Katten Financial Markets and Funds *Quick Take*
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New DOL Rule Enables Consideration of ESG Factors in Investing, Plus the SEC Continues its ESG Enforcement Push in the Absence of Final SEC Rules

By Johnjerica Hodge, Danette Edwards and Nikita Yogeshwarun

On November 22, the US Department of Labor (DOL) announced a final rule promulgated by the Employee Benefits Security Administration that allows retirement plan fiduciaries to consider environmental, social and governance (ESG) factors in investment choices. The new rule, “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,” will take effect sixty days after its publication in the *Federal Register*, although certain proxy voting provisions will not take effect until one year after publication. The rule was issued in response to President Biden’s Executive Order 14030, which directs the federal government to highlight and consider policies to protect the retirement funds of American workers and families from ESG threats such as climate-related financial risk.

Labor Secretary Marty Walsh stated, “Today’s rule clarifies that retirement plan fiduciaries can take into account the potential financial benefits of investing in companies committed to positive environmental, social and governance actions as they help plan participants make the most of their retirement benefits.”

Although DOL’s new rule does not require plan fiduciaries to credit ESG factors in investments, it does allow them to assess ESG-related benefits while still adhering to the principle that fiduciaries must not accept reduced returns or greater risks to secure collateral benefits.

DOL’s rule may be the precursor to much broader SEC regulations. The SEC is widely expected to issue new ESG-related rules of its own, having proposed a set of regulations on this subject at multiple points earlier this year. Indeed, earlier this week, a group of Attorneys General for seventeen states submitted a letter to the Senate Committee on Banking, Housing, and Urban Affairs and House Committee on Financial Services lending their support for the SEC’s proposed ESG rules.

Meanwhile, the SEC’s Division of Enforcement continues its aggressive push on the ESG front. On November 22, 2022, the SEC filed a settled administrative proceeding against an asset manager for alleged policies and procedures failures involving two mutual funds and one separately managed account strategy marketed as ESG investments. To settle the charges, the asset manager agreed to pay a multi-million dollar penalty. As agency rulemaking across the government evolves to provide more clarity in the ESG realm, companies can expect the SEC to continue to bring ESG-related actions. *Read about the new DOL rule.*

December 9 Looms as Compliance Date for Private Investment Funds and Certain Investment Advisers to Comply With New Cybersecurity Requirements

By David Dickstein, Vlad Bulkin, Wendy Cohen, Richard Marshall, Trisha Sircar, Allison Yacker and Lance Zinman

As discussed in our March 3 Advisory, on October 27, 2021, the Federal Trade Commission (FTC) announced revisions (the 2021 Revisions) to its information "Safeguards Rule" (the Rule) adopted under the Gramm-Leach-Bliley Act (GLBA). The Rule was first enacted in 2002 to ensure that financial institutions under the jurisdiction of the FTC protect nonpublic personal information (NPI) of their natural person clients and investors (each, a Customer). Financial institutions under the FTC's jurisdiction include private investment funds (Private Funds) and ***any investment advisers that are not registered with the Securities Exchange Commission (SEC) such as state registered investment advisers***. The 2021 Revisions were adopted in response to the significant harm caused to consumers, including monetary loss, identity theft and other forms of financial distress as a result of data breaches and other cybersecurity concerns.

The 2021 Revisions became effective on December 9, 2021, with an initial compliance date of December 9, 2022, for most substantive changes. However, for various reasons, including lack of personnel and supply chain equipment issues, on November 15, 2022, the FTC extended the compliance deadline until June 9, 2023 for several aspects of the 2021 Revisions. Nonetheless, the compliance date for other aspects of the 2021 Revisions remains December 9, 2022. Below are the 2021 Revisions for those requiring compliance by December 9, 2022 and for those which compliance was delayed until June 9, 2023. *Read Katten's advisory.*

FINRA Announces Targeted Exam of Retail Communications Related to Crypto Assets

By Susan Light

In November, the Financial Industry Regulatory Authority (FINRA) launched a targeted examination into firm practices regarding retail communications concerning crypto asset products and services. FINRA's broad sweep focuses on retail communications made by brokers or their affiliates in the third quarter of 2022 that involved a crypto asset or a service involving the transaction or holding of a crypto asset, as well as the firm's supervisory processes and procedures over this area. For purposes of this sweep, "Crypto Asset" means an asset that is issued or transferred using distributed ledger or blockchain technology, including, but not limited to, so-called "virtual currencies," "coins," and "tokens." A Crypto Asset may or may not meet the definition of a "security" under the federal securities laws, will not include a security registered under the Securities Act and transferred through a registered clearing agency.

This is the first sweep letter issued by FINRA this year. The regulator states that it conduct targeted exams to gather information and carry out investigations. Sweep information is used to focus examinations and pinpoint regulatory response to emerging issues. *Read FINRA's targeted exam letter.*

Gary DeWaal and Daniel Davis Advocate for Crypto Spot Market Regulation

By Gary DeWaal and Daniel Davis

In articles that ran in *Bloomberg Law* and Global Investor Group's *FOW (Futures & Options World)*, Financial Markets and Funds attorneys Gary DeWaal and Daniel Davis called on Congress to "adopt meaningful and comprehensive crypto legislation."

For *Bloomberg Law*, Gary examined recent market turbulence and how it has renewed debate over federal regulation of crypto. He suggested that the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) should keep regulating crypto assets and activities under existing law, and the CFTC needs exclusive authority over the spot market in new legislation. It also is noted that the CFTC has the advantage, (1) citing recent enforcement actions; (2) it's an efficient change given the CFTC's existing plenary jurisdiction over derivatives trading involving virtual currencies; and (3) that as a principles-based regulator, the CFTC is best-situated to respond most rapidly to changes in technology and practices to ensure maximum customer protection. *Read "This Is How the SEC and CFTC Should Regulate the Crypto Markets."*

Gary and Dan reflected in *FOW* on the December 1 Senate hearing on the recent collapse of FTX and pending crypto bills, noting that Congress needs to quickly "adopt meaningful and comprehensive crypto legislation." With any one of three bi-partisan, comprehensive bills on the table, Congress could potentially grant the CFTC exclusive jurisdiction to regulate intermediaries and transactions involving spot virtual currencies; requires the segregation of customer assets at such entities; and imposes customer protection requirements on such firms equivalent to the types of obligations imposed routinely on intermediaries in the regulated derivatives and securities industries today. They cited other notable investment scandals in history, indicating that while it is not possible to prevent all instances of fraud, ensuring that one regulator — the CFTC — oversees spot crypto industry registrants would go a long way to ensure customer protection is at the forefront. *Read "Congress needs to prioritise customer protections in crypto."*

ICE Futures US Equity Basis Block Trades: A New Way to Price Block Trades in Certain Equity Index Futures

By Stephen Morris

Effective December 13, 2022, ICE Futures U.S. (IFUS) is implementing new functionality under its block trade rule permitting dealers to trade "equity basis blocks" (EBBs) in IFUS futures contracts on MSCI Indices, the NYSE FANG+ Index, and the ICE Biotechnology and Semiconductor Index. Similar to the CME's "derived blocks" (introduced for certain CME equity index futures last May – for which, see here), an EBB is a block trade, the price and quantity of which depend on hedging transactions by the dealer that takes place after the terms of the block trade have been agreed, but prior to being submitted to the exchange. Permissible hedging vehicles include stock baskets, cash market instruments, or equity index futures or options. Per the IFUS FAQ, the hedging instruments "must demonstrate a reasonable price correlation to the equity index futures product underlying the EBB."

A dealer trading EBBs may commence hedging activity upon having reached an agreement with its counterparty on the quantity of futures or notional value of the block, the execution methodology for the hedging transactions, the markets on which the hedging transactions will take place, and the predetermined basis to be used in determining the price of the block trade after the hedge has been established. *Read about IFUS block trade rule.*

Is the Financial Services and Markets Bill 2022 Really the UK's "Big Bang 2.0"?

By Carolyn Jackson, Nathaniel Lalone, Neil Robson, Alice D'Mello and Christopher Collins

The UK Government introduced the Financial Services and Markets Bill into Parliament on 20 July 2022. The Bill comes with high hopes, and has been described as a "once in a generation opportunity" to improve the UK's financial regulatory framework, and to make the UK's financial services sector more competitive in a post-Brexit world. The Bill has been cited by a number of UK politicians as the start of a "Big Bang 2.0" for the UK's financial sector.

The Katten UK Financial Regulatory team presented a webinar discussing what the proposed Bill might mean for financial trading and markets firms and whether it really could be the UK's "Big Bang 2.0." The webinar covers a number of topics under the Bill, including the revocation of EU law, changes to the powers and objectives of the UK regulators and transitional changes to the UK's MiFID regime under the Wholesale Markets Review. *Watch 'Is the Financial Services and Markets Bill 2022 Really the UK's "Big Bang 2.0"?'.*

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