



Katten Financial Markets and Funds Quick Take

October 2023

The SEC Adopts New Short Sale Reporting Requirements for Institutional Investment Managers

By David Dickstein, Eli Krasnow

On October 13, the Securities and Exchange Commission (SEC) adopted Rule 13f-2 which will require institutional investment managers to report on new Form SHO specified short position data and short activity data for equity securities that exceed certain reporting thresholds. As a result, investment advisers, broker-dealers, family offices, corporations, insurance companies and pension funds that meet any one of the reporting thresholds will be required to file Form SHO. [Read about SEC Rule 13f-2.](#)

Significant Changes Proposed to CFTC Rule 4.7 'Registration Lite'

By Christian Hennion, Mia Hayes

For the last three decades, CFTC Regulation 4.7 has provided registered commodity pool operators (CPOs) and commodity trading advisors (CTAs) with exemptions from certain compliance requirements under Part 4 of the Commodity Exchange Act, in their dealings with investors and clients that are "qualified eligible persons" (QEPs) under that rule. Reliance on Regulation 4.7 has led the Commodity Futures Trading Commission (CFTC) to reassess whether the provisions of the rule continue to align with the purposes motivating its adoption, culminating in a proposal to implement substantial amendments to the rule. [Read about CFTC Rule 4.7.](#)

Tread with Caution: New CFTC Enforcement Advisory on Penalties, Monitors and Admissions Portends Increased Compliance Costs for Industry

By Carl Kennedy, Daniel Davis, Gary DeWaal, Alexander Kim

It is no longer just lions, tigers and bears Dorothy needs to be fearful of, but if she is a potential defendant in a CFTC enforcement action, she must also now worry about potential higher fines (especially if she is recidivist), imposition of third-party monitors, and mandatory admissions of facts and/or violations of law to obtain a settlement under a CFTC Division of Enforcement (DOE) [Advisory](#) issued on October 17. [Read about the CFTC's DOE Advisory.](#)

CFTC Resuscitates Version of MLB's Former 'Neighborhood Play' to Sue Principal of Defunct Crypto-Asset Entity Voyager as a Commodity Pool Operator

By Christian Hennion, Daniel Davis, Gary DeWaal

The CFTC appears to have revived a version of Major League Baseball's "neighborhood play," as evidenced by its allegations in a recently filed enforcement action, [CFTC v. Stephen Ehrlich](#). There, the CFTC claimed that Voyager Digital Ltd. and certain of its affiliates, defunct crypto

asset entities, should have been registered as a CPO (and were not) when they lent customers' crypto assets to unrelated borrowers that engaged in commodity interest transactions (e.g., futures or swaps). [Read about the CFTC's enforcement action.](#)

SEC's Request for Interlocutory Appeal of Favorable Rulings for Ripple Labs' Defendants Rejected Based on Well-Settled Law

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

On October 3, a federal court denied the SEC's request to certify for appeal the same court's decision ([Initial Decision](#)) granting Ripple Labs, Inc.'s and two principals' motion for summary judgment that certain types of sales and distributions of the digital asset XRP did not constitute investment contracts. The SEC had [charged](#) that such (and other) offers and sales by the three defendants were investment contracts (and thus securities) that were required to be registered or exempt from registration and were not. [Read about the rejection of the SECs appeal.](#)

US Court Holds DeFi Developer Cannot Be Held Liable for Third-Party Bad Actors; A Week Later, CFTC Suggests Contrary View Over One Commissioner's Dissent

By Gary DeWaal, Daniel Davis

A developer and financial backers of a renowned decentralized finance (DeFi) protocol cannot be held liable to private litigants for the activities of unrelated bad actors that utilized the protocol to launch and offer for sale scam digital assets, ruled a federal district court judge in New York City on August 29. About a week later, the Commodity Futures Trading Commission (CFTC) took a different approach, commencing and settling an enforcement action against the developer of a DeFi protocol for activities apparently engaged in through an unrelated third-party DeFi application that purportedly were in violation of the Commodity Exchange Act. [Read about these contradictions.](#)

FinCEN Announces Extension to CTA Reporting Deadlines

By Kevin Keen

The US Corporate Transparency Act (CTA) is the first comprehensive ultimate beneficial owner (UBO) and controlling persons reporting regime in the United States and will have broad and cascading implications for financial institutions, service providers, fiduciaries, private clients and family offices, inbound investors, and state agencies alike. It imposes reporting requirements on many existing and newly formed US companies and non-US companies registered to do business in the United States (Reporting Companies). At the same time, the CTA imposes various requirements upon the Financial Crimes Enforcement Network (FinCEN) and the US Department of the Treasury. [Read about FinCen's CTA guidance.](#)

The Carbon Claims Pincer Movement

By Chris Cole

In response to litigation about carbon neutrality claims, many corporations and asset managers have been inclined to go silent, that is, to engage in "greenhushing" by not publicly mentioning any carbon reduction goals. Although greenhushing may seem the course of least resistance, it is increasingly under fire by regulators, potentially causing whiplash. [Read about sustainability disclosure regulations.](#)

UK Regulators Publish Consultations on Diversity and Inclusion Measures

By Sara Portillo, Neil Robson

The Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) have recently published consultation papers on a package of measures to promote diversity and inclusion (D&I) in the UK financial sector aiming to achieve healthier firm cultures, reduce groupthink, unlock new talent from individuals with underrepresented characteristics and address consumer needs (jointly, the "Consultations"). [Read about D&I consultations.](#)

UK Crypto AML Registrations: FCA Feedback on Good and Poor Quality Applications

By Sara Portillo, Neil Robson, Christopher Collins

On 6 October 2023, the FCA updated its anti-money laundering (AML) and counter terrorist financing (CTF) regime webpage with useful feedback on good and poor quality applications – based on real-life applications submitted to the FCA by UK cryptoasset businesses (CBs) for registration under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR). [Read about the low volume of CB registrations.](#)

FCA Final Warning for Cryptoasset Firms Publishing Financial Promotions in the UK

By Sara Portillo, Neil Robson, Christopher Collins

On September 21, the FCA published a letter setting out a "final warning" to cryptoasset firms marketing to UK consumers, and those supporting them, to get ready for the cryptoasset financial promotions rules effective as of October 8. From such date, unauthorized and unregistered cryptoasset firms will only be able to communicate financial promotions that have been approved by an FCA or PRA authorized person or that are within the scope of certain narrow exemptions in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/1529). [Read about cryptoasset firm marketing.](#)

FCA Publishes Policy Statement and Near-Final Rules on Financial Promotion Approvals Gateway

By Neil Robson, Christopher Collins, Nathaniel Lalone, Ciara McBrien

The FCA has published a policy statement (PS23/13) on introducing a "gateway" for firms that approve the financial promotions of unauthorized firms. PS23/13 supports amendments made to the Financial Services and Markets Act 2000 (FSMA) by the recently enacted Financial Services and Markets Act 2023 (FSMA 2023). PS23/13 also follows the FCA's consultation paper (CP22/27) on the gateway's proposed operation and related issues. [Read about the gateway and permissioning requirements.](#)

ICYMI

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

- ["The Manifold Compliance Challenges of Foreign Security Futures,"](#) October 16, 2023
- ["SEC Adopts Amendments to 'Names Rule' Impacting Regulated Investment Funds,"](#) October 10, 2023
- ["SEC Complaint Signals Aggressive Approach to Information Barriers Enforcement,"](#) September 29, 2023
- ["California Passes Two Climate Disclosure Laws That Will Require Unique, Public Reporting of Carbon Emissions and Climate Risk,"](#) September 26, 2023

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