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Blockchain Policy Update: LabCFTC Releases “A CFTC Primer on Virtual Currencies”

The Commodity Futures Trade Commission’s (CFTC’s) recent publication of “A CFTC Primer on Virtual Currencies” indicates that cryptocurrency will remain in the CFTC’s crosshairs for the foreseeable future. Though the CFTC primer begins with a caveat—content therein should not be construed as an “official policy or position”—the document is valuable insofar as it defines virtual currencies (VCs), outlines their utilities and their potential for malfeasance. At the same time, the CFTC primer provides insight into the commission’s current thinking on cryptocurrency and may therefore portend the kind of regulatory measures and other exigencies VC developers and their counsel need to prepare for.

Introduced as an educational tool, “A CFTC Primer on Virtual Currencies” is indeed an apt starting point for companies interested in learning the rudiments of Bitcoin and its kin as they begin to explore investments in initial coin offerings (ICOs). Much of what’s contained content-wise is information that can be found elsewhere on the web, including a number of our previous [publications](#) on the relationship between [blockchain technology](#) and the [ICO process](#). But for those who don’t have the time to read the CFTC primer in its entirety, we’ve created an overview of the highlights.

Perhaps the most curious passage in “the Primer” is a reference to the Securities and Exchange Commission’s [“DAO Report.”](#) According to the CFTC, there are no “inconsistencies” between its gloss on virtual currencies and that of the SEC. However, the CFTC would seem to imply that those tokens which belie the strictures of the Howey Test (and are therefore *not* securities) may still be commodities and thereby subject to CFTC regulation. Like the SEC, the CFTC is adopting a “facts and circumstances” test—to wit, each new token will be scrutinized to determine whether it qualifies as a commodity *or* a security.

Interestingly, the SEC is itself actively pursuing instances of fraud stemming from ICOs. This was especially evident in the charges recently brought against [Maksim Zaslavskiy](#), who initiated ICOs for a real estate and diamonds club membership. Both ventures turned out to be smoke and mirrors, making it patently obvious Zaslavskiy committed fraud, allegedly. In fact, when one removes the patina of cryptocurrency, the case is relatively straightforward—just another advanced fee scheme with a pyramidal twist. Even so, while this crackdown on fraudulence has been widely embraced, attorneys for clients in the VC industry have been clamoring for clear guidance; in particular, a framework for determining what constitutes a digital token as opposed to a security. In that respect, the CFTC primer adds relatively little to the conversation.

The CFTC primer, unlike the more draconian actions taken by China and South Korea, appears in line with the SEC's gradualist approach to regulations. For now, it looks as though any token offering will be subjected to a two-tier analysis before determining whether the digital offering is neither a security nor a commodity. On balance, the CFTC primer is at least tacit consent on the CFTC's part to permit innovation to continue, perhaps even a harbinger of the its intention to work productively with the industry in the days ahead. If so, that's good news.

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