CLIENT ALERTS & INSIGHTS

Regulatory Reset: CFTC Pulls Back on Guidance for 'Actual Delivery' of Digital Assets

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Key Takeaways

- The CFTC has withdrawn its 2020 guidance on the meaning of "actual delivery" for digital asset transactions, citing the need to reassess the guidance in light of evolving technology, market practices and policy objectives.
- This move creates short-term uncertainty for digital asset market participants, as there is currently no clear federal standard for what constitutes "actual delivery" in retail crypto transactions. Businesses face increased risk of regulatory ambiguity and potential enforcement gaps until new guidance or legislation is issued.
- Firms involved in retail digital asset transactions should closely monitor regulatory developments and be prepared to adapt compliance practices as new standards emerge. Engaging with policymakers and industry groups may help shape future guidance and ensure business models remain aligned with evolving regulatory expectations.

On December 10, 2025, the CFTC withdrew interpretive guidance concerning the term "actual delivery" as set forth in the Commodity Exchange Act ("CEA"), as that term relates to digital assets. [1] In withdrawing this guidance, the CFTC recognized that evolving market practices, technological innovations and broader policy objectives are no longer aligned with the outdated guidance. As innovation in financial technology continues and the market for digital assets grows and diversifies, the CFTC will need to grapple with how "actual delivery" should be interpreted and what standards market participants should expect in the absence of updated guidance.

Overview of the "Actual Delivery" Exception

The CFTC has long held that certain speculative commodity transactions involving leverage or margin are futures contracts subject to CFTC oversight.[2] But certain transactions are excepted from regulation by the CEA, including a contract of sale that "results in *actual delivery* within 28 days or such other longer period as the Commission may determine by rule or regulation[.]"[3]

For years, the CFTC has wrestled with interpretation of the term "actual delivery," and has twice offered interpretive guidance on its meaning. In 2013, the CFTC issued a final interpretation of "actual delivery" in the context of margined, financed or leveraged retail commodity transactions generally ("2013 Guidance"). In 2020, the CFTC adopted the since-withdrawn interpretive guidance ("2020 Guidance"), which was issued "to inform the public of the Commission's views when determining whether actual delivery has occurred" in the retail virtual currency transaction context.

Under the 2020 Guidance, "actual delivery" occurs in retail virtual currency transactions when: (1) a customer secures: (i) possession *and* control of the entire quantity of the commodity, whether it was purchased on margin, or using leverage, or any other financing arrangement, and (ii) the ability to use the entire quantity of the commodity freely in commerce (away from any particular execution venue) no later than 28 days from the date of the transaction and at all times thereafter; and (2) the offeror and counterparty seller (including any of their respective affiliates or other persons acting in concert with the offeror or counterparty seller on a similar basis) do not retain *any* interest in, legal right to or control over any of the commodity purchased on margin, leverage or other financing arrangement at the expiration of 28 days from the date of the transaction.

In the lead up to issuance of the 2020 Guidance, most public comments showed enthusiasm for the CFTC's "do no harm approach," in trying to ensure that its guidance would not stifle innovation. However, comments from ConsenSys[4] and Coinbase[5] representatives, among others,[6] indicated dissatisfaction with the initial proposal in that it failed to fully appreciate current popular security measures and the size of the market, and that it was not equipped to deal with the rapidly evolving technology. But, after the 2020 Guidance was published, there was very little discussion of the new "actual delivery" requirements by those in the crypto space and even within academia. The guidance mostly mirrored existing case law, so there was little new to discuss.

Despite minimal public discourse on the 2020 Guidance following its issuance, changes in the industry-including developments in technology and the political environment-have caused some to question its continued relevance. While the 2020 Guidance followed a "do no harm" approach, it was not as flexible as anticipated, leading to recent calls for reversal or revision.[7]

The CFTC justified its withdrawal of the 2020 Guidance as a necessary step to reassess relevance and alignment with current practices and policy objectives. The CFTC concluded that "the [2020 Guidance] is likely outdated and thus provides limited value to market participants and, further, may conflict with the ongoing work of the Commission necessary to implement the President's Working Group's recommendations."[8]

Looking Ahead

Critically, the CFTC withdrew the 2020 Guidance without replacing it. The President's Working Group report recommended that the CFTC should consider using its authority under the CEA to "[p]rovide guidance as to how digital assets may be considered commodities under Section 1a(9) of the CEA. For example, the agency can consider expanding upon prior guidance on 'actual delivery' of virtual assets."[9] But the report provided no detail about potential expansions, nor did it mention the withdrawal of the 2020 Guidance that ultimately transpired. It remains to be seen whether the CFTC will act to adopt novel interpretive guidance or remain silent on the issue.

One plausible explanation for the CFTC's decision to withdraw the 2020 Guidance is that doing so clears the path for the comprehensive legislative agenda being pursued by Congress.[10] Withdrawing the 2020 Guidance reduces the likelihood that the CFTC's interpretation of "actual delivery" will become entrenched in a way that could complicate or conflict with a future statutory framework. This rationale is consistent with the Trump Administration's commitment to fostering a regulatory climate that encourages participation in the U.S. digital asset sector, though it could lead to uncertainty in the short-term. Still, if the Trump Administration continues to dial back enforcement efforts,[11] the uncertainty may be inconsequential.

Regardless, it appears that new legislation would be in accordance with the CFTC's responses to some requested changes noted in the 2020 Guidance.[12] It would also provide the opportunity for standard definitions for all regulations, which was an issue that commenters flagged given the different definitions used by courts and the CFTC.

In any event, industry participants should be prepared for a similar "do no harm" approach that hopefully provides better standards that grow with the industry.

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[1] 7 U.S.C. § 1 et. Seq.; Acting Chairman Pham Announces Withdrawal of Outdated Digital Assets Guidance | CFTC.

[2] *See In re Stovall,* CFTC Docket No. 75-7 [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) paragraph 20,941, at 23,777 (CFTC Dec. 6, 1979) (applying traditional elements of a futures contract to a purported cash transaction).

[3] 7 U.S.C. § 2(c)(2)D(ii)(III)(aa) (emphasis added).

[4] https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61601&SearchText=.

[5] https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61600&SearchText=.

[6] Comments for the proposal can be found here: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2851.

[7] Peter Y. Malyshev, *Key Areas of Focus for the CFTC under the Second Trump* Administration, 45 No. 5 Futures & Derivatives L. Rep. NL 1 (2025).

[8] *See* President's Working Group report on Strengthening American Leadership in Digital Financial Technology at 141, available at: https://www.whitehouse.gov/crypto/.

[9] *Id.* at 142.

[10] Congress passed the Guiding and Establishing National Innovation for U.S. Stablecoins Act ("GENIUS Act") in July, the first comprehensive U.S. federal law regulating stablecoins. The House passed Digital Asset Market Clarity Act ("CLARITY Act") which would regulate the broader digital asset market, in July. And the Senate Banking and Agriculture Committees have released discussion drafts of parallel legislation.

[11] *See* the "Enforcement Updates" section from our Summer 2025 Roundup.

[12] https://www.cftc.gov/sites/default/files/2020/06/2020-11827a.pdf. (for example, the CFTC did not try to shorten the delivery window despite public due to its belief in a lack of authority to do so without Congressional approval and suggested that the use of the term "actual" within the CEA limits its ability to change the delivery rules).