

Defining (Again) The Scope of “Commodity”

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On July 21, 2025, a U.S. district court judge in Texas stated in an opinion and order^[1] that “section 1 [of the Commodity Exchange Act (“**CEA**”)]^[2] does not encompass precious metals [such as gold] as commodities because they are neither agricultural products nor movie tickets.”^[3] The judge cited a lot of authority in his opinion, but another quote comes to mind from Voltaire: “opinion has caused more trouble on this little earth than plagues and earthquakes.” Indeed, the law is very well established on the matter that gold is a “commodity” under § 1a(9) of the CEA.

Questioning the scope of the definition of “commodity” will cause a lot of confusion and create unnecessary uncertainty in an otherwise established area of law because this analysis may apply to other new “articles” and “goods” “in which contracts for future delivery are presently . . . dealt in,” such as various digital commodities (e.g., cryptos or tokens), or event contracts (e.g., outcomes of sports games), or other things that may be developed in the future. Recognizing the importance of this litigation, the Commodity Futures Trading Commission (the “**CFTC**”) filed a brief on August 28, 2025^[4] addressing in great detail which “goods” and “articles” are included in the definition of “commodity” and why this is important, particularly now.

- **The Facts of the Case.**

The facts of the case are very straightforward. In 2020, the CFTC, along with state attorneys general and regulators from thirty states, brought a fraud action against defendants in connection with a scheme to entice mostly retired individuals to use their retirement funds to invest in gold and silver bullion and coins.^[5] The defendants made numerous false statements and sold otherwise liquid precious metals, coins, and bullion at exorbitant markups (e.g., a 128% markup for silver and 91% for gold), claiming that these were unique numismatic assets.^[6] They were not. The CFTC sued under § 6(c)(1) of the CEA and § 180.1 of the CFTC regulations.^[7] None of the contracts offered under the defendants’ scheme were derivatives (*i.e.*, “commodity interests”), which was not in dispute between the parties.^[8]

- **CFTC’s Jurisdiction.**

Under the CEA, the CFTC has exclusive jurisdiction over transactions in “commodity interests,”^[9] meaning that only the CFTC can promulgate regulations as well as prosecute fraud and manipulation in derivatives – and that federal preemption applies, to the exclusion of states’ and other federal regulators’ jurisdictional reach.

However, with respect to transactions involving only “commodities” without derivatives, the CFTC has only enforcement jurisdiction.^[10] Further, if there is no “commodity” involved, the CFTC has no jurisdictional reach at all. Whether gold and silver bullion is a “commodity” is the core issue in this case because, as the August 28 CFTC’s Brief states, “[w]ithout correction of the [July 21 Opinion and Order] to clarify that precious metals are commodities, it will be impossible for the parties to prepare for and conduct the rapidly approaching trial in this case.”^[11]

- **Defining Commodity.**

The August 28 CFTC’s Brief provides a very detailed analysis of the scope of the definition of “commodity” under the CEA.

First, the CFTC discusses how the definition in § 1a(9) came about and how it was expanded since 1922, and explains that because the definition provides a list of enumerated agricultural commodities, catch-all provisions were included to address additional commodities in which there may develop a futures market in the future.^[12] Second, the CFTC points out that the CEA itself includes additional sub-definitions of agricultural, exempt,^[13] and excluded commodities,

as well as several other sections in which gold and precious metals are specifically referenced (e.g., § 19 of the CEA).

[14] Third, the CFTC lists numerous cases which held that currencies, interest rates or indices, events and occurrences, digital assets / cryptocurrencies, and precious metals are all recognized as commodities.[15] Fourth, the CFTC notes that the carve-out of onions and movie box office receivables proves that the scope of the “commodity” definition in § 1a(9) is much broader than merely agricultural commodities.[16]

In fact, even though not mentioned in the August 28 CFTC’s Brief, on July 18, 2025, the President signed into law the GENIUS Act, which amended the CEA and added to the list of carved out “commodities” payment stablecoins issued under the GENIUS Act.[17] Logically, if something was not already a “commodity,” there would be no reason to carve that good or article from the definition of a “commodity,” indicating that stablecoins were previously commodities.

Finally, the CFTC states that “[m]oreover, precious metals are ‘goods’ or ‘articles’ ‘in which contracts for future delivery are presently . . . dealt in,’ as numerous precious metals futures contracts are traded on CFTC-regulated exchanges, such as those operated by ICE Futures US and the Chicago Mercantile Exchange.”

Additionally, to follow the judge’s logic in the July 21 Opinion and Order, the definition of “security” under the Securities Act of 1933 and the Securities and Exchange Act of 1934[18] would only include a very narrow list of “securities,” per 15 U.S.C. § 77b(1), and clearly would not include investment contracts on orange grove properties in Florida, as is now well-established under the Howey Test.[19] And ignoring the holdings of numerous cases addressing the scope of § 1a(9) of the CEA is “absolutely weird,” to quote U.S. Supreme Court Justice Antonin Scalia (in reference to another unrelated case).

The defendants’ argument that the gold and silver bullion had significant numismatic value is inapposite because there were millions of these coins issued.[20] they are contemporary, and the secondary market trading in these coins is at, or substantially at, the spot price of gold and silver, proving that the coins and the bullion are the same as precious metals themselves, which are “commodities.”[21]

- **Discussion of § 2(C)(2)(D) and § 19 of the CEA.**

The judge addressed § 2(C)(2)(D) of the CEA, discussing the “actual delivery” exemption. This provision had nothing to do with the case at hand, because the contracts in question were not leveraged retail commodity contracts and therefore not derivatives, meaning that the fact that these coins and bullion were “actually delivered” has no bearing on this case.

Likewise, these contracts were not § 19 leveraged contracts, which is not alleged in this case. However, the CFTC did note that reference to § 19 is helpful since it specifically refers to precious metals, bullion, and coins, confirming that gold and silver are “commodities” under the CEA.

- **Implications on other markets.**

If the Texas judge’s conclusion in the July 21 Opinion and Order that gold and silver are not “commodities” were to stand, significant implications would follow: first, there would be confusion in the commodities industry, which relies on existing case law and the CFTC’s interpretation of what is a “commodity”; second, there would be significant uncertainty over the CFTC’s anti-fraud and anti-manipulation jurisdictional reach under § 6(c)(1) of the CEA and § 180.1 of the CFTC regulations; and third, participants in novel commodities markets, e.g., markets in digital commodities and digital assets, would be reluctant to develop new products given the uncertainty over the CFTC’s jurisdictional reach, especially at a time when the CFTC is likely to be granted additional exclusive jurisdiction over spot and forward (i.e., non-derivative) markets in digital commodities (e.g., under the Clarity Act enacted in the U.S. House on July 17, 2025, or similar legislation).[22]

In sum, the Texas judge’s July 21 opinion either completely missed or significantly and materially misinterpreted the CEA and over 100 years worth of legal precedent.

[1] Mem. Op. & Order Den. Mots. for Summ. J., CFTC et al., v. TMTE, Inc. a/k/a/ METALS.COM et al., No. 3:20-cv-02910-X (N.D. Tex. July 21, 2025) (No. 911) (the “**July 21 Opinion and Order**”).

[2] 7 U.S.C. § 1a *et seq.*

[3] July 21 Opinion and Order at 9.

[4] Pl. CFTC's Resp. in Opp'n to Defs. Mot. to Recons. Summ. J. Order & Cross-Mot. for Recons., CFTC et al. v. TMTE, Inc. a/k/a METALS.COM et al., No. 3:20-cv-02910-X (N.D. Tex. Aug. 28, 2025) (No. 934) (the "**August 28 CFTC's Brief**").

[5] See <https://www.cftc.gov/PressRoom/PressReleases/8254-20> (the "**Sept. 2020 CFTC Complaint**").

[6] The assets in question were Silver Royal Canadian Mint Polar Bear Bullion, Gold Royal Canadian Mint Polar Bear Bullion and Gold British Standard Bullion (collectively, the "**gold and silver bullion**"). These are very actively traded coins and bullion and there are many millions of them in circulation, meaning that these are not unique numismatic assets.

[7] 7 C.F.R. § 1 *et seq.*

[8] Derivatives include swaps, options, futures, and certain retail leveraged products. See 7 U.S.C. § 1a(10)(A) (defining "commodity interests" to include futures, swaps, options, and certain leveraged transactions).

[9] § 2(a)(1)(A) of the CEA gives the CFTC exclusive jurisdiction over "transactions involving swaps or contracts of sale of a commodity for future delivery."

[10] § 6(c)(1) of the CEA and 17 C.F.R. § 180.1 of CFTC regulations which prohibit fraud "in connection with ... a contract of sale of commodity in interstate commerce."

[11] August 28 CFTC's Brief at 15.

[12] *Id.* at 6–8.

[13] The August 28 CFTC's Brief states that: "[p]hysical commodities such as gold, silver, platinum, palladium, oil, and gas are all examples of "exempt" commodities that are not agricultural but are nonetheless "commodities" under the CEA."

[14] August 28 CFTC's Brief at 8–11, 18–22.

[15] *Id.* at 12–14.

[16] *Id.* at 6.

[17] Guiding and Establishing National Innovation for U.S. Stablecoins (GENIUS) Act, Pub. L. No. 119-27, 139 Stat. 419, at § 17(f) (amending § 1a(9) of the CEA).

[18] 15 U.S.C. § 77a *et seq.*; 15 U.S.C. § 78a *et seq.* The definition of "security" may be found at 15 U.S.C. § 77b(a) (1).

[19] See SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

[20] The Sept. 2020 CFTC's Complaint states at 80: "Contrary to Metals' false claims, Polar Bear Bullion have no numismatic or seminumismatic value. Polar Bear Bullion are readily available to the public and are not rare. In fact, there are over 6 million units of Polar Bear Bullion in circulation."

[21] For example, an ancient Byzantine gold coin (solidus) typically included 4.5 grams of gold, which as of the date of this article, is approximately \$491 without taking into account its numismatic value; however, a Constantine the Great gold solidus coin minted between 307 and 337 may trade between \$5,000 and \$13,000 and one is currently listed on eBay for \$128,000. This example illustrates that a highly rare gold coin of a numismatic value will be worth far more than the value of the precious metal itself and would certainly not itself be a "commodity."

[22] See House Comm. on Fin. Servs. & House Comm. on Agric., Section-by-Section: Digital Asset Market Clarity (CLARITY) Act of 2025 (Jul. 10, 2025), https://financialservices.house.gov/uploadedfiles/2025-07-10_-_sbs_-_clarity_act_of_2025_final.pdf.