Anchin Alert

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CFTC Suggests It Has Broader Jurisdiction Over Virtual Currencies, Including ICOs

The Commodity Futures Trading Commission (CFTC) recently published a primer to educate the public on virtual currencies. In the explanation, the CFTC outlined its position regarding its role regulating virtual currencies. The primer suggests that the CFTC sees itself having jurisdiction over certain virtual currency transactions, including Initial Coin Offerings (ICOs).

The Role of the CFTC

The CFTC's role is defined as protecting the investing public from fraud, manipulation and abusive practices regarding commodities and their futures, options, and derivatives and other products that are regulated by the Commodity Exchange Act (CEA). While the common definition of commodities includes physical goods like agricultural products and natural resources, the CFTC also believes the CEA includes currencies and interest rates in its delineation. Under this broad description, the CFTC believes it derives its authority.

Overseeing Virtual Currencies

In 2015, the CFTC ruled that Bitcoin and other virtual currencies meet the definition of commodities and therefore fall under its jurisdiction. The primer reminds readers about this finding and explains that cryptocurrencies will fall under the CFTC's jurisdiction when they are used in futures, options or derivatives contracts.

Generally, the CFTC will not oversee spot or cash market transactions of digital currencies that do not utilize margin, leverage, or financing. However, it will get involved in interstate spot/cash market transactions where fraud or manipulation occur - potentially including ICOs,. The primer placed particular emphasis on the registration status with the CFTC of the platforms or persons engaged in such transactions; indicating that a lack of registration would certainly pique the Commission's interest.

Legitimizing ICOs

Another notable aspect of the primer is that it the CFTC indicated their agreement that the SEC has primary responsibility for the regulation of ICOs (see the SEC's DAO report) it retains jurisdiction over any related derivative trading activity.

For now, it seems the CFTC will only pursue ICOs where fraud or manipulation occur in the commodities markets. An ICO, on its own, would not lead to CFTC action.

As this market continues to expand, more clarification is expected from the CFTC and other regulatory agencies as they further define their roles.

For more information, contact your Anchin relationship partner, Jeffrey I. Rosenthal, or Peter L. Berlant of Anchin's Financial Services Practice at 212.840.3456.

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