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**Via Electronic Submission and Email**

Mr. Christopher J. Kirkpatrick  
Secretary of the Commission  
U.S. Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

**Re: Retail Commodity Transactions Involving Virtual Currency (RIN 3038-AE62)**

Dear Mr. Kirkpatrick:

The Futures Industry Association (“FIA”) appreciates the opportunity to comment on the Commodity Futures Trading Commission’s (“Commission”) proposed interpretation of “actual” delivery of virtual currency for purposes of the exception of certain transactions from the regulation of retail commodity transactions under Section 2(c)(2)(D) of the Commodity Exchange Act, as amended (“CEA”).<sup>1</sup> FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA’s membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry.

FIA understands that rapid developments in the virtual currency markets, particularly the retail virtual currency market, have created challenges for the Commission and other federal and state regulators. FIA shares the Commission’s interest in fair and transparent markets that are free from fraud and manipulation. However, FIA recommends that the Commission proceed with caution in interpreting the “actual delivery” requirement of CEA Section 2(c)(2)(D)(ii)(III)(aa) in the context of a new, digital and still-developing market that requires thoughtful application of traditional legal concepts to new technology. FIA’s comments are designed to help the Commission ensure that its interpretation does not unnecessarily inhibit innovation in new cash commodity markets, and is not inconsistent with delivery practices in other cash commodity markets.

**I. The Interpretation Should be Sufficiently Flexible to Enable Market-Enhancing Innovation in the Virtual Currency Markets**

In its Proposed Interpretation, the Commission announced that it “does not intend to impede market-enhancing innovation or otherwise harm the evolving virtual currency marketplace with this interpretation.”<sup>2</sup> It also emphasized that its goal in proposing the interpretation is to “support further

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<sup>1</sup> See *Retail Commodity Transactions Involving Virtual Currency*, 82 Fed. Reg. 60335 (Dec. 20, 2017) (hereinafter “**Proposed Interpretation**”).

<sup>2</sup> Proposed Interpretation at 60339.

market-enhancing innovation.”<sup>3</sup> FIA’s comments below align with, and are meant to promote, this overarching goal.

**A. The Commission should allow the virtual currency market to develop a spot market rather than imposing its own length of time for the spot market.**

FIA recommends that the Commission allow the virtual currency markets to continue to develop before determining whether it would be appropriate to seek an actual delivery period that is shorter than the maximum 28-day period specified in CEA Section 2(c)(2)(D)(ii)(III)(aa).<sup>4</sup> As the Commission is aware, the period between the trade date and the delivery date in order for a transaction to be considered a spot transaction varies across commodities and may even vary within a commodity.<sup>5</sup> It takes time for the length of the spot period in each asset class to develop.<sup>6</sup> The Commission should take the same approach here and allow evolving market practice to determine the spot period in the virtual currency markets.

Although current market practice may provide for delivery in fewer than 28 days, this nascent market may change over time. As a result, shortening the 28-day period for spot delivery of virtual currency may be premature and unintentionally stifle innovation. Rather than engaging Congress to change the 28-day delivery period for virtual currency, the Commission should allow developing practices and conventions in the virtual currency markets to set the parameters of the spot market.

**B. The Commission should avoid overly prescriptive mechanisms for effecting actual delivery.**

Question 2 of the Proposed Interpretation asks whether the Commission should consider additional examples to demonstrate actual delivery. Given the current stage of development in the virtual currency market, the Commission should host a roundtable in the near-future to gain a more fulsome understanding of the various delivery mechanisms available in this market. Information obtained through a roundtable would help the Commission to develop a standard for actual delivery that does not unintentionally omit or restrict innovative and effective delivery mechanisms. Furthermore, the Commission should consider the fact that, as is true in other commodity markets, virtual currency may provide for a variety of delivery mechanisms. The various delivery practices in other commodity markets should inform the development of a principles-based standard that is sufficiently flexible to accommodate alternative mechanisms for effectuating actual delivery of virtual currency.

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<sup>3</sup> *Id.*

<sup>4</sup> Proposed Interpretation, Question 1.

<sup>5</sup> *See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”*; *Mixed Swaps; Security Based Swap Agreement Recordkeeping*, 77 Fed. Reg. at 48256-57 (Aug. 13, 2012) (describing the spot market for foreign currency as settling within two days, but noting “that the settlement cycle for spot transactions exchanging Canadian dollars for U.S. dollars (or vice versa) is T+1”); *Report on Exchanges of Futures for Physicals*, 51, 65, 124-147 (1987) (the market practices in the cash markets for sugar, crude oil and foreign currency, call for delivery within 75, 30 and 2 days, respectively); and *Bank of Brussels Lambert S.A. v. Intermedals Corp.*, 779 F. Supp. 741, 748 (S.D.N.Y. 1991) (referring to “the conventions of foreign currency trading” to determine what constitutes the “current market.”).

<sup>6</sup> *See, e.g., Regulation of Noncompetitive Transactions Executed on or Subject to the Rules of a Contract Market*, 63 Fed. Reg. 3708, 3712 (Jan. 26, 1998) (noting the importance of “prevailing cash market practice” in determining the delivery parameters of cash market transactions).

The primary focus in determining whether and when actual delivery of virtual currency has occurred should be on the process for, and timing of, title transfer. Once a retail customer holds title to virtual currency, the retail customer has received delivery and should be able to exercise control over the virtual currency. As FIA comments below, the CFTC should not limit how market participants can transfer title to virtual currency, but rather should allow the market to develop various title transfer mechanisms.<sup>7</sup>

In addition, a retail customer who holds title should be allowed to grant control over the virtual currency to a third-party custodian. And, as is the case in other retail markets, a customer holding title should be able to grant liens to third parties. The fact that title to virtual currency is subject to a lien does not mean that the customer does not have title to the commodity. A customer that holds virtual currency subject to a lien is in a similar position to the purchaser of an automobile who has title subject to a loan provided by a financial institution. In both scenarios, the existence of a lien does not alter the customer's title to, or possession of, either the virtual currency or automobile.

Finally, the Commission should expressly limit the scope of its interpretation of actual delivery to virtual currency so that it does not unintentionally affect or limit accepted delivery practices in other commodity markets. As the Commission is aware, virtual currency is different from oil, grain, gold, and other physical commodities. Therefore, the Commission's interpretation of what constitutes actual delivery in virtual currency should not limit the means for effectuating actual delivery in a different commodity.

**C. The Commission should not unduly restrict legitimate transactions involving affiliated entities.**

The Commission should ensure that its interpretation of actual delivery does not adversely affect market liquidity, market-making activity, and legitimate transactions involving affiliated entities.<sup>8</sup> Question 3 asks whether the Commission should restrict the ability of the offeror of virtual currency to take the opposite side of a customer transaction either directly or through an affiliated liquidity provider or market maker. Question 5 similarly asks if the Commission should prohibit a depository from being owned or operated by the offeror of virtual currency. FIA believes that these potential restrictions are unnecessary because an offeror's affiliation with a liquidity provider, market-maker or depository has no impact on whether actual delivery occurs. For example, the fact that a depository is affiliated with the offeror of virtual currency does not alter whether the purchaser has title to and control over the virtual currency. Control of the currency would be governed by the contract between the customer and the depository as it is in other commodity markets. Instead of a prohibition on transactions between affiliates of offerors and customer-purchasers of virtual currency, the Commission's analysis should focus on whether the purchaser has title to and control over the virtual currency.

**D. The Commission needs more information before making an informed decision about whether to consider an exemption under CEA Section 4(c).**

In response to question 4 of the Proposed Interpretation, FIA believes the Commission should continue to collect information regarding the virtual currency markets before deciding whether to issue one or more exemptions under Section 4(c) of the CEA from the exchange-trading and registration requirements applicable to certain retail virtual currency transactions.

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<sup>7</sup> See Section I.H below.

<sup>8</sup> *Proposed Interpretation*, Question 3.

**E. The Commission should not impose a rigid definition, or require registration, of virtual currency depositories.**

The Commission should not develop a specific definition or registration requirement for depositories of virtual currency.<sup>9</sup> Instead, the Commission should continue, as it does in other cash commodity markets, to allow the relationship between a customer and a depository to be governed by the contract between the parties.<sup>10</sup> FIA is not aware of any reason to distinguish between the regulatory treatment of depositories of virtual currency and depositories in other markets. Consequently, the Commission should not create a separate regulatory regime for depositories of virtual currency. Even if the Commission believes that it should treat virtual currency depositories differently from depositories in other commodities, it should collect more information about current and potential virtual currency depositories before making a determination regarding the appropriate regulatory regime.

**F. The Commission should not require “possession” of a private key in order to demonstrate “full control” of the virtual currency.**

The actual delivery requirement should not require that a purchaser have possession of a private key to demonstrate that the purchaser has full control of the virtual currency.<sup>11</sup> Any requirement that a market participant possess a private key to demonstrate actual delivery would impose an artificial restraint on the market that could stifle innovation. Possession of a private key by itself does not have a bearing on title to virtual currency, so possession of a private key should not impact whether actual delivery occurs. Furthermore, the concept of a “private key” pertains to the current virtual currency market and may not be relevant in the future. Similar to the Commission’s recently updated recordkeeping requirements in Rule 1.31, the interpretation should be technology-neutral and avoid language that is predicated or relies heavily on current technology (*e.g.*, “private key” or “wallet”).<sup>12</sup>

**G. The Commission should not restrict the ability of market participants to grant liens on any asset to which they hold title.**

The Proposed Interpretation provides that actual delivery requires that “no liens [...] resulting from the use of margin, leverage, or financing used to obtain the entire quantity of the commodity purchased will continue forward at the expiration of 28 days from the date of the transaction.”<sup>13</sup> FIA recommends that the Commission eliminate the restriction on granting liens because it is not relevant to whether actual delivery occurs. The granting of liens is a common practice in the cash commodity and retail markets (*e.g.*, auto loans). A lien protects a lender against a default by a borrower; it does not restrict ownership absent a default.

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<sup>9</sup> *Proposed Interpretation*, Question 5.

<sup>10</sup> As noted above in Section I.C above, the Commission should not limit the ability for the depository to be affiliated with the seller or broker.

<sup>11</sup> *Proposed Interpretation*, Question 6.

<sup>12</sup> *See Recordkeeping*, 82 Fed. Reg. 24479 (May 30, 2017).

<sup>13</sup> *Proposed Interpretation* at 60340; and Question 7.

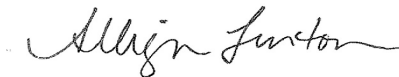
**H. The Commission should promote flexibility regarding evidence of title for actual delivery.**

FIA recommends that title to virtual currency be addressed in the transaction documentation between the parties, *i.e.*, the mechanism(s) employed through the virtual currency network. In response to question 8, FIA recommends that the Commission not develop a prescriptive regime concerning what constitutes good title to virtual currency for purposes of actual delivery. As the Commission is aware, the evidence of title transfer varies from one market to another. The energy markets, for example, do not use warehouse receipts like those used in the agricultural and metals markets. Therefore, the Commission should allow the transaction documentation within the virtual currency markets to determine title to the virtual currency.

**II. Conclusion**

FIA recommends that the Commission proceed with caution in interpreting the CEA's "actual delivery" requirement in the context of a nascent and developing virtual currency market. Any interpretation adopted by the Commission should not inhibit innovation in new cash commodity markets or call into question customary practices in other cash commodity markets. FIA appreciates the opportunity to comment on the Proposed Interpretation. Please contact Allison Lurton, Senior Vice President and General Counsel, at 202-466-5460, if you have any questions about this letter.

Respectfully submitted,



Allison Lurton  
Senior Vice President and General Counsel

cc: Honorable J. Christopher Giancarlo, Chairman  
Honorable Brian D. Quintenz, Commissioner  
Honorable Rostin Behnam, Commissioner  
Amir Zaidi, Director, Division of Market Oversight  
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