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With the growing usage and awareness of virtual currencies, regulators are left to determine how to properly classify and regulate this undeveloped sector. Classifying these digital assets as currencies, commodities, or securities will not only help embrace regulation, and thus support the legitimization of the new sector, but will also guide present and future agencies in their regulatory efforts. In CFTC v. McDonnell, the United States District Court for the Eastern District of New York issued its first published decision that considered whether virtual currencies are properly characterized as commodities. While the court held that virtual currencies are “goods exchanged in a market for a uniform quality and value . . . falling within the common definition of [a] ‘commodity,’” the question of whether a cryptocurrency is considered a commodity, security, or some other traditional form of investment, is highly dependent on the specific underlying facts and circumstances.

Since 2015, the United States Commodity Futures Trading Commission (“CFTC”) has held that virtual currencies, such as Bitcoin, should be defined and regulated as commodities. While this was an accepted

2 See McDonnell, 287 F. Supp. 3d at 260 (discussing necessary regulatory oversight to increase economic prosperity).
4 See id. at 217 (articulating standing of Commodity Futures Trading Commission).
6 See CFTC v. McDonnell, supra note 3 (discussing regulatory viewpoint of the CFTC); see also Mitchell Prentis, Digital Metal: Regulating Bitcoin as A Commodity, 66 CASE W. RES. L. REV.
decision among regulators, it has not been adopted by any court until the U.S. District Court of the Eastern District of New York issued its decision in March 2018 establishing that virtual currencies should be properly characterized as commodities. In *CFTC v. McDonnell*, the issue arose out of alleged fraud in connection with the solicitation of cryptocurrency and "fiat" currency from customers in exchange for advice and services associated with trading virtual currencies. The court in *McDonnell* addressed two primary issues: "(1) whether virtual currency may be regulated by the CFTC as a commodity; and (2) whether the amendments to the Commodity Exchange Act ("CEA") under the Dodd-Frank Act permit the CFTC to exercise its jurisdiction over fraud that does not directly involve the sale of futures or derivative contracts."

Judge Weinstein, of the presiding court, stated that "virtual currencies are goods that can be exchanged in a market place for a uniform quality and value and thus should be treated as a commodity." The court in

609, 626 (2015) (stating virtual currencies can be regulated by CFTC as commodities). Both virtual currencies and commodities can be defined as "goods" exchanged in a market for a uniform quality and value. *Id.* Due to their overlapping characteristics, virtual currencies can be defined as "commodities," thus granting regulatory power to the CFTC. *Id.*

7 See *McDonnell*, 287 F. Supp. 3d at 218 (discussing background of Bitcoin and virtual currencies).

8 See *id.* (presenting claim asserted against defendants). The name of the defendant's company was CabbageTech D/B/A Coin Drop Markets. *Id.; see also Fiat Money, INVESTOPEDIA, https://www.investopedia.com/terms/f/fiatmoney.asp (last visited Oct. 7, 2018) (defining "Fiat Money").

Fiat money is currency that a government has declared to be legal tender, but it is not backed by a physical commodity. The value of fiat money is derived from the relationship between supply and demand rather than the value of the material from which the money is made. Fiat money only has value because the government maintains that value, or because two parties agree on said value.


9 See *McDonnell*, 287 F. Supp. 3d at 217 (discussing how court viewed and dissected issues); see also McAvoy, *supra* note 1 (highlighting issues addressed in *McDonnell*).

First, the court found that the Commodity Exchange Act, or CEA, should be construed liberally, and that cryptocurrencies have many of the same qualities as traditional commodities such as gold. Second, it found that Section 2(c)(2)(C)(i)(II)(bb)(AA) of the CEA grants the CFTC jurisdiction over cryptocurrency spot markets involving the scienter-based crimes of fraud or manipulation, even though the CFTC does not have jurisdiction over these markets in the absence of manipulation or fraud. Third, the court found that the CFTC has concurrent jurisdiction over these types of crimes with other regulatory agencies.

McAvoy, *supra* note 1.

10 See *CFTC*, 287 F. Supp. 3d at 229 (discussing Judge Weinstein's holding); see also 7 U.S.C. § 1(a)(9) (2018) (defining commodity). The CEA defines commodities as:
McDonnell listed a wide range of options for the potential regulation of virtual currencies by utilizing the current regulatory landscape and outlined not only options for individual regulatory agencies, but also presented the idea of interagency cooperation — a teamwork approach. The court’s opinion acknowledged and emphasized the difficulties of trying to regulate a new digital asset that can be classified as a commodity, but can also behave like a security or other forms of investments. Although the world of virtual currencies lacks depth in regards to legal precedent, the court here was able to rely on a holding issued by the Southern District of New York.

The McDonnell court recognized the power of the commission to bring forth actions stemming from any person using deceptive or manipulative tactics related to any sale of any commodity in interstate commerce, as previously established in \textit{CFTC v. Gelfnan Blueprint, Inc.} The CFTC expanded its enforcement powers and established jurisdiction over virtual currencies traded in interstate commerce. Although Judge Weinstein’s opinion does not bind any other court, its value as the first published court decision regarding this topic is certain to be influential in future cases as a strong and reliable precedent.

\[\ldots\text{wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles \ldots and all services, rights, and interests \ldots in which contracts for future delivery are presently or in the future dealt in.}\]


11 See McDonnell, 287 F. Supp. 3d at 221 (describing potential options for regulating virtual currencies).

12 See id. at 225 (recognizing difficulties in regulating currencies that behave similarly to commodities or other forms of investments); see also \textit{Types of Investments}, FINRA, http://www.finra.org/investors/types-investments (last visited Oct. 7, 2018) (listing various investments). 'Traditional' forms of investments include stocks, bonds, mutual funds, bank products, options, annuities, alternative investments, futures, and insurance. Id.

13 See McDonnell, 287 F. Supp. 3d at 227 (examining court’s analysis in \textit{CFTC v. Gelfman Blueprint, Inc.}). In \textit{CFTC v. Gelfman}, the CFTC relied on the broad statutory authority of Section 9(1) of the CEA which focuses on fraud and manipulation involving commodities in interstate commerce. See Gelfman Blueprint, Inc., 2017 WL 4228737.

14 See id. (noting McDonnell court’s recognition of what was established in \textit{CFTC v. Gelfman Blueprint, Inc.}).

15 See id. (describing expansion of regulatory powers of CFTC).

16 See CFTC, A CFTC Primer on Virtual Currencies, LAB CFTC, (Oct. 17, 2017), http://www.cftc.gov/idc/groups/public/documents/file/labcftc_primercurrencies100417.pdf (stating CFTC's jurisdiction is implicated “if there is fraud or manipulation involving a virtual currency traded in interstate commerce.”). This case answered two issues: (1) can virtual currency be regulated by the CFTC as a commodity and (2) do the amendments to CEA under the Dodd-
7 U.S.C. Ch. 1 helps to govern the commodities markets. Under §13a-1(a), the CFTC may, "seek injunctive relief when it believes that an entity or person is in violation of the Commodities Exchange Act & Regulations (CEA)." The statutes within the CEA are intended to be liberally interpreted and thus grant the CFTC more regulatory reach to ensure broad market protection for investors. The CFTC may use this liberal interpretation of the CEA to employ its regulatory powers by pursuing civil actions or issuing administrative orders that help to create new precedent and interpretation of the CEA. By charging civil actions and establishing its own administrative law, the CFTC is able to explore and determine the scope of its regulatory reach.

The regulatory capacity of the CFTC has been established by broadly defining what is and what is not a "commodity" under the CEA. The CEA defines commodities as "crops and goods" but also states that commodities include "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in." This interpretation has been further expanded upon by the court in Barclays PLC, which established that the CEA covers both tangible and intangible commodities.
when it ruled that the CFTC should regulate fixed interest rate benchmarks.\(^\text{25}\) Due to the fluid and intangible nature of virtual currencies, they possess overlapping characteristics with commodities.\(^\text{26}\)

In *Digital Metal: Regulating Bitcoin as a Commodity*, Mitchell Prentis explores the cross-over between the CEA’s definition of a commodity and the characteristics of virtual currencies.\(^\text{27}\) Prentis defines virtual currencies as “goods exchanged in a market for uniform quality and value,” which falls well within both the general definition of “commodity” as well as the definition established by the CEA within 7 U.S.C. § 1a(9).\(^\text{28}\) While this definition of “commodity” grants authority to the CFTC, it “does not preclude other agencies from exercising regulatory power when virtual currencies [function] differently than derivative commodities.”\(^\text{29}\) For example, if the virtual currency being offered or traded possesses traits characterizing it as a “security,” the Securities and Exchange Commission (“SEC”) would exercise their regulatory power rather than the CFTC.\(^\text{30}\)

In its case versus McDonnell, the CFTC asserted that, due to their characteristics, virtual currencies have the ability to be regulated as a commodity.\(^\text{31}\) The court categorized the virtual currencies as “goods exchanged in a market for a uniform quality and value,” falling well within

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\(^{25}\) See id. (regulating fixed interest rate benchmarks as commodities as intangible commodities); see also Press Release, U.S. CFTC, Barclays to Pay $400 Million Penalty to Settle CFTC Charges of Attempted Manipulation and False Reporting of Foreign Exchange Benchmark Rates, U.S. CFTC (May 20, 2015), https://www.cftc.gov/PressRoom/PressReleases/7181-15 (discussing sanctions imposed on Barclays by CFTC). The CEA covers intangible commodities. *Id.* Barclays was charged with “attempted manipulation, false reporting, and aiding and abetting other banks’ attempts to manipulate, global foreign exchange (FX) benchmark rates to benefit the positions of certain traders.” *Id.*; see also Benchmark Interest Rate, NASDAQ, https://www.nasdaq.com/investing/glossary/b/benchmark-interest-rate (last visited October 27, 2018) (defining benchmark interest rate).


\(^{28}\) See Prentis, *supra* note 27, at 630 (defining virtual currencies); see also Yusen, *supra* note 27 (acknowledging characteristics and expectations of virtual currencies).

\(^{29}\) See McDonnell, 287 F. Supp. 3d at 228 (focusing on regulatory power given to CFTC through definition of “commodity”).


\(^{31}\) See McDonnell, 287 F. Supp. 3d at 217 (summarizing the court’s holding in favor of CFTC).
the common definition of "commodity" as established within the CEA. This categorization by the court bolstered the CFTC's holding that not only can virtual currencies be regulated via the CEA as commodities, but the CFTC also possesses anti-fraud and manipulation jurisdiction over them. While the CFTC categorizes virtual currencies as commodities and establishes its authority over virtual currency spot markets, they also recognize potential concurrent jurisdiction amongst other federal agencies.

Although the CFTC has successfully identified traits that allow virtual currencies to be classified commodities, this new sector will be well molded and properly regulated through interagency cooperation. Due to the fact-intensive nature of the cases concerning virtual currencies, details such as the manner in which a virtual currency is distributed, traded, used, or relied upon by an investor may have an effect on its classification as a commodity. The court properly acknowledged the ever-changing

32 See id. at 228; see also 7 U.S.C. § 1(a)(9) (defining "commodity").
34 See McDonnell, 287 F. Supp. 3d at 220 (discussing concurrent jurisdiction between federal agencies); see also Spot Market, INVESTOPEDIA, https://www.investopedia.com/terms/s/spotmarket.asp (defining "Spot Market" as market where financial instruments are traded for immediate delivery). "This varies from a futures market, since a futures contract is based on delivery of the underlying asset at a future date." Id.

...other regulatory agencies that the Court believes may have jurisdiction over virtual assets, including: — The SEC, to the extent a token or cryptocurrency is a security under the Howey Test (test created by the Supreme Court for determining whether an arrangement qualifies as 'investment contract' that is deemed to be a security). — The Department of Justice and state criminal authorities where fraud or other crimes are involved. — The Treasury Department's Financial Enforcement Network, or FinCEN, in connection with violations of money laundering laws. — The Internal Revenue Service, or IRS, on gains and losses pertaining to virtual currencies and failures to properly report that income. — Self-regulatory organizations, or SROs, such as stock exchanges, that can help self-police virtual currency markets. — State regulators, including under money transmitter laws, where spot transaction exchanges may be required to register with agencies such as the New York Department of Financial Services. — Any combination of the above.

See Nixon Peabody, supra note 1.
35 See McDonnell, 287 F. Supp. 3d at 220-21 (recognizing need for interagency cooperation in regulating virtual currencies).
regulatory environment within its exploration of the multiple avenues of regulation through their discussion of cooperation between the regulatory agencies."

The emergence of a new sector, such as virtual currencies, creates a responsibility for the regulatory agencies, including the CFTC, to ensure responsible innovation and enhance current financial markets.« Regulators are tasked with harmonizing investor protection and systematic regulation while simultaneously possessing a duty to encourage innovation and not stifle it.» It is possible that the best way to encourage cooperation between regulatory agencies is for courts to issue opinions structured similarly to the court in CFTC v. McDonnell." By analyzing not only virtual currencies on a generalized basis, but also looking at the facts specific to the case, the court establishes sound precedent which future regulators and market participants can rely on.«

"[When] purchasers no longer have expectation of managerial stewardship from a third party, a coin is not a security," said William Hinman, the head of the SEC’s division of corporate finance, at the Yahoo Finance All Markets Summit: Crypto. [I]nvestors could be buying coins in the belief they can profit when they [the company] go(es] public and [the currency] increase[s] in value.

Id. 37 See McDonnell, 287 F. Supp. 3d at 220 (addressing overlapping and concurrent jurisdiction between regulatory agencies in oversight of virtual currencies).

38 See id. at 241 (acknowledging necessity of utilizing regulation to foster open, transparent, competitive, and financially sound markets).


40 See 287 F. Supp. 3d at 213 (discussing strategies to encourage regulatory cooperation); see also Nixon Peabody, supra note 1 (specifying court’s holdings within CFTC v. McDonnell).

41 See McDonnell, 287 F. Supp. 3d at 241 (discussing mission of CFTC).

"The mission of the CFTC is to foster open, transparent, competitive, and financially sound markets. By working to avoid systemic risk, the Commission aims to protect market users and their funds, consumers, and the public from fraud, manipulation, and abusive practices related to derivatives and other products that are subject to the Commodity Exchange Act (CEA)."

Id.
Although virtual currencies create obstacles such as regulation, oversight, and legitimization, there are major advantages to the utilization of decentralized financial systems.\(^4\) A decentralized financial system has the profound ability to increase the accuracy and efficiency of transaction processing, increase the availability of financial freedom from centralized risks such as failed currencies and governments, and increase the efficiency of payment clearance, and support improved security through anonymity.\(^5\) By addressing the challenge of interagency cooperation, federal courts and agencies have the ability to foster this new innovation, streamline the financial services industry and open the doors to further disruptive innovation and technology.\(^6\)

In determining whether virtual currencies may be treated as commodities, the court in \textit{CFTC v. McDonnell} correctly concluded that the nature of these currencies caused them to fall within the scope of the CFTC’s regulatory powers. While this regulatory reach is well within the bounds prescribed to the CFTC, regulating a new currency with traits that have not yet been regulated necessitates open lines of communication between federal agencies sharing potential concurrent jurisdiction. With proper interagency cooperation, a wave of progressive regulation can be welcomed, and in the process, disruptive innovation can be fostered which has the power to change and improve the world as we know it today.

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\(^{44}\) See Stiglitz, \textit{supra} note 39 (discussing regulation of virtual currencies and its relation to innovation).