

**Alert | Futures & Derivatives/
Blockchain & Digital Assets**



July 2023

In Decentralized Finance, DAOs Are People Too

In what appears to be a case of first impression, a federal district court has held that a decentralized autonomous organization (DAO) is a person subject to the provisions of the Commodity Exchange Act, as amended (CEA), and rules and regulations of the Commodity Futures Trading Commission (CFTC). DAOs are certain computerized technologies applied in decentralized finance. One trading platform [describes](#) DAOs as “software running on a blockchain that offer users a built-in model for the collective management of its code.”

On June 8, 2023, Judge William Orrick of the U.S. District Court for the Northern District of California entered an [order](#) (Order) granting CFTC’s motion for default judgment against a DAO called Ooki DAO (Ooki DAO) for allegedly violating the CEA in connection with operating an online protocol called the bZx Protocol (Protocol) for buying and selling certain cryptocurrency derivatives.

By way of background, CFTC settled an action in September 2022 (bZeroX Action) against bZeroX, LLC, a Delaware limited liability company (bZeroX), which previously operated the Protocol, and bZeroX’s principals. In the bZeroX Action, CFTC alleged that bZeroX offered leveraged off-exchange transactions in cryptocurrencies on the Protocol deemed to be commodities, without the Protocol being registered as required under the CEA.

In the consent order settling the bZeroX Action against bZeroX and its two founders, CFTC alleged that bZeroX transferred control of the Protocol from bZeroX to a DAO called bZx DAO, which subsequently renamed itself and began doing business as Ooki DAO. Separately from the bZeroX Action, bZeroX

applied for and was issued a **trademark** for “OOKI” in which bZeroX’s business was described as “Commercial lending services; Commodity exchange; Commodity trading for others; Cryptocurrency exchange services; Cryptocurrency trading services; On-line real-time currency trading; On-line trading of financial instruments, shares, options and other derivative products.”

DAOs differ from traditional organizations managed by boards, committees and executives. Rather than being governed by a limited group, DAOs use a set of rules written down in code and enforced by the network of computers running a shared software. To become a member of a DAO, users need to first join the DAO by buying its cryptocurrency. Holding the asset then generally gives users the power to vote on proposals and updates, proportional to the amount they hold. The voting element was particularly important in CFTC’s jurisdictional assertion in the bZeroX Action.

The Protocol was used for “tokenized margin trading and lending” in various cryptocurrencies, rather than using fiat currencies in such transactions. In the Protocol, users could select an available blockchain network to connect a wallet to deposit or withdraw cryptocurrencies. The Protocol described itself as being “non-custodial,” in that users maintained control over their own passwords and digital assets.

Previous cases initiated by either the CFTC or, in the case of cryptocurrencies regulated as securities, the Securities and Exchange Commission, alleged that certain online trading platforms were engaged in offering products or conducting transactions requiring registration under the CEA or applicable securities laws, respectively. What distinguishes the Order is the conclusion that Ooki DAO was subject to requirements under the CEA as a “person.”

Section 4(a) of the CEA, 7 U.S.C. § 6(a), makes it unlawful “for any person to offer to enter into, enter into, execute, confirm the execution of, or conduct an office or business in the United States for the purpose of soliciting or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity future delivery ... unless (1) such transaction is conducted on or subject to the rules of a board of trade which has been designated or registered by the Commission [CFTC] as a contract market or derivatives transaction execution facility for such commodity.”

In the Order, Judge Orrick concluded that Ooki DAO was an unincorporated association, under both California and U.S. law, and that as an unincorporated association, Ooki DAO could be sued under the CEA, notwithstanding opposing arguments contained in amicus briefs filed in this case. The amicus briefs argued that Ooki DAO was not a proper party defendant because it was: (i) a technology and not an entity, (ii) not an unincorporated association; and (iii) not a “person” subject to the CEA. Judge Orrick rejected each of these arguments.

Judge Orrick determined that through deployment of crypto tokens, users of the Protocol could engage in transactions subject to CFTC regulation, and therefore Ooki DAO was not merely a technology. He also reviewed reference sources cited by CFTC and in the amicus briefs and determined that Ooki DAO constituted an unincorporated association under both California and federal law. Finally, he found that Ooki DAO was a “person” under the CEA because the CEA includes “associations” in the definition of “person.” Interestingly, Judge Orrick declined to adopt detailed findings of fact proposed by CFTC.

Although this case was not decided on the merits, and Ooki DAO did not answer or otherwise plead or appear at a hearing held in this matter, Judge Orrick’s procedural decision that DAOs are persons under the CEA nevertheless has several potentially significant implications for decentralized finance.

First, Judge Orrick allowed CFTC to serve Ooki DAO by posting copies of the summons and complaint in Ooki DAO's website online discussion forum and help chat box. In this way, Judge Orrick embraced other courts' willingness to permit unique service of process in decentralized finance or cryptocurrency cases, including online posting and in other cases airdropped non-fungible tokens.

Second, persons and companies engaged in decentralized finance risk enforcement action, notwithstanding the underlying architecture enabling DAOs to operate through consensus mechanisms. Such mechanisms allow a potentially large number of participants to act collectively, without any single person being separately responsible for management or having decision-making authority.

On this point, CFTC charged the principals of bZeroX in the bZeroX Action with **control person liability under the CEA**. CFTC rules applicable to off-exchange transactions define "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." With respect to bZeroX, CFTC claimed that members of a DAO, having the power or authority to vote on governance matters concerning the DAO, and who exercise such power by voting, control the DAO and therefore are liable for actions of the DAO.

As CFTC Commissioner Summer Mersinger noted in her dissent to the settlement in the bZeroX Action, in a hypothetical situation involving a DAO that submits for a vote by its members a governance proposal having nothing to do with the CEA or CFTC rules, a member voting on the proposal "has now become a member of the unincorporated association and [possibly unknowingly] assumed personal liability and is subject to CFTC sanctions for any violations of the CEA by the DAO."

The extent to which the Ooki DAO case or Order may be cited in future CFTC actions or otherwise have precedential value will be determined over time. But in a legal environment that is evolving and constantly changing, persons engaged in decentralized finance or holding DAO tokens should remain vigilant regarding emerging trends in this area.

Authors

This GT Alert was prepared by:

- **Jeffrey M. Henderson** | +1 312.456.8453 | hendersonj@gtlaw.com
- **Douglas E. Arend** | +1 312.476.5029 | arendd@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Berlin.⁻ Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Houston. Las Vegas. London.* Long Island. Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. Seoul.[∞] Shanghai. Silicon Valley. Singapore.⁼ Tallahassee. Tampa. Tel Aviv.[^] Tokyo.* Warsaw.[~] Washington, D.C.. West Palm Beach. Westchester County.

This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ⁻Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ^{}Operates as a separate UK registered legal entity. ⁺Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [»]Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [∞]Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. [^]Greenberg Traurig's Singapore office is operated by Greenberg Traurig Singapore LLP which is licensed as a foreign law practice in Singapore. [~]Greenberg Traurig's Tel Aviv office is a*

*branch of Greenberg Traurig, P.A., Florida, USA. *Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2023 Greenberg Traurig, LLP. All rights reserved.*