Published on *The National Law Review* https://natlawreview.com

CFTC Brings Enforcement Action against Digital Exchange and Natural Person Controller Suggesting Native Cryptoasset is a Commodity and Not a Security

Article By:

Gary De Waal

Daniel J. Davis

The Commodity Futures Trading Commission (CFTC) charged a group of companies and their natural person controller with operating an unlicensed futures brokerage company (i.e., a futures commission merchant ("FCM")); not complying with anti-money laundering requirements applicable to FCMs; and executing and confirming futures transactions on an unlicensed futures exchange. Additionally, the CFTC alleged that the defendants engaged in attempted manipulation, fraud and deception in connection with transactions in a native cryptocurrency created and utilized by the defendants. In doing so, the CFTC implied that a little-known digital asset constituted a commodity under the CFTC's jurisdiction, and not a security under the Securities and Exchange Commission's ("SEC") jurisdiction.

All these charges were contained in a CFTC complaint filed on September 30, 2022, in a federal district court in Florida.

In **CFTC v. Adam Todd, Digitex LLC** and two other affiliated companies (collectively, "Digitex") the CFTC claims that from approximately July 31, 2020 through at least May 2022, the defendants accepted customer funds and matched customer orders for bitcoin and ether on a leveraged basis through its proprietary trading platform. Moreover, to facilitate processing of margin requirements, and settlement of gains and losses, Digitex required utilization of DGTX, the native cryptocurrency of the trading platform. According to the CFTC, the defendants sold DGTX to the public directly, as well as listed DGTX on third-party trading platforms. In connection with all customer transactions, Digitex was the counterparty.

The CFTC claims that, through these activities the defendants acted as an FCM without required registration and failed to comply with the anti-money laundering requirements of an FCM. The CFTC also charged that defendants attempted to manipulate and engaged in fraud and deceit when they engaged in certain transactions in over-the-counter markets as well as on third-party trading platforms, that were intended to inflate the price of DGTX to enable the defendants to benefit from artificially higher prices. The CFTC claimed that Mr. Todd possessed "inside information concerning the supply of DGTX and ability to impact the price of DGTX."

Finally, the CFTC claimed that in executing leveraged margin transactions (which applicable law regards as futures transactions), the defendants violated either of two provisions of applicable law: (1) engaging in and confirming transactions on a market that was not licensed by the CFTC as a contract market (Commodity Exchange Act ("CEA") Section 4(a)) or (2) permitting direct access to its trading platform that was not registered with the CFTC as a foreign board of trade (CEA Section 4(b).

In its complaint, the CFTC endeavors to support its jurisdiction by implying that DGTX tokens were not security tokens (and thus not under the jurisdiction of the SEC), noting that "DGTX tokens did not confer any ownership rights in [Digitex] and did not permit the token holders to participant in any matters concerning the corporate governance of [Digitex]." The CFTC asserted that "DGTX was a …digital representation of value that functioned as a medium of exchange …and therefore was a commodity…"

> "DGTX was a digital asset, a digital representation of value that functioned as a medium of exchange, and also traded on web-based trading platforms that were accessible to market participants in the United States, including Todd, and therefore was a commodity in interstate commerce." CFTC Complaint, par. 37.

https://www.cftc.gov/media/7826/enfdigitexcomplaint093022/download

National Law Review, Volume XII, Number 285

Source URL:https://natlawreview.com/article/cftc-brings-enforcement-action-against-digital-exchange-and-natural-person