanctions, *In the Matter of: TeraExchange LLC*, September 24, 2015, <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfteraexchangeorder92415.pdf>.

<sup>27</sup> Matthew Leising, "U.S. Regulators Subpoena Crypto Exchange Bitfinex, Tether," *Bloomberg*, January 30, 2018, <https://www.bloomberg.com/news/articles/2018-01-30/crypto-exchange-bitfinex-tether-said-to-get-subpoenaed-by-cftc>.

<sup>28</sup> Gabriel Rubin et al., "U.S. Regulator Demands Trading Data from Bitcoin Exchanges in Manipulation Probe," *Wall Street Journal*, June 8, 2018, <https://www.wsj.com/articles/u-s-regulators-demand-trading-data-from-bitcoin-exchanges-in-manipulation-probe-1528492835>.

<sup>29</sup> "CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets," CFTC, January 4, 2018, [https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder\\_virtualcurrency01.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf).

<sup>30</sup> "Statement by SEC Chairman Jay Clayton and CFTC Chairman J. Christopher Giancarlo: Regulators Are Looking at Cryptocurrency," SEC, January 25, 2018, <https://www.sec.gov/news/public-statement/statement-clayton-giancarlo-012518>.

<sup>31</sup> "Joint Statement by SEC and CFTC Enforcement Directors Regarding Virtual Currency Enforcement Actions—SEC Co-Enforcement Directors Stephanie Avakian and Steven Peikin and CFTC Enforcement Director James McDonald," SEC, January 19, 2018, <https://www.sec.gov/news/public-statement/joint-statement-sec-and-cftc-enforcement-directors>.

<sup>32</sup> "Leaders of CFTC, FinCEN, and SEC Issue Joint Statement on Activities Involving Digital Assets," CFTC, October 11, 2019, <https://www.cftc.gov/PressRoom/SpeechesTestimony/cftcfinsecjointstatement101119>.

<sup>33</sup> William Hinman, "Digital Asset Transactions: When Howey Met Gary (Plastic) – Remarks at the Yahoo Finance All Markets Summit: Crypto," SEC, June 14, 2018, <https://www.sec.gov/news/speech/speech-hinman-061418>, stating "putting aside the fundraising that accompanied the creation of Ether, based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions. And, as with Bitcoin, applying the disclosure regime of the federal securities laws to current transactions in Ether would seem to add little value. Over time, there may be other sufficiently decentralized networks and systems where regulating the tokens or coins that function on them as securities may not be required."

<sup>34</sup> "CFTC Says Cryptocurrency Ether Is a Commodity, and Ether Futures Are Next," *Yahoo Finance*, October 10, 2019, <https://ca.finance.yahoo.com/news/cftc-says-cryptocurrency-ether-is-a-commodity-and-is-open-to-ether-derivatives-133455545.html>.

<sup>35</sup> William Foxley, "CFTC Chairman Confirms Ether Cryptocurrency Is a Commodity," *CoinDesk*, October 10, 2019, <https://www.coindesk.com/cftc-chairman-confirms-ether-cryptocurrency-is-a-commodity>.

<sup>36</sup> "CFTC Seeks Public Comments on Crypto-Asset Mechanics and Markets," CFTC, December 11, 2018, <https://www.cftc.gov/PressRoom/PressReleases/7855-18>.

<sup>37</sup> "ErisX Pioneers First U.S. Based Ether Futures Contract," ErisX Insight, May 11, 2020, <https://medium.com/@erisxinsights/erisx-pioneers-first-u-s-based-ether-futures-contract-9d9e0830212f>.

<sup>38</sup> Sara Hanks, "The Morphing of Securities Tokens," *CrowdCheck Blog*, June 15, 2018, <https://www.crowdcheck.com/blog/morphing-securities-tokens>.

<sup>39</sup> "H.R.4895 - CFTC Reauthorization Act of 2019," U.S. Congress, <https://www.congress.gov/bill/116th-congress/house-bill/4895/text#toc-H3E399FC18B4E4159944E1F5D64ADB29C>.

<sup>40</sup> Jason Brett, "Congress Offers a Regulatory 2.0 Upgrade to CFTC for Digital Commodities," *Forbes*, December 11, 2019, <https://www.forbes.com/sites/jasonbrett/2019/12/11/congress-offers-a-regulatory-2-0-upgrade-to-cftc-for-digital-commodities/#cf4e32e1accb>.

<sup>41</sup> Jason Brett, "Congress Considers Federal Crypto Regulators in New Cryptocurrency Act of 2020," *Forbes*, December 19, 2019, <https://www.forbes.com/sites/jasonbrett/2019/12/19/congress-consider-federal-crypto-regulators-in-new-cryptocurrency-act-of-2020/#176740c85fcd>.