

## CLIENT ALERT

# CFTC's Spot Trading Crypto Initiative and Request for Comment

August 11, 2025

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On August 4, 2025, U.S. Commodity Futures Trading Commission (“**CFTC**”) Acting Chairman Caroline Pham announced that the CFTC is seeking stakeholder input regarding providing regulatory clarity on listing spot crypto asset contracts under Section 2(c)(2)(D) of the Commodity Exchange Act (“**CEA**”) and Part 40 of the CFTC regulations (the “**Initiative**”).<sup>1</sup> This request for public input is a dynamic start to the CFTC’s “**Crypto Sprint**”<sup>2</sup> seeking to enable spot trading of digital assets on registered designated contract markets (“**DCM**”), which would permit retail trading of such assets with leverage, margin, or financing without needing to meet an exemption. The CFTC also requested comments on whether there are any securities implications with respect to a Securities and Exchange Commission (“**SEC**”) framework for trading of non-security assets that are part of an investment contract, in

<sup>1</sup> Acting Chairman Pham Launches Listed Spot Crypto Trading Initiative, CFTC Release No. 9105-25 (Aug. 4, 2025). (“Spot Trading Crypto Initiative”).

<sup>2</sup> Acting Chairman Pham Announces CFTC Crypto Sprint, CFTC Release No. 9104-25 (Aug. 1, 2025).

coordination with the SEC's "**Project Crypto**" as a broader response to the recommendations set forth in the President's Working Group on Digital Asset Markets Report ("**Working Group Report**").<sup>3</sup>

This client alert provides an overview of Section 2(c)(2)(D) of the CEA, which has been the subject of multiple enforcement actions involving digital assets, as well as the regulatory paths set forth in the Initiative and the broader implications for the future of listing spot crypto asset contracts.

### ***Background: The CEA and Retail Commodity Transactions***

Although the CFTC's jurisdiction over spot commodity markets is limited to anti-fraud and anti-manipulation authority, when retail participants trade commodities on margin or leverage, the margined or leveraged trading activity is regulated essentially as though it involved futures contracts, unless an exception applies. If no exception applies to such transactions, then the retail commodity transactions must, among other requirements, trade on a DCM, i.e., a futures exchange.<sup>4</sup> Furthermore, entities that facilitate trading in the margined or leveraged contracts must register with the CFTC. For example, participants that execute customer orders and accept margin funds on behalf of market participants may need to register with the CFTC as futures commission merchants.

There are two primary exceptions to the CFTC's jurisdictional authority to regulate commodity contracts traded on margin or leverage as futures contracts. First, trading on margin or leverage is not regulated as a futures contract if the parties to the trading activity are "eligible contract participants" ("**ECP**") or "eligible commercial entities," ("**ECE**") which are definitions designed to differentiate sophisticated market participants or commercial actors from retail participants.<sup>5</sup> Second, the CFTC does not regulate commodity trading on margin or leverage, even if the parties to the trading are retail customers, so long as the trading in the contracts "results in actual delivery within 28 days or such longer period as the [CFTC] may determine."<sup>6</sup>

If a retail commodity transaction is not conducted on a DCM, nor executed between two ECPs/ECEs, and also does not meet an exception, such retail commodity transactions may be deemed illegal, off-exchange transactions in violation of Section 4(a) of the CEA.

### ***Recent Issues Regarding Retail Commodity Transactions Exemptions***

Through an interpretive release and subsequent settlement orders consistent with the guidance, the CFTC has applied Section 2(c)(2)(D) in the context of digital assets and provided some direction on the meaning of "actual delivery" of digital assets for purposes of this limited exception under Section 2(c)(2)(D).

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<sup>3</sup> <https://www.whitehouse.gov/wp-content/uploads/2025/07/Digital-Assets-Report-EO14178.pdf> ("Working Group Report").

<sup>4</sup> See Section 2(c)(2)(D) of the CEA.

<sup>5</sup> See CEA Sections 1a(17) & (18).

<sup>6</sup> See CEA Section 2(c)(2)(D)(ii)(III)(aa).

### *Interpretive Guidance*<sup>7</sup>

On March 24, 2020, the CFTC unanimously approved final interpretive guidance concerning the meaning of “actual delivery” in the context of retail commodity transactions of virtual currencies.<sup>8</sup> In the CFTC’s view, the focus should be “whether the customer has secured a meaningful degree of possession and control of the virtual currency.”<sup>9</sup> Having full possession and control means that the seller or offeror has delivered the entire purchase of virtual currencies to the buyer, including any portions of the sale made using leverage, margin, or other financing, and the purchaser can freely transfer, move, or use the full amount of purchased virtual currencies from one depository to another.<sup>10</sup> According to the guidance, to show that the customer has full possession, there should be no liens on purchased virtual currency that extends beyond 28 days from the date of transaction.<sup>11</sup> The CFTC noted that possession of a private key is not a requirement to demonstrate full control for the purposes of “actual delivery.”<sup>12</sup>

### *Kraken*<sup>13</sup>

In 2021, the CFTC determined that from June 2020 to July 21, 2021, Kraken operated a digital asset platform that allowed retail customers to purchase and sell digital assets, including bitcoin, on margin.<sup>14</sup> In determining whether a customer qualified for margin, Kraken required the customer to meet certain contractual prerequisites, but did not assess whether the customer was an ECP, ECE or a retail customer. Customers had the option to settle transactions with their own funds or to trade on margin, “for which Kraken was the sole provider.”<sup>15</sup> The Kraken Order explained that certain transactions conducted on the Kraken platform did not comply with the “actual delivery” exception to the CFTC’s mandatory exchange trading requirement because Kraken maintained possession and control of the “entire quantity of the assets purchased using margin,” and therefore customers were not able to use the assets “freely in commerce away from the execution facility until the customer satisfied the repayment obligation.”<sup>16</sup> Consequently, Kraken could not rely on the actual delivery exception to shield it from the CFTC regulating the contracts as futures contracts under the CEA.

<sup>7</sup> For more information, please see the Client Alert available [here](#).

<sup>8</sup> CFTC Issues Final Interpretive Guidance on Actual Delivery for Digital Assets, CFTC Release Number 8139-20 (Mar. 24, 2020).

<sup>9</sup> Final Guidance at p. 16, *supra* fn 1.

<sup>10</sup> *Id.*, p. 33.

<sup>11</sup> *Id.*, pp. 23-24.

<sup>12</sup> *Id.*, p. 18.

<sup>13</sup> For more information, please see the Client Alert available [here](#).

<sup>14</sup> *In re Payward Ventures, Inc. (d/b/a/ Kraken)*, Order Instituting Proceedings Pursuant to Sections 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 21-20 (Sept. 28, 2021) (“Kraken Order”).

<sup>15</sup> Margined transactions were conducted through Kraken’s central limit order book and execution facility, and “Kraken maintained physical or constructive custody of all digital assets or fiat currency purchased using margin for the duration of a customer’s open margined position.” Customers who traded on margin were only obligated to repay Kraken upon closing their open margined position. A position remained open until a customer “submitted a closing trade, [or] repaid the margin, or Kraken initiated a forced liquidation, based on the occurrence of certain triggering events.” Customers were required to repay Kraken within 28 days, and if a customer failed to repay Kraken within that time frame, Kraken could unilaterally force the margined position to be liquidated. Additionally, Kraken could force liquidation if the value of the collateral dropped below certain thresholds.

<sup>16</sup> *Id.*

## *Ooki DAO*

On September 22, 2022, the CFTC issued an order simultaneously filing and settling charges against bZeroX LLC and its founders for developing and releasing a blockchain-based software protocol that enabled users to engage in off-exchange leveraged and margined retail commodity transactions in violation of the CEA and CFTC regulations.<sup>17</sup> By enabling retail commodity transactions involving U.S. retail customers, bZeroX was required to comply with Section 4(a) of the CEA, which provides that any relevant transaction must be “made on or subject to the rules of a board of trade that has been designated or registered by the CFTC as a contract market for the specific commodity.”<sup>18</sup> Because bZeroX was not registered as a DCM with the CFTC, the retail commodity transactions it facilitated through its platform constituted illegal, off-exchange transactions in violation of Section 4(a) of the CEA.

## **CFTC's New Proposal**

The CFTC's new proposal is part of a coordinated federal response to the Working Group Report's suggestions to build a formal legal framework for digital assets. The Working Group recommended that the CFTC provide guidance to DCMs regarding the listing of leveraged, margined, or financed spot retail commodity transactions on digital assets pursuant to CEA Section 2(c)(2)(D).<sup>19</sup>

This recommendation envisions digital commodity transactions taking place in compliance with the existing framework and occurring on DCMs as contemplated under Section 2(c)(2)(D) and Section 4(a). In implementing this recommendation, the CFTC and DCMs will need to consider how trading in spot crypto asset contracts will be supported on an exchange designed for derivatives trading, as well as the legal and practical considerations of applying DCM regulations to spot crypto asset trading on a DCM. Though there are some precedents of spot trading taking place on a DCM (e.g., in dairy products), this is a relatively limited and discrete market for *non-leveraged*

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<sup>17</sup> *In the Matter of bZeroX, LLC; Tom Bean; and Kyle Kistner*, Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 22-31 (Sept. 22, 2022). The bZx Protocol is comprised of a collection of smart contracts on the Ethereum blockchain that facilitate margined and leveraged retail commodity transactions. The protocol allows any customer with an Ethereum wallet, including retail customers, to post margin to open leveraged positions whose value was determined by the price difference between two virtual currencies from the time the position was opened to the time it was closed. To execute a transaction on the bZx Protocol, a trader posts collateral in the form of ether (“ETH”) to a smart contract to open a leveraged position based on the trader's expectation regarding the value of ETH to another virtual currency. The smart contract would then borrow the other virtual currency from a bZx Protocol liquidity pool, whose assets were supplied by liquidity providers and received interest-bearing tokens in exchange. The smart contract would exchange the borrowed currency for ETH on a separate decentralized exchange and issue the trader a new token representing the position. Positions on the bZx Protocol automatically rolled over every 28 days and could be liquidated at any time. The primary benefit that bZeroX touted was that the decentralized nature of the bZx Protocol allowed customers to engage in these transactions without a third-party intermediary taking custody of their assets. The bZeroX website allowed users to transfer assets and open positions on the bZx Protocol and bZeroX collected transaction fees from users, including origination fees and trading fees.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> Working Group Report at 52.

trading in tangible commodities, and the DCM rules make clear that this activity is not regulated by the CFTC. The regulator and the exchanges are thus in relatively uncharted territory.

Part 40 of the CFTC Regulations sets forth rules and procedures applicable across registered entities, including DCMs. These would include, among others, rules regarding product self-certifications and requests for product approval, which would need to be considered in the context of listing of leveraged, margined, or financed spot products.

### ***The CFTC's Requests for Comment and Implications***

To aid in navigating this terrain, the CFTC seeks public input and feedback **by August 18, 2025** on listing and regulating spot crypto asset contracts traded on DCMs within the existing CFTC framework, explicitly Section 2(c)(2)(D) of the CEA and Part 40 of the CFTC regulations.<sup>20</sup>

Additionally, the CFTC is seeking public input on the implications of this Spot Trading Crypto Initiative under the securities laws. The SEC's Project Crypto is progressing in parallel with the CFTC's Crypto Sprint, having already published a number of statements, and is expected to provide further guidance on various digital asset regulatory matters and revised criteria for determining whether a digital asset is a security, a commodity, or otherwise.

We will continue to keep our clients apprised and informed as further developments are released. If you have any questions regarding this client alert or would like to submit input to the CFTC regarding this crypto spot trading Initiative, please contact one of the authors, any member of our CFTC team listed below, or the Willkie attorney with whom you regularly work.

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<sup>20</sup> Spot Trading Crypto Initiative.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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