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# Precious Metals Fraud Case Invites Challenges to CFTC's Antifraud Authority

On July 21, 2025, in *Commodity Futures Trading Commission et al. v. TMTE Inc et al.*, a Texas district court denied summary judgment to both the Commodity Futures Trading Commission (CFTC) and two individual defendants in a \$185 million fraud suit filed by the CFTC and 30 state attorneys general against two precious metals dealers for the alleged sale of gold and silver bullion to investors at inflated prices. The court held that questions of fact as to “which congressional grant of jurisdiction” controlled the case made summary judgment inappropriate. However, the opinion is most notable for supporting a narrow view of the CFTC’s antifraud jurisdiction under the Commodity Exchange Act (CEA).

### Background

In September 2020, the CFTC and 30 state regulators filed a joint civil enforcement action against two California precious metals dealers, Lucas Asher and Simon Batashvili, accusing them of fraudulently inducing investors nationwide to purchase hugely overpriced gold and silver bullion. When it was filed, the case represented the largest-ever joint filing between the CFTC and state regulators. Because many of the targeted investors were elderly, the \$185 million in customer funds obtained by Asher and Batashvili is estimated to include over \$140 million in retirement savings. The CFTC and state attorneys general seek disgorgement, civil monetary penalties, and restitution, as well as lifetime registration and trading bans for the defendants and a permanent injunction against any further violations of the CEA, state laws, or CFTC regulations as charged.

The CEA gives the CFTC broad regulatory jurisdiction, including antifraud authority, over commodity futures. The CFTC has long interpreted that

jurisdiction to include regulating markets for precious metals such as gold, copper, and silver. In addition to civil enforcement actions such as the case against Asher and Batashvili, the CFTC has exercised this authority by investigating price manipulation of the gold and silver markets and issuing consumer alerts on precious metals fraud scams.

However, the recent opinion from Judge Brantley Starr of the U.S. District Court for the Northern District of Texas suggests the CFTC may not have the power to regulate gold and silver bullion sales in some instances.

### **Gold and silver as commodities**

The defendants argued that gold and silver bullion are not commodities as the word is defined in the CEA. Judge Starr agreed, writing that the CEA provides limited grounds to argue that the CFTC has the power to regulate gold and silver. Section 1a(9) of the CEA lists 25 specific agricultural commodities such as livestock and corn, but also includes a catchall stating that commodities comprise “all other goods and articles . . . in which contracts for future delivery are presently or in the future dealt in.” While the CFTC has for decades utilized the catchall to flex its authority over novel types of commodity futures, Judge Starr reasoned that “all other goods and articles” should be limited to agricultural items.

The district court’s interpretation of Section 1a(9) focuses on the literal meaning of the provision as written, rather than relying on the CEA’s purpose or history or the intent of its drafters. The opinion employs a canon of statutory interpretation called, in Latin, *ejusdem generis* to rule that a general term (in this case, “all other goods and articles”) following a list of specific examples (here, agricultural products) should be limited to the same class. The opinion also points out that, when Congress revised Section 1a(9) in 2010 to carve out movie tickets, the provision was not otherwise changed. Therefore, “section 1 does not encompass precious metals as commodities because they are neither agricultural products nor movie tickets.”

Notably, a different provision of the CEA mentions gold and silver: Section 19 addresses gold, silver, and platinum in reference to standardized contracts. The court declined to analyze the applicability of Section 19 at the summary judgment stage, citing insufficient briefing by the parties.

The court also discussed the CFTC’s jurisdiction under Sections 2 and 6 of the CEA. Section 2 gives the CFTC jurisdiction over “transactions involving swaps or contracts of sale of a commodity for future delivery.” Section 6(c), added by the Dodd-Frank Wall Street Reform and Consumer Protection Act, grants the CFTC authority to regulate fraud “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.” Dodd-Frank also established what is known as “the actual delivery exception” to the CFTC’s jurisdiction, which grants the CFTC authority over retail transactions

involving leverage, margin, or financing, except “contract[s] of sale that result[] in actual delivery within 28 days.” Retail sales are subject to enforcement under Sections 4(a), 4(b), and 4b of the CEA, but not Section 6.

Judge Starr commented that it was impossible to conclude at the summary judgment stage whether the actual delivery exception applied because the defendants only summarily asserted without explanation that their transactions were not leveraged. Additionally, the CFTC argued that it independently had jurisdiction over the transactions under Section 6. As a result, the court determined it was inappropriate to issue summary judgment to either party.

Regarding the state law claims, the court found that a reasonable juror could determine that the defendants’ statements to customers were not investment advice and instead were mere puffery, permitting all claims based on fraud and investment advice to continue to trial.

### **What this means to you**

This court’s reading of the definition of “commodity” is a narrow one. In 2018, another district court held that the CFTC’s authority did not reach precious metals sales because defendants make “actual delivery” and the CEA only prohibits fraud in connection with market manipulation, but that decision was overturned on appeal. The Ninth Circuit held that actual delivery “unambiguously requires the transfer of some degree of possession or control” to customers, and as alleged in the complaint, the defendants’ delivery of metal to its customers “amounts to sham delivery, not actual delivery.” The Ninth Circuit also held that the CEA prohibits fraud regardless of whether there has also been market manipulation.

Importantly, Judge Starr’s interpretation of Section 1a(9) could be applied to strip the CFTC of jurisdiction over certain commodity futures markets (beyond just gold and silver) in some circumstances. Other federal courts have read Section 1a(9) more broadly and allowed the CFTC to regulate non-agricultural assets as commodities. This includes virtual currencies, which are currently a significant area of enforcement for the CFTC.

*CFTC v. TMTE Inc.* is currently set for trial in October 2025. This case is one to watch for the commodities industry, as the CFTC likely will raise additional arguments in its trial brief, as requested by the court, to assert its enforcement authority over the precious metals industry.

### **Contact us**

If you have any questions about this recent litigation, please contact Sydney Sznajder, Kip Randall, or your Husch Blackwell attorney.