Katten Financial Markets and Funds *Quick Take*
October 2022

SEC to Inspect Firms for Compliance With New Advertising and Solicitation Rule

By Richard Marshall

November 4 is the compliance date for the new rule governing advertising and solicitation activities by investment advisers. The new rule substantially revises decades old authorities governing this activity.

On September 19, the Securities and Exchange Commission (SEC) Division of Examinations issued a risk alert announcing the SEC will begin conducting inspection sweeps immediately after the compliance date for the new rule to test whether firms are in compliance. The sweeps with focus on:

- whether firms have revised their policies and procedures to conform with the new rule;
- whether firms are collecting and retaining evidence substantiating factual statements in advertising, as required by the new rule;
- whether firms are changing performance presentations, including presenting all performance gross of fees, presenting multi-year historical performance for separately managed accounts, and complying with numerous conditions on use of hypothetical performance (which will be more broadly permitted); and
- whether firms are retaining newly required records and amending their Form ADVs as required.

CFTC Brings Enforcement Action Against Digital Exchange and Natural Person Controller Suggesting Native Cryptoasset is a Commodity and Not a Security

By Gary DeWaal and Daniel Davis

The Commodity Futures Trading Commission (CFTC) charged a group of companies and their natural person controller with operating an unlicensed futures brokerage company (i.e., a futures commission merchant (FCM)); not complying with anti-money laundering requirements applicable to FCMs; and executing and confirming futures transactions on an unlicensed futures exchange. Additionally, the CFTC alleged that the defendants engaged in attempted manipulation, fraud and deception in connection with transactions in a native cryptocurrency created and utilized by the defendants. In doing so, the CFTC implied that a little-known digital asset constituted a commodity under the CFTC's jurisdiction, and not a security under the Securities and Exchange Commission's (SEC) jurisdiction. All these charges were contained in a CFTC complaint filed on September 30, in a federal district court in Florida. *Read about the CFTC's enforcement action.*

Holders of DAO Governance Tokens Beware: According to the CFTC, Voting May Be Hazardous to Your Well-Being

By Gary DeWaal, Daniel Davis and Lance Zinman

Natural persons and legal entities are potentially jointly and severally liable for all of a decentralized autonomous organization's (DAO) violations of the Commodity Exchange Act (CEA) and Commodity Futures Trading Commission (CFTC or Commission) regulations if they participate in the governance of the DAO through voting of the DAO's governance tokens, charged the CFTC in two related enforcement actions filed on September 22.

This is because the CFTC stated that DAOs are equivalent to unincorporated associations. As a result, persons who participate by voting the DAO's governance tokens are members of such an association and thus, claimed the CFTC, personally, jointly and severally liable, for up to all of the debts of such DAO, relying on state law principles. By analogy, such persons also are potentially, personally, both jointly and severally liable for all of the DAO's violations of the CEA and CFTC regulations, posited the CFTC. *Read Katten's advisory.*

Preference Due Diligence in the Crypto Winter

By Michael Rosella

Published by the *New York Law Journal*, the article explores how US Bankruptcy Code due diligence requirements could be applied to preference claims in Chapter 11 cases involving cryptocurrency. The article examines Sections 547(b) and 550 of the US Bankruptcy Code, which collectively allow a debtor to claw back certain payments made to non-insiders in the 90 days prior to the bankruptcy filing and to insiders in the year before a filing. It is noted that the Small Business Reorganization Act of 2019 raised the bar on the due diligence needed to pursue such litigation, requiring the debtor to assess "known or reasonably knowable affirmative defenses" before moving forward. *Read Katten's article in the New York Law Journal.*

The Long and Winding Road of JAC Regulatory Alert 14-03

By Stephen Morris

Once, many years ago, the Joint Audit Committee (JAC) released a Regulatory Alert (RA 14-03) addressed to futures commission merchants that are clearing members of derivatives clearing organizations registered with the CFTC, which included the following passage: "Additionally, all accounts of the same beneficial owner within the same regulatory account classification (i.e., customer segregated, customer secured, cleared swaps customer, or noncustomer) should be combined for margin purposes. FCMs should be reminded that when determining an account's margin funds available for disbursement, all accounts of the same beneficial owner, even if under different control, within the same regulatory account classification *must* be combined" (emphasis in the original). *Read about the JAC's Regulatory Alert.*

ICE Clear EU to Accept EUAs as Collateral (But Only From Non-FCM Clearing Members)

By Stephen Morris

Citing "current liquidity pressures" in EU energy markets and the need to provide market participants with "more options regarding the assets they provide to the Clearing House as margin cover," ICE Clear Europe has proposed changes to its rules that would make EU emission allowances (EUAs) permitted margin collateral for net short EUA futures positions (that is, emissions futures contracts in respect of which EUAs are deliverable as settlement upon expiration). Valuation of EUA collateral will be subject to haircuts, as determined by ICE Clear EU in its discretion. Eligible clearing members will be able to use EUAs to collateralize both proprietary and customer positions in EUA futures. *Read about ICE Clear EU's fillings.*

How to Minimize Risk Under the Bribery Act 2010

By Neil Robson

Published in *Thomson Reuters Regulatory Intelligence*, the article reviews what financial services organizations can do to continue to minimize risk of foreign or domestic bribery as part of guidance set forth in the UK Bribery Act 2010. Understanding the details of the Bribery Act, keeping anti-bribery policies up-to-date and ensuring the entire organization understands the procedures for implementing those policies are ways to remain in compliance, as well as be in a position to respond quickly should a breach occur. *Read Katten's article in Thomson Reuters Regulatory Intelligence.*

The UK National Security and Investment Act – Guidance Notes

By Oliver Williams, Edward Tran and Omar Malek

On January 4, the UK National Security and Investment Act 2021 (NSI Act) went into effect. As we previously noted, the NSI Act grants the UK government wide new powers to scrutinize and intervene in acquisitions and investments on grounds of national security and made it necessary to notify related transactions in 17 key sectors. Since its introduction, the UK government on June 16 produced an annual report which provided insights into the regime and operational takeaways. Not long after on July 19, the UK government produced market guidance notes (Guidance) highlighting feedback received from the implementation of the NSI Act, particularly focusing on mandatory notifications along with real-life scenarios faced. This details further implications and impact of the introductions of the NSI Act. The Guidance was published in addition to the new guidance on the applicability of the NSI Act to new-build downstream gas and electricity assets. *Read Katten's advisory.*

California Consumer Privacy Act's Employee and B2B Exemptions to Expire on January 1, 2023

By Trisha Sircar, Jose Basabe, Catherine O'Brien and Rachel Schaub

The California Consumer Privacy Act (CCPA) is California's groundbreaking legislation that seeks to give California consumers certain rights over how a business handles "personal information" collected about its consumers. On October 11, 2019, California Governor Gavin Newsom signed AB 25 into law, which provided businesses with temporary relief by exempting personal information that is collected in certain employment contexts and in a business-to-business (B2B) context from the scope of the CCPA until January 1, 2021. As previously reported, Governor Newsom signed AB 1281 into law on September 29, 2020, providing a one-year extension to the partial employee and B2B exemptions to January 1, 2022, applicable only in the event that the California Privacy Rights Act (CPRA) ballot initiative failed. When the CPRA was approved during the 2020 election by California voters, the exemptions were extended one final time to January 1, 2023. On August 31, 2022, the California legislature adjourned without extending the exemptions, which automatically expire on January 1, 2023 in conjunction with the CPRA effective date. *Read Katten's advisory.*

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