



Katten Financial Markets and Funds *Quick Take*

September 2023

SEC Adopts Controversial and Sweeping Changes to Private Fund Rules; Requires Documentation of Annual Compliance Reviews

By Adam Bolter

On August 23, the Securities and Exchange Commission (SEC) voted 3-2 (with Commissioners Peirce and Uyeda dissenting) in favor of adopting new and amended rules under the Investment Advisers Act of 1940 (Advisers Act) that significantly impact the regulation of private fund advisers. As proposed, different aspects of the final rules impact (i) SEC-registered private fund advisers; (ii) all private fund advisers (including exempt reporting advisers); and/or (iii) all SEC-registered investment advisers. [Read about new Advisers Act rules for private fund advisers.](#)

SEC Narrows Exemption From FINRA Membership for Broker-Dealers

By James Brady, Susan Light

On August 23, the SEC adopted amendments to SEC Rule 15b9-1 that effectively will require nearly all broker-dealers to become members of the Financial Industry Regulatory Authority (FINRA). As background, SEC Rule 15b9-1 provides an exemption to broker-dealers from the requirement to become a member of a registered national securities association (i.e., FINRA). [Read about eliminating the proprietary trading exclusion.](#) For more information, read Katten's September 6 advisory, "[FINRA Gains Greater Jurisdiction and Members: Amendments to SEC Rule 15b9-1 Will Require Most Proprietary Trading Broker-Dealers to Join FINRA.](#)"

Finally Finally! FINRA Finalizes Amendments to Covered Agency Transaction Requirements Under FINRA's Margin Rule 4210

By Susan Light

After seven years of extending the implementation date of the original rulemaking adopted in 2016 for Covered Agency Transactions, the SEC approved FINRA's amendments on July 27, 2023, which will become effective on May 22, 2024. Covered Agency Transactions include (1) To Be Announced transactions, inclusive of adjustable-rate mortgage transactions; (2) Specified Pool Transactions; and (3) transactions in Collateralized Mortgage Obligations issued in conformity with a program of an agency or Government-Sponsored Enterprise, with forward settlement dates. [Read about the three changes.](#)

The Second Circuit Agrees: Loans are Not Securities

By Amanda Segal, Lori Jacobs

In a highly anticipated decision, the United States Court of Appeals for the Second Circuit affirmed the District Court's decision in *Kirschner v. JP Morgan Chase Bank* that the syndicated loan at issue in the case was not a security and therefore not subject to state and federal securities laws. The August 24 ruling is being viewed as a victory by the loan market; any decision to the contrary would have subjected borrowers and lenders to a more complex and stringent regulatory framework, disrupting decades of market practice. [Read about the Kirschner case implications.](#)

SEC Denial of Grayscale Bitcoin Fund Was Arbitrary and Capricious Rules DC Circuit Court of Appeals

By Gary DeWaal, Daniel Davis, Sheehan Band, Alexander Kim

The SEC acted arbitrarily and capriciously when it denied Grayscale Investment LLC's proposed listing of a bitcoin exchange-traded fund (ETP) in July 2022, ruled a unanimous three-judge panel of the United States Court of Appeals for the District of Columbia Circuit on August 29. Grayscale's ETP was intended to be traded on NYSE Arca, a national securities exchange. [Read about the SEC's denial.](#)

Offering of NFTs Allegedly Promoted as Investments Claimed to be Unregistered Securities Offering by SEC in Settled Enforcement Action

By Gary DeWaal, Daniel Davis

An offering of non-fungible tokens was deemed an unlawful offering of securities without registration by the SEC in a novel Order of first impression accepting a settlement of proposed charges against Impact Theory, LLC on August 28. [Read about the SEC's ruling.](#)

Quantum Computing Could Threaten Blockchain, Crypto

By Daniel Davis, Alexander Kim

Published by *Bloomberg Law*, the article examines how quantum computing could impact blockchain protocols and cryptocurrency mining. Questions remain regarding the utility of quantum computers and how long development will take for quantum computers to break cryptographic protocols in use today. [Read Katten's article.](#)

President Biden Issues Executive Order Targeting Certain Investments in China

By Jacques Semmelman

On August 9, President Biden issued an [Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern](#) (EO). The "Countries of Concern," listed in an Annex to the EO, are the People's Republic of China, the Special Administrative Region of Hong Kong and the Special Administrative Region of Macau. In conjunction with the EO, the US Treasury issued a [Fact Sheet](#), along with a detailed [Advance Notice of Proposed Rulemaking](#) that requests public input on 83 questions, in advance of the issuance of implementing regulations. [Read about Biden's EO.](#)

Katten and Reputation Consultancy Lansons Debut UK Podcast Series on Misconduct in Financial Services

Hosted by Neil Robson, Ciara McBrien

In collaboration with [reputation consultancy Lansons](#), Katten has launched “(mis)Conduct, Money & Reputation,” a new podcast series that explores the increasingly widespread issue of misconduct in financial services, to give listeners a better understanding of rules and regulations — and the reputational fallout when things go wrong. [Read about the first episode, “Odey, FCA, non-financial misconduct.”](#)

Is ESG Waning Globally for the Asset Management Industry?

By Neil Robson

Published in the *International Financial Law Review (IFLR)*, the article looks at the different approaches to environmental, social and governance (ESG) matters between the United States and Europe, including recent developments in the asset management industry that indicate such matters “were being put on the back burner in terms of priorities,” as major money managers have chosen to support very small percentages of shareholder resolutions related to ESG. [Read about Neil’s article.](#)

The Post-Brexit Future of the UK’s Securitization Regime Takes Shape

By Nathaniel Lalone, Peter Englund, Christopher Collins, Ciara McBrien

As part of post-Brexit regulatory reforms, the UK government is working to repeal and replace retained EU financial services law with new domestic rules — this includes the UK’s on-shored version of the Securitisation Regulation (UK SR). The UK government recently published a draft statutory instrument (SI) to replace the UK SR. Many key obligations will remain, including risk retention, transparency and due diligence, but the SI leaves the details to the UK regulators, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) (together, the Regulators). [Read about securitization regulatory reforms.](#)

FCA Publishes Expectations on the Travel Rule for UK Cryptoasset Businesses

By Christopher Collins, Ciara McBrien, Neil Robson

The FCA has published a statement on its expectations for UK cryptoasset businesses (CBs) complying with the Travel Rule. CBs are required to collect, verify and share information about cryptoasset transfers, (i.e., a CB transferring a cryptoasset to another CB). [Read about the Travel Rule.](#)

FCA’s Plans to Improve Whistleblower Confidence a Positive Step

By Neil Robson, Ciara McBrien

Published by the *IFLR*, the article analyzes the Financial Conduct Authority’s (FCA) report on its 2022 whistleblowing qualitative assessment survey results and the steps it intends to take to improve whistleblower confidence. Whistleblower protection is expected to be a key priority going forward, with an emphasis on making people feel safe to report concerns “in confidence, with confidence.” [Read about Katten’s article.](#)

ICYMI

Here’s a look back at recent client advisories from Katten.

- [“CFPB Director Announces Intention to Propose Rules Targeting the Reliance on Non-Traditional Data Sources in Consumer Finance,”](#) September 8, 2023
- [“FINRA Settles First Significant CAT Reporting Enforcement Action,”](#) September 7, 2023

- [“FINRA Gains Greater Jurisdiction and Members: Amendments to SEC Rule 15b9-1 Will Require Most Proprietary Trading Broker-Dealers to Join FINRA,”](#) September 6, 2023

CONTACTS

For questions about developments in the [Financial Markets and Funds](#) industry, please contact any of the following Katten attorneys.



[Wendy E. Cohen](#)

[vCard](#)



[Daniel J. Davis](#)

[vCard](#)



[Carl E. Kennedy](#)

[vCard](#)



[Christopher T. Shannon](#)

[vCard](#)



[Allison C. Yacker](#)

[vCard](#)



[Lance A. Zinman](#)

[vCard](#)

Partners Stephen Morris and Jonah Roth serve as co-editors of Katten Financial Markets and Funds Quick Take.



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