




U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of the
General Counsel

MEMORANDUM

TO: ALL STAFF

FROM: Daniel J. Davis, General Counsel 

DATE: February 5, 2018

SUBJECT: Guidance Regarding Ethics Laws and Regulations Related to Employee Holdings and Transactions in Cryptocurrencies

CFTC Ethics has received numerous inquiries regarding the holding of or transacting in cryptocurrencies, or virtual currencies, such as Bitcoin. The following guidance discusses the rules related to holding and transacting in cryptocurrencies. The CFTC has determined that cryptocurrencies, such as Bitcoin, are commodities under the Commodity Exchange Act (“CEA”).¹ Because cryptocurrencies such as Bitcoin are commodities, they are not prohibited interests.² However, the ethics rules and regulations related to CFTC employee transactions in commodities will apply to your holdings and transactions in cryptocurrencies. ***Please note that ethics guidance varies from person to person based on various facts and circumstances. The fact that your colleague has been cleared to engage in virtual currency transactions does not mean that you may do so as well.***

This guidance is provided to help you understand your ethical obligations and assist you in complying with the requirements of the CEA, 7 U.S.C. 13(c) and (d)(1), the CFTC’s supplemental ethics regulations at 5 C.F.R. 5101 and 17 C.F.R. 140.735, and other Federal conflicts of interest statutes. This guidance is not a substitute for obtaining ethics advice. Please seek ethics advice when you have any questions about these types of transactions or any other ethics issue.

¹ For more information about cryptocurrencies and Bitcoin, see LabCFTC’s “[A CFTC Primer on Virtual Currencies](http://www.cftc.gov/Bitcoin/index.htm)” or visit <http://www.cftc.gov/Bitcoin/index.htm>.

² Cryptocurrency, and commodities in general, do not fall within the definition of a prohibited interest as described by 17 C.F.R. 140.735-2a(b).

As a general matter, you should keep the following in mind when considering owning or engaging in transactions in cryptocurrencies:

- If your knowledge of cryptocurrencies is gained from the CFTC and your holdings or transactions of virtual currencies would lead a reasonable person to question your conduct, you may run afoul of the agency's ethical standards.
- You cannot own or transact in derivatives products (i.e., futures or swaps) regulated by the Commission that are based on cryptocurrencies (or any other commodity). For example, you cannot own or transact in Bitcoin futures products.
- You cannot purchase cryptocurrencies, such as Bitcoin, on margin.
- You cannot transact in cryptocurrencies if you have nonpublic information regarding cryptocurrencies. Thus, if your job at the CFTC brings you in contact with information regarding enforcement actions regarding cryptocurrencies, surveillance of cryptocurrencies, or policy decisions regarding cryptocurrencies, you most likely have nonpublic information regarding cryptocurrencies and cannot trade them.
- Simply holding cryptocurrency or other commodities may not create an 18 U.S.C. 208 conflict of interest for you. However, if you participate personally and substantially in a particular matter that will directly or predictably affect your financial interests or your imputed financial interests (i.e., the financial interests or your spouse, dependents, and others, including certain business relationships), and you believe that your financial interest in the cryptocurrency (or the interest of your spouse, minor child, or other interested person) will also be affected, seek ethics advice before participating in the matter.

Endeavor to avoid any actions creating the appearance that you are violating the law.

Cryptocurrencies and their regulatory environment are evolving at a rapid pace and gaining significant attention from regulated entities and the public at large. In this environment, the situation is ripe for the public to question the personal ethics of employees engaging in cryptocurrency transactions. Please keep in mind that you must endeavor to avoid any actions creating the appearance that you are violating the law or government and Commission ethical standards. *See* 5 C.F.R. 2635.101(b)(14). Even if after reviewing this guidance, you think that you can transact in cryptocurrency without violating any rules, ask yourself if a reasonable person given all of the facts would question your ethics. If so, then you should not engage in transactions for cryptocurrency. However, if you decide to engage in transactions for cryptocurrencies, we strongly encourage you to first seek ethics advice.

Even though a commodity, such as cryptocurrency, is not a prohibited interest, the transaction you engage in to acquire or sell the commodity may be prohibited.

Before engaging in transactions related to any commodity, including cryptocurrency, you must be certain that the transaction will not violate ethics laws and regulations specific to CFTC employees. For example, you are prohibited from engaging in commodity futures transactions or

swaps. You are also prohibited from engaging in transactions for commodity futures or even the commodity itself if you are using nonpublic information for your own benefit or the benefit of another. Because you need to be aware of all of the restrictions, the guidance below reviews the prohibitions in more detail.

The CEA at 7 U.S.C. 13(c), which prohibits certain transactions by Commissioners and Commission employees, section 13(d)(1), which prohibits the use of nonpublic information in certain ways, and 17 C.F.R. 140.735-2, which implements these CEA sections and imposes additional restrictions are provided in the attached appendix.

While there is no restriction on buying or selling commodities including cryptocurrency per se, there is a blanket prohibition against transacting in futures and swaps. As the environment in which cryptocurrency and cryptocurrency futures markets is rapidly changing, regulatory requirements may change as well. Thus, a cryptocurrency transaction that would not be considered a commodity futures contract today may become one tomorrow. For example, if the CFTC or an exchange issues a regulation or rule shortening the settlement time period for cryptocurrency futures contracts, you would need to be aware of this rule change to ensure that your cryptocurrency purchase settlement dates are less than the newly established standard in order to avoid engaging in futures contract transactions. As the rules in cryptocurrency futures contracts may change rapidly, you must exercise diligence and know the current rules before engaging in transactions for cryptocurrency.

You will also need to avoid purchasing cryptocurrency on margin. As prescribed in 7 U.S.C. 13(c), you are prohibited from entering into contracts for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract. For example, if you give a company \$100 to place into an account in exchange for \$100 worth of cryptocurrency, and it also allows you to borrow more cryptocurrency to purchase even more of cryptocurrency, essentially betting that the value of cryptocurrency will increase, you have engaged in a prohibited transaction. You cannot purchase cryptocurrency on margin.

Additionally, before purchasing cryptocurrency as a commodity, ask yourself whether you learned nonpublic information about the cryptocurrency because of your CFTC official position. Nonpublic information includes information that you gained through your CFTC employment and that you know or reasonably should know has not been made available to the general public. It includes information that is routinely exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, or exempt from disclosure by other statutes, Executive Order, or by regulation. *See* 5 C.F.R. 2635.703. Nonpublic information includes classified information as defined in 17 C.F.R. 140.21, and commercial confidential information prohibited from disclosure by the Trade Secrets Act, 18 U.S.C. 1905. It can also include economic or official information that has not been authorized for release. *See* 17 C.F.R. 140.735-5. If you have nonpublic

information about the cryptocurrency, even if you acquired that information by overhearing colleagues discussing nonpublic information near the water cooler, you are prohibited from transacting in the cryptocurrency.

Even if transacting in cryptocurrency or other commodities will not be a prohibited transaction for you, you must ensure that you will not violate the federal conflict of interest statute, 18 U.S.C. 208.

Under the conflict of interest law, 18 U.S.C. 208, as implemented by the Office of Government Ethics (“OGE”) at 5 C.F.R. Part 2640.103, it can be illegal for you, a Federal employee, to participate personally and substantially in a particular matter that will directly and predictably affect your financial interests or your imputed financial interests.

Financial interests imputed to you include the financial interests of your spouse, minor child, general partners from outside business activities, and organizations or entities in which you are an officer, director, trustee, general partner, or employee. Imputed financial interests also include entities with which you are seeking employment or have an arrangement concerning prospective employment. The financial interest itself can arise from ownership in company stocks, corporate or municipal bonds, mutual funds, options, futures, exchange-traded funds, unit investment trusts, limited partnership interests, pension plans from former employers, spousal employment, outside activities, or agreements for future payments from a non-Federal employer or future employment arrangements.

A particular matter includes matters involving specific parties, such as enforcement actions, litigation, investigations or examinations, rulemakings that affect specific parties in an industry, or other matters where the United States is on one side of the matter, and a third party is on the other side. It also includes particular matters of general applicability, such as certain narrowly focused rulemakings, where the particular matter is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties.

To “participate personally and substantially” means to participate directly and includes the direct and active supervision of a subordinate in the matter through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other similar activity that is more than knowledge of or perfunctory involvement in the matter.

Limited exceptions apply to the conflict of interest rules. If you believe holding cryptocurrency and participating in a particular matter may cause you to have a conflict of interest, immediately recuse yourself and seek ethics advice.

APPENDIX

7 U.S.C. 13(c) "Transactions by Commissioners and Commission Employees Prohibited"

It shall be a *felony* punishable by a fine of not more than \$500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any Commissioner of the Commission or any employee or agent thereof, to participate, directly or indirectly,

- in any transaction in commodity futures, or
- any transaction of the character of or which is commonly known to the trade as an
 - Option
 - Privilege
 - Indemnity
 - Bid
 - Offer
 - Put
 - Call
 - Advance guaranty
 - Decline Guaranty
- or any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as
 - a margin account
 - margin contract
 - leverage account
 - leverage contract
 - or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract
 - or is marketed or managed in substantially the same manner as such a standardized contract
- or for any such person to participate, directly or indirectly, in any investment transaction
 - in an actual commodity if **nonpublic information** is used in the investment transaction
 - if the investment transaction is prohibited by rule or regulation of the Commission,

or if the investment transaction is effected by means of any instrument regulated by the Commission.
 - The foregoing prohibitions shall not apply to any transaction or class of transactions that the Commission, by rule or regulation, has determined would not be contrary to the public interest or otherwise inconsistent with the purposes of this subsection.

7 U.S.C. 13(d)(1) "Use of Information by Commissioners and Commission Employees Prohibited"

It shall be a *felony* punishable by a fine of not more than \$500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution—

- for any Commissioner of the Commission or any employee or agent thereof who, by virtue of his employment or position, **acquires information which may affect or tend to affect the price of any commodity futures or commodity and which information has not been made public**
- to impart such information with intent to assist another person,
- directly or indirectly, to participate in
 - any transaction in commodity futures,
 - any transaction in an actual commodity, or in
 - any transaction of the character of or which is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or in
 - any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under
 - any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract.

17 C.F.R. 140.735-2, "Prohibited transactions"

- b. Prohibitions. Except as otherwise provided in this subsection, no member or employee of the Commission shall:
1. Participate, directly or indirectly, in any transaction:
 - i. In swaps;
 - ii. In commodity futures;
 - iii. In retail forex transactions, as that term is defined in § 5.1(m) of this chapter;
 - iv. Involving any commodity that is of the character of or which is commonly known to the trade as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, or decline guaranty; or
 - v. For the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract;
 2. Effect any purchase or sale of a commodity option, futures contract, or swap involving a security or group of securities;
 3. Sell a security which he or she does not own or consummate a sale by the delivery of a security borrowed by or for his or her account;
 4. Participate, directly or indirectly, in any investment transaction in an actual commodity if:
 - i. **Nonpublic information** is used in the investment transaction;
 - ii. It is prohibited by rule or regulation of the Commission; or
 - iii. It is effected by means of any instrument regulated by the Commission and is not otherwise permitted by an exception under this section;
 5. Purchase or sell any securities of a company which, to his or her knowledge, is involved in any:
 - i. Pending investigation by the Commission;
 - ii. Proceeding before the Commission or to which the Commission is a party;
 - iii. Other matter under consideration by the Commission that could have a direct and predictable effect upon the company; or
 6. Recommend or suggest to another person any transaction in which the member or employee is not permitted to participate in any circumstance where the member or employee could reasonably expect to benefit or where the member or employee has or may have control or substantial influence over such person.