

## VI. *CFTC v. My Big Coin Pay: The CFTC's Jurisdiction over Cryptocurrency*

### A. Introduction

The definition of what constitutes cryptocurrency varies. The Internal Revenue Service (IRS) describes cryptocurrency as “a digital representation of value” that may “operate[] like ‘real’ currency . . . but . . . does not have legal tender status [in the United States].”<sup>1</sup> Additionally, “[t]he [CFTC] interprets the term virtual currency broadly.” For the purpose of the CFTC’s “actual delivery” interpretation, the CFTC defined a “virtual or digital currency” as “[e]ncompass[ing] any digital representation of value (a ‘digital asset’) that functions as a medium of exchange, and other digital unit of account that is used as a form of a currency (i.e., transferred from one party to another as a medium of exchange)”<sup>2</sup> The CFTC explained that cryptocurrency “may be manifested through units, tokens, or coins, among other things.”<sup>3</sup> And the interpretation covers “distribut[ion] by way of digital ‘smart contracts,’ among other structures.”<sup>4</sup> However, the CFTC has been reluctant to give a bright line definition of what it considers a “virtual currency” subject to its regulation because of the “evolving nature of the commodity.”<sup>5</sup>

This article reviews the recent district court opinion, *CFTC v. My Big Coin Pay*, which held that virtual currencies are commodities even when they lack a future component,<sup>6</sup> and the opinion’s signifi-

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<sup>1</sup> I.R.S. Notice 2014-21, 2014-16 I.R.B (defining cryptocurrency as “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value. In some environments, it operates like ‘real’ currency”—i.e., the coin and paper money of the United States or of any other country that is designated as legal tender, circulates, and is customarily used and accepted as a medium of exchange in a country of issuance – but it does not have legal tender status [in the United States].”).

<sup>2</sup> Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60,335, 60,337–38 (Dec. 20, 2017) (to be codified at 17 C.F.R. pt. 1).

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

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (“[T]he [CFTC] notes that it does not intend to create a bright line definition at this time given the evolving nature of the commodity and in some instances, its underlying public distributed ledger technology.”).

<sup>6</sup> Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 498 (D. Mass. 2018) (citing Commodity Futures Trading Comm’n v. McDonnell, 287 F. Supp. 3d 213, 228 (E.D.N.Y. 2018); *In re*

cance in the context of developing cryptocurrency regulation. Section B contains a brief overview of cryptocurrencies generally and a comparison of cryptocurrencies to traditional commodities. This is followed by a discussion of the different ways the Commodity Futures Trading Commission (CFTC) has interpreted its jurisdiction over cryptocurrencies. Section B then explains the response of regulators to the emerging sector, focusing primarily on the CFTC's early response. Section C discusses the case itself, and finally, Section D discusses the case's significance and its potential impact on the emerging cryptocurrency sector.

## B. Background

In addition to being difficult to define, cryptocurrencies also have potential similarities with and differences from what has traditionally been considered a commodity. The Commodity Exchange Act specifically lists many agricultural products that are considered "commodities" under the Act.<sup>7</sup> One potential difference is that all of the listed commodities have inherent value.<sup>8</sup> In contrast, a crypto-coin's "value is determined entirely by market expectations" and its exchange rate, not its inherent value.<sup>9</sup> Still, to say all "commodities" have

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BFXNA Inc., CFTC Docket No. 16-19, 2016 WL 3137612, at \*5-6 (June 2, 2016); *In re* Coin-flip, Inc., CFTC Docket No. 15-29, 2015 WL 5535736, at \*3 (Sept. 17, 2015) (holding that cryptocurrencies are commodities that the CFTC can regulate regardless of whether the specific currency has a futures component).

<sup>7</sup> 7 U.S.C. § 1a(9) (2012) ("The term 'commodity' means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, *Solanum tuberosum* (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions . . . and motion picture box office receipts . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.").

<sup>8</sup> George Friedman, *Opinion: Why it Matters if Bitcoin is a Currency or a Commodity*, MARKETWATCH (Dec. 13, 2017, 4:07 PM), <https://www.marketwatch.com/story/why-it-matters-if-bitcoin-is-a-currency-or-a-commodity-2017-12-13> [<https://perma.cc/S4J7-QKH9>] (explaining that "[a] commodity is an object with use value . . . [and Bitcoin's value] represents no underlying object with use value").

<sup>9</sup> *Id.*

inherent value is an over-generalization in light of the fact that gold has long been considered a commodity though it arguably has limited—if any—intrinsic value.<sup>10</sup> Both gold and cryptocurrencies require market demand to give them value.<sup>11</sup> The CFTC has recognized these similarities, describing the early purpose of cryptocurrency as an alternative to gold.<sup>12</sup> Another potential difference is that a crypto-coin offered by one company is not necessarily the same type of product as a crypto-coin offered by another company.<sup>13</sup> This potential difference comes up in *My Big Coin Pay*.<sup>14</sup> As discussed below, defendants distinguished its cryptocurrency from other cryptocurrencies that might be a commodity, such as Bitcoin.<sup>15</sup> However, the defendants' argument was ultimately rejected, and this view would contradict the reasoning of the district court.<sup>16</sup>

### 1. *The CFTC's Interpretation of its Jurisdiction*

Prior to the holding in *My Big Coin, Pay*, the CFTC released several interpretations of its authority over cryptocurrency.<sup>17</sup> On

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<sup>10</sup> *Id.* (explaining that gold's "use value is somewhat limited").

<sup>11</sup> *Id.*

<sup>12</sup> Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60,335, 60,337 (Dec. 20, 2017) (to be codified at 17 C.F.R. pt. 1) ("Indeed, since their inception, virtual currency structures were proposed as digital alternatives to gold and other precious metals.").

<sup>13</sup> See, e.g., Frank Chaparro, *Here Are 8 of the Most Bizarre Cryptocurrencies on the Market*, BUS. INSIDER (Sept. 1, 2017, 1:12 PM), <https://www.businessinsider.com/cryptocurrency-market-most-bizarre-2017-8> [<https://perma.cc/ND3V-EMVX>]; Rob Marvin, *23 Weird, Gimmicky, Straight-Up Silly Cryptocurrencies*, PCMAG (Feb. 6, 2018, 12:30 PM), <https://www.pcmag.com/feature/358046/23-weird-gimmicky-straight-up-silly-cryptocurrencies> [<https://perma.cc/G45Z-3QFN>].

<sup>14</sup> *Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, 496 (D. Mass. 2018) (distinguishing My Big Coin from Bitcoin).

<sup>15</sup> *Id.* (arguing that although Bitcoin is a "commodity" under the CEA, My Big Coin is not because "contracts for future delivery" are indisputably not "dealt in" My Big Coin").

<sup>16</sup> The court in *My Big Coin Pay* relied on the futures component of Bitcoin to hold that My Big Coin was a commodity even though My Big Coin did not have a futures component itself. *Id.* at 498 ("[I]t is undisputed that there is futures trading in virtual currencies (specifically involving Bitcoin).").

<sup>17</sup> Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. at 60,337; *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commis-*

December 15, 2017, the CFTC proposed a legal interpretation that would classify virtual currencies as “commodities” under the Commodities CEA and making them subject to the CFTC’s regulation.<sup>18</sup> The CFTC stated that it considered “virtual currency to be a commodity, like many other intangible commodities that the [CFTC] has recognized over the course of its existence (e.g., renewable energy credits and emission allowances, certain indices, and certain debt instruments among others).”<sup>19</sup>

Additionally, the CFTC has released an interpretation for when its “actual delivery” exception may apply within the context of cryptocurrencies.<sup>20</sup> The CEA generally gives the CFTC jurisdiction over “retail commodity transactions” subject to a few exceptions.<sup>21</sup> One such exception to what constitutes a “retail commodity transaction” is for “a contract sale that . . . results in actual delivery within 28 days.”<sup>22</sup> This is referred to as the “actual delivery” exception.<sup>23</sup> The CFTC explained the following requirements for “actual delivery” within the context of cryptocurrencies:

- (1) [a] customer having the ability to: (i) [t]ake 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) use it freely in commerce (both within and away from any particular platform) no later than 28 days from the date of transaction; and (2) [t]he offeror and counterparty seller (including any of their respective

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*sion, Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 115th Cong. 103 (2018) (written testimony of J. Christopher Giancarlo Chairman, Commodity Futures Trading Comm’n).

<sup>18</sup> Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. at 60,337 (“[T]he Commission considers virtual currency to be a commodity.”); Press Release, Commodity Futures Trading Comm’n, CFTC Issues Proposed Interpretation on Virtual Currency “Actual Delivery” in Retail Transactions (Dec. 15, 2017), <https://www.cftc.gov/PressRoom/PressReleases/7664-17> [<https://perma.cc/NDA3-6Q3K>].

<sup>19</sup> Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. at 60,337.

<sup>20</sup> *Id.* at 60,337–38.

<sup>21</sup> 7 U.S.C. § 2(c)(2)(D)(i)–(ii) (2012).

<sup>22</sup> *Id.* § 2(c)(2)(D)(ii)(III)(aa).

<sup>23</sup> Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. at 60,337 (making reference to the “actual delivery exception”).

affiliates or other persons acting in concert with the offeror or counterparty seller on a similar base) not retaining any interest in or control over any of the commodity purchased on margin.<sup>24</sup>

The CFTC also emphasized that it “employ[s] a functional approach and examine[s] how the agreement, contract or transaction is marketed, managed, and performed, instead of relying solely on language used by the parties in the agreement, contract, or transaction.”<sup>25</sup> However, the CFTC was clear that “a sham delivery does not constitute actual delivery for purposes of this interpretation.”<sup>26</sup>

Additionally, on February 6, 2018, CFTC Chairman Christopher Giancarlo submitted a written testimony to the Senate Banking Committee describing what the agency saw as its jurisdiction regarding cryptocurrency.<sup>27</sup> He explained that

the CFTC does NOT have regulatory jurisdiction under the CEA over markets or platforms conducting cash or ‘spot’ transactions in virtual currencies or other commodities or over participants on such platforms. . . . However, the CFTC DOES have enforcement jurisdiction to investigate through subpoena and other investigative powers and, as appropriate, conduct civil enforcement action against fraud and manipulation in virtual currency derivatives markets and in underlying virtual currency spot markets.<sup>28</sup>

The Chairman Giancarlo also noted that the CFTC has been working closely with the SEC in making policy and jurisdictional decisions.<sup>29</sup>

## 2. *Early Regulatory Action*

Both the Securities and Exchange Commission (SEC) and CFTC have taken steps to regulate fraud in the emerging cryptocur-

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<sup>24</sup> *Id.* at 60,339.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Virtual Currencies*, *supra* note 17, at 103.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

rency sector.<sup>30</sup> This article focuses on the CFTC's regulatory authority over cryptocurrency. A brief explanation of the SEC's approach provides context to how the CFTC fits in with other regulators. Currently, the SEC employs the "Howey" test to determine if a cryptocurrency is a security.<sup>31</sup> The SEC has stated that cryptocurrencies that raise money with an initial coin offering (ICO) will likely meet this standard and be considered a security subject to securities regulation.<sup>32</sup>

The CFTC has also played an escalating role in the past year and a half. The CFTC has recognized the fraud in the emerging sector and has issued warnings to investors.<sup>33</sup> The CFTC also had a major win in the Southern District of New York with *CFTC v. McDonnell*, a case related to the cryptocurrency Bitcoin.<sup>34</sup> There, the court found that "[w]here a futures market exists for a good, service, right, or interest, it may be regulated by CFTC, as a commodity, without regard to

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<sup>30</sup> Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207, 17-18 (July 25, 2017) (concluding that the cryptocurrencies that meet the definition of a security must comply with securities regulation); Press Release, Commodity Futures Trading Comm'n, Customer Advisory: Beware Virtual Currency Pump-and-Dump Schemes (Feb. 15, 2018), <https://www.cftc.gov/PressRoom/PressReleases/pr7697-18> [<https://perma.cc/57QP-6296>].

<sup>31</sup> Sec. & Exch. Comm'n v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946) ("[A]n investment contract for purposes of the Securities Act means a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.").

<sup>32</sup> *Spotlight on Initial Coin Offerings (ICOs)*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/ICO> [<https://perma.cc/4S6Z-DCZS>] (last visited Feb. 22, 2019).

<sup>33</sup> Press Release, Commodity Futures Exch. Comm'n, Customer Advisory: Use Caution When Buying Digital Coins or Tokens (July 16, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7756-18> [<https://perma.cc/75DL-WHPQ>]; see also Press Release, *supra* note 30.

<sup>34</sup> *Commodity Futures Trading Comm'n v. McDonnell*, 287 F. Supp. 3d 213, 228-29 (S.D.N.Y. 2018) (holding that "virtual currencies can be regulated by CFTC as a commodity," and "CFTC has jurisdictional authority to bring suit against defendants utilizing a scheme to defraud investors"); Memorandum from Skadden, Arps, Slate, Meagher & Flom LLP, Federal Judge Rules Virtual Currencies Are Commodities Under the Commodity Exchange Act (Mar. 8, 2018), <https://www.skadden.com/insights/publications/2018/03/federal-judge-rules-virtual-currencies>.

whether the dispute involves futures contracts.”<sup>35</sup> However, this case did not fully resolve the issue in *My Big Coin Pay* because Bitcoin had a futures component.<sup>36</sup>

### C. *CFTC v. My Big Coin Pay, Inc.*

*CFTC v. My Big Coin Pay, Inc.* involved an action brought by the CFTC against My Big Coin Pay for fraudulent marketing.<sup>37</sup> The CFTC alleged that “[the defendants] ‘operated a virtual currency scheme in which they fraudulently offered the sale of a fully-functioning virtual currency’ called ‘My Big Coin’;”<sup>38</sup> and “[the] defendants enticed customers by making . . . misleading statements and omitting material facts.”<sup>39</sup> Several of the alleged false statements included that the cryptocurrency was “‘backed by gold,’ could be used anywhere Mastercard was accepted, and was being ‘actively traded’ on several currency exchanges.”<sup>40</sup>

The CFTC alleged that this conduct violated Section 6(c)(1) of the CEA<sup>41</sup> and CFTC Regulation 180.1(a).<sup>42</sup> Section 6(c)(1) of the CEA makes it unlawful to “enter into, or confirm the execution of a [fraudulent transaction]<sup>43</sup> . . . involving the purchase or sale of any

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<sup>35</sup> *McDonnell*, 287 F. Supp. 3d at 227.

<sup>36</sup> *Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, 498 n.9 (D. Mass. 2018) (observing that *McDonnell* “can be distinguished on [its] facts since [it] involved the virtual currency of Bitcoin”).

<sup>37</sup> *Id.* at 494.

<sup>38</sup> *Id.* (quoting Defendant Randall Crater and Relief Defendants’ Memorandum in Support of their Motion to Dismiss the Amended Complaint at 1, *Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492 (D. Mass. 2018) (No. 63)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 7 U.S.C. § 9(1) (2012) (prohibiting “manipulative or deceptive device[s] or contrivance” that is “in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity”).

<sup>42</sup> 17 C.F.R. § 180.1(a)(2) (2017) (prohibiting “mak[ing], or attempt[ing] to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading”). See *My Big Coin*, 334 F. Supp. 3d at 494–95.

<sup>43</sup> 7 U.S.C. § 6c(a)(2) (“A transaction referred to in paragraph (1) is a transaction that—(A) (i) is, of the character of, or is commonly known to the trade as, a “wash sale” or “accommodation trade;” or (ii) is a fictitious sale; or

commodity, for future delivery . . .”<sup>44</sup> My Big Coin Pay moved to dismiss the case, making several arguments.<sup>45</sup>

*1. Defendants Argue That the CFTC Lacks Jurisdiction*

First, My Big Coin argued “that the CFTC fail[s] to state a claim because My Big Coin . . . is not a ‘commodity’ within the meaning of the Act.”<sup>46</sup> The court dismissed this jurisdiction argument because whether or not My Big Coin Pay is a commodity “goes to the merits of the [CFTC’s] claim, not jurisdiction.”<sup>47</sup> The court then held that it has jurisdiction because the claim presents a federal question<sup>48</sup> and “federal law expressly authorizes CFTC to sue and the court to grant appropriate relief.”<sup>49</sup>

*2. Defendants Argue That My Big Coin Is Not a “Commodity” under the CEA*

Moving onto the merits of the claim, the defendants made several arguments for why My Big Coin is not a “commodity” under the CEA. First, the defendants argued that My Big Coin Pay cannot be a commodity under the Act because “‘contracts for future delivery’ are indisputably not ‘dealt in’ My Big Coin.”<sup>50</sup> The defendants cited the language of the CEA which defines a “commodity” as: “goods and articles, . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.”<sup>51</sup> The defendants contend that “[a]s a virtual currency with no physical or

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(B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.”).

<sup>44</sup> *Id.* § 6c(a)(1).

<sup>45</sup> *My Big Coin Pay*, 334 F. Supp. 3d at 494.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 495.

<sup>48</sup> *Id.* (citing 28 U.S.C. § 1331 (2012)) (“This court has subject matter jurisdiction because the case presents a federal question.”).

<sup>49</sup> *My Big Coin Pay*, 334 F. Supp. 3d at 495 (citing 7 U.S.C. § 13a-1(a) (2012)).

<sup>50</sup> *My Big Coin Pay*, 334 F. Supp. 3d at 496.

<sup>51</sup> Defendant Randall Crater and Relief Defendants’ Memorandum in Support of their Motion to Dismiss the Amended Complaint at 5, *Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492 (D. Mass. 2018) (No. 63).

tangible existence, My Big Coin is not a ‘good’ or an ‘article.’”<sup>52</sup> Therefore, virtual currencies are a “service, right or interest” which “are only included in the CEA’s definition of the term ‘commodity’ if there are futures contracts traded on them.”<sup>53</sup> They argued that in order to be a “commodity” under the CEA, “the specific item in question must itself underlie a futures contract.”<sup>54</sup>

Second, the defendants argued that the legislative history of the CEA confirms that My Big Coin is not a “commodity.”<sup>55</sup> The defendants point to letters sent by the U.S. Department of the Treasury (Treasury Department) and the SEC during the drafting of the CEA.<sup>56</sup> The defendants point to a letter where the Treasury Department was concerned that the CEA would give the CFTC jurisdiction over “a wide variety of transactions involving financial instruments’ [that were already regulated] by the Office of the Comptroller of the Currency and the Federal Reserve.”<sup>57</sup> Defendants state that Congress “addressed the Treasury Department’s concerns, in part, by including a [futures delivery] qualifier to ‘all services, rights and interests.’”<sup>58</sup>

Third, the defendants argued that the CFTC’s previous “speaking orders” provide no basis for the proposition that all virtual currencies are ‘commodities.’”<sup>59</sup> Defendants point to two “speaking orders” in which the CFTC “declared, broadly, that virtual currencies are commodities under the CEA.”<sup>60</sup> Defendants contend that the reasoning of both “speaking orders” apply “solely to Bitcoin, the only virtual currency upon which futures are traded.”<sup>61</sup>

The CFTC responded to defendants’ various arguments by arguing “‘a ‘commodity’ for purposes of [the CEA definition] is

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Id.* at 7 (explaining the original amendment “generated concerns at the Treasury Department, SEC, and other regulators”).

<sup>57</sup> *Id.* at 7–8 (quoting Letter from Donald L.E. Ritger, Acting Gen. Counsel, Dep’t of the Treasury, to Herman E. Talmadge, Chairman, Senate Comm. on Agric. & Forestry (July 30, 1974).

<sup>58</sup> Defendant Randall Crater and Relief Defendants’ Memorandum at 8.

<sup>59</sup> *Id.* at 10–11 (citing *In re BFXNA Inc.*, CFTC Docket No. 16-19, 2016 WL 3137612 (June 2, 2016); *In re Coin-flip, Inc.*, CFTC Docket No. 15-29, 2015 WL 5535736 (Sept. 17, 2015))

<sup>60</sup> Defendant Randall Crater and Relief Defendants’ Memorandum at 10–11.

<sup>61</sup> *Id.*

broader than any particular type or brand of that commodity.”<sup>62</sup> The CFTC then, “[p]ointing to the existence of Bitcoin futures contracts, . . . argue[d] that contracts for future delivery of virtual currencies are ‘dealt in’ and that My Big Coin, as a virtual currency, is therefore a commodity.”<sup>63</sup> The CFTC also argued that the CEA was meant to give the CFTC regulatory authority over broad categories of products.<sup>64</sup>

The court sided with the CFTC.<sup>65</sup> The court explained that “the CEA intentionally defined the term ‘commodity’ broadly, finding that a broad interpretation also accords with Congress’s goal in enacting the CEA of strengthening federal regulations of the commodity and futures trading industry.”<sup>66</sup> The court referred to several cases involving natural gas that supported the CFTC’s view and highlighted “that courts have repeatedly rejected arguments that a particular type of natural gas was not a commodity because that specific type was not the subject of a futures contract.”<sup>67</sup> The court then found that because “My Big Coin is a virtual currency and it is undisputed that there is futures trading in virtual currencies (specifically involving Bitcoin),” that the CFTC met its burden in showing that “My Big Coin is a ‘commodity’ under the [CEA]”, at least “at the pleading stage.”<sup>68</sup>

### 3. *Defendants Argue That the CEA Only Covers Market Manipulation*

Finally, My Big Coin argued that the CEA was “‘meant to combat fraudulent market manipulation—not the kind of garden variety sales puffery that the Amended Complaint alleges.’”<sup>69</sup> In sup-

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<sup>62</sup> *Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, 496 (D. Mass. 2018) (quoting Plaintiff’s Opposition to Defendant Crater and Relief Defendant’s Motion to Dismiss the Amended Complaint at 10, *Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492 (D. Mass. 2018) (No. 70)).

<sup>63</sup> *My Big Coin Pay*, 334 F. Supp. 3d at 496–97.

<sup>64</sup> *Id.* at 497.

<sup>65</sup> *Id.* at 498.

<sup>66</sup> *CFTC v. My Big Coin Pay: Another Federal Court Sides with CFTC on Virtual Currency Oversight* (Oct. 3, 2018), PRAC. L. FIN.

<sup>67</sup> *My Big Coin Pay*, 334 F. Supp. 3d at 497 (citing *United States v. Brooks*, 681 F.3d 678 (5th Cir. 2012); *United States v. Futch*, 278 F. App’x 387, 395 (5th Cir. 2008); *United States v. Valencia*, No. Civ.A. H–03–024, 2003 WL 23174749 (S.D. Tex. Aug. 25, 2003)).

<sup>68</sup> *My Big Coin Pay*, 334 F. Supp. 3d at 498.

<sup>69</sup> *Id.* (quoting Docket #69 at 15).

port of this argument, My Big Coin cited the language of the CEA,<sup>70</sup> the statutes drafting history,<sup>71</sup> and *CFTC v. Monex Credit Co.*, which held the language of Section 6(c)(1) “prohibited fraudulent manipulation but *not* fraud without manipulation.”<sup>72</sup>

The court rejected these arguments, stating “both Section 6(c)(1) and Regulation 180.1 explicitly prohibit fraud even in the absence of market manipulation” and “some isolated statements in the legislative history . . . are insufficient to overcome the broad language in the statute as it was passed.”<sup>73</sup> The court recognized that *Monex Credit Co.* was contrary to its opinion but did not explain how the court improperly interpreted the CEA.<sup>74</sup>

#### D. The Case’s Significance

*CFTC v. My Big Coin Pay, Inc.* is significant for several reasons. First, classifying all cryptocurrencies as commodities affirms the CFTC’s ability to regulate the sector.<sup>75</sup> The CFTC joins the SEC, IRS, and other federal and state regulators that have jurisdiction over the cryptocurrency sector.<sup>76</sup> The SEC has previously said that cryptocurrencies that engage in an ICO are securities and must register with

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<sup>70</sup> Defendant Randall Crater and Relief Defendants’ Memorandum in Support of their Motion to Dismiss the Amended Complaint at 14, *Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492 (D. Mass. 2018) (No. 63) (quoting 7 U.S.C. § 9(1) (2012)).

<sup>71</sup> Defendant Randall Crater and Relief Defendants’ Memorandum in Support of their Motion to Dismiss the Amended Complaint at 14 (quoting 156 Cong. Rec., 111th Cong., No. 67 S3348 (May 6, 2010)) (“My amendment strengthens the [CFTC]’s authority to go after manipulation and attempted manipulation.”).

<sup>72</sup> Defendant Randall Crater and Relief Defendants’ Memorandum in Support of their Motion to Dismiss the Amended Complaint at 14 (citing *Commodity Futures Trading Comm’n v. Monex Credit Co.*, 311 F. Supp. 3d 1173 (C.D. Cal. 2018)).

<sup>73</sup> *My Big Coin Pay*, 334 F. Supp. 3d at 498–99 (citing 7 U.S.C. § 9 (2012) (banning the use of any ‘manipulative or deceptive or contrivance’ in connection with the sale of a commodity); 17 C.F.R. §180.1(a) (2017) (banning the use of ‘any manipulative device, scheme, or artifice to defraud,’ the making of “any untrue or misleading statement of a material fact,” or the use of “any act, practice or course of business, which operates . . . as a fraud or deceit . . .” in connection with the sale of a commodity)).

<sup>74</sup> *My Big Coin Pay*, 334 F. Supp. 3d at 498–99.

<sup>75</sup> *Id.*

<sup>76</sup> See *Virtual Currencies*, *supra* note 17.

the SEC.<sup>77</sup> Therefore, a cryptocurrency that raises money with an ICO may meet the definition of both a security and a commodity.<sup>78</sup> This could lead to a problem because commodities and securities are regulated under different rules by the CFTC and SEC, which could lead to confusion over which rules to follow.<sup>79</sup> Some critics believe the “turf wars between the different regulatory agencies . . . is [not] in the best interest of the U.S. or the blockchain technology industry.”<sup>80</sup> They argue that the current approach of the United States is overly complicated and impedes innovation.<sup>81</sup> The CFTC has “emphasize[d] that it does not intend to impede market-enhancing innovation or otherwise harm the evolving virtual currency marketplace.”<sup>82</sup> Additionally, Chairman Giancarlo, has expressed his personal views on the “promising benefits” of blockchain technology.<sup>83</sup> He maintains that “[blockchain technology] could be the biggest technological innovation in the financial services industry and financial market regulation in a generation or more.”<sup>84</sup> He also recommended that regulators going forward should take a “do no harm” approach to regulating the emerging sector.<sup>85</sup>

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<sup>77</sup> Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, *supra* note 30, at 10 (asserting “that the U.S. federal securities law may apply to” ICOs).

<sup>78</sup> Olly Jackson, *Confusion Reigns: Are Cryptocurrencies Commodities or Securities*, INT’L FIN. L. REV. (Mar. 14, 2018) (explaining the problem of having both the CFTC and SEC pursue cryptocurrencies).

<sup>79</sup> *Id.* (alleging that the jurisdictional authority of both regulators “could cause confusion as it may be unclear whether the SEC or the CFTC should prosecute”).

<sup>80</sup> Laura Shin, *Crypto Industry Frustrated by Haphazard Regulation*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/06/27/business/dealbook/crypto-industry-regulation.html>.

<sup>81</sup> *Id.*

<sup>82</sup> Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60,335, 60,337–38 (Dec. 20, 2017) (to be codified at 17 C.F.R. pt. 1).

<sup>83</sup> J. Christopher Giancarlo, Commissioner, Commodity Futures Trading Comm’n, Keynote Address Before the Markit Group, 2016 Annual Customer Conference New York (Mar. 10, 2016), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-15> [<https://perma.cc/FCM5-MBQ3>] (explaining his view of the “promising benefits” of distributed ledger technology or blockchain and for the need for regulators to take a “do no harm” approach).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (laying out five regulator steps to “do no harm”: (1) “Put Our Best Foot Forward”; (2) “Allow ‘Breathing Room’”; (3) “Get Involved”; (4) “Listen and Learn”; (5) “Collaborate Globally”).

Second, there may be a shift in who invests in cryptocurrency. Some believe that as more regulators get involved in the sector, more institutional investors will invest.<sup>86</sup> It is difficult to know the exact breakdown of who is currently invested in cryptocurrency, but several sources have reported that the majority of investors are young, male, and inexperienced.<sup>87</sup> Additionally, some believe a large portion of the current investors are interested in cryptocurrencies' potential use for illicit means.<sup>88</sup>

There also is a question of how far this case extends. Several partners at Morgan Lewis do not believe the courts holding will reach all "crypto-assets."<sup>89</sup> They believe "the CFTC takes the position that for the purposes of the commodity definition, virtual currency means "a digital representation of value that functions as a medium of exchange, a unit of account and/or store of value, but does not have legal tender status in any jurisdiction."<sup>90</sup> Therefore, "it may be that not all crypto-assets are commodities, but only those that satisfy one of the

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<sup>86</sup> See Jackson, *supra* note 78 ("The ruling could see an increase in enforcement action and, as is often the case with greater regulation, could drive out retail investors and encourage institutional investors.").

<sup>87</sup> Chuck Jones, *Who Is Buying Bitcoin and Cryptocurrencies?* FORBES (Mar. 23, 2018, 6:37pm), <https://www.forbes.com/sites/chuckjones/2018/03/23/who-is-buying-bitcoin-and-cryptocurrencies/#5474be2a4aae> [<https://perma.cc/CS2X-MTH7>] (citing a 2,001 person survey which found that Millennials are the largest age group that owns cryptocurrency); Kailey Leinz, *A Look at Who Owns Bitcoin (Young Men) and Why (Lack of Trust)*, BLOOMBERG (Jan. 24, 2018, 11:45 AM), <https://bloomberg.com/news/articles/2018-01-24/a-look-at-who-owns-bitcoin-young-men-and-why-lack-of-trust> (citing a 5,700-person poll which found "71 percent of digital coin's owners are male"); *Who are the Crypto Investors?*, ETORO: MARKET INSIGHTS BLOG (May 10, 2018) <https://www.etoro.com/en-us/blog/market-insights/who-are-the-crypto-investors> [<https://perma.cc/9TFZ-86HQ>] (finding that 91.5% of people who invested in crypto through its product were male and that most were novice investors).

<sup>88</sup> Sean Foley et al., *Sex, Drugs, and Bitcoin: How Much Illegal Activity is Financed Through Cryptocurrencies*, REV. FIN. STUD. (forthcoming) (finding that "approximately one-quarter of bitcoin users are involved in illegal activity"); Leinz, *supra* note 87.

<sup>89</sup> Michael M. Philipp et al., *Court: Cryptocurrencies Are Commodities Even Without Futures*, MORGAN, LEWIS & BOCKIUS LLP (Oct. 12, 2018), <https://www.morganlewis.com/blogs/finreg/2018/10/court-cryptocurrencies-are-commodities-even-without-futures> [<https://perma.cc/KN7C-25NN>] ("[T]he case does not mean that all crypto-assets are necessarily commodities.").

<sup>90</sup> *Id.*

CFTC's functional descriptions of virtual currency."<sup>91</sup> However, as discussed above, the CFTC has been careful not to draw any bright-line definitions.<sup>92</sup> Therefore, it may be difficult to know what crypto-asset, if any, would not be considered a commodity by the CFTC.

### E. Conclusion

*My Big Coin Pay* is a major decision that clarifies the scope of the CFTC's regulatory authority over cryptocurrencies that do not include a futures component. However, several questions remain. First, the court held that the CFTC had met its burden at the pleadings stage, leaving open the possibility that *My Big Coin* may be found to not be a commodity in later proceedings.<sup>93</sup> Second, the court did not attempt to reconcile its opinion with *CFTC v. Monex Credit Co.*'s holding that the language of Section 6(c)(1) "prohibited fraudulent manipulation but *not* fraud without manipulation."<sup>94</sup> It remains to be seen whether *My Big Coin Pay* will be an isolated case or whether the CFTC will continue to play a meaningful role in keeping the cryptocurrency sector accountable.

Noah Cherry<sup>95</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60,335, 60,337–38 (Dec. 20, 2017) (to be codified at 17 C.F.R. pt. 1) ("[T]he [CFTC] notes that it does not intend to create a bright line definition at this time given the evolving nature of the commodity and in some instances, its underlying public distributed ledger technology.").

<sup>93</sup> *Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, 498 (D. Mass. 2018) (finding that the CFTC met its burden in showing that "My Big Coin is a 'commodity' under the [CEA]," at least "at the pleading stage").

<sup>94</sup> *Id.* (recognizing that *Commodity Futures Trading Comm'n v. Monex Credit Co.*, 311 F. Supp. 3d 1173 (C.D. Cal. 2018) is contrary to its opinion); Defendant Randall Crater and Relief Defendants' Memorandum in Support of their Motion to Dismiss the Amended Complaint at 2, *Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492 (D. Mass. 2018) (No. 63) (citing *Commodity Futures Trading Comm'n v. Monex Credit Co.*, 311 F. Supp. 3d 1173 (C.D. Cal. 2018)).

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