



Katten Financial Markets and Funds Quick Take

March 2023

FINRA Updates Its Sweep on Social Media Influencers, Customer Acquisition and Related Information Protection

By Susan Light

On February 28, the Financial Industry Regulatory Authority (FINRA) provided an update for its sweep on [Social Media Influencers, Customer Acquisition and Related Information Protection](#), which was first conducted in September 2021, the purpose of which was to review firms' practices related to their acquisition of customers through social media channels and sharing of customers' usage information with affiliates and non-affiliated third parties. [Read about FINRA's update.](#)

Yet More Delays to FINRA's Proposed Rule Amendments to Rule 4210 Margin for Covered Agency Transactions

By Susan Light

FINRA recently filed a [proposed rule change](#) with the SEC to yet again delay until October 25, 2023 the implementation date for amendments to Rule 4210 (Margin Requirements) for Covered Agency Transactions. FINRA's original 2015 proposal sought to establish margin requirements for (1) To Be Announced (TBA) transactions, inclusive of adjustable rate mortgage (ARM) transactions; (2) Specified Pool Transactions; and (3) transactions in Collateralized Mortgage Obligations (CMOs) (collectively, "Covered Agency Transactions"). [Read about FINRA's proposed rule change.](#)

SEC 2023 Examination Priorities

By Richard Marshall, James Brady, David Dickstein, Christian Hennion, Paul McCurdy

On February 7, the Securities and Exchange Commission's (SEC) Division of Examinations (Division) published its examination priorities for 2023. The Division noted that in fiscal year 2022, the Division examined approximately 15 percent of all registered investment advisers (RIAs). The Division stressed that moving forward increased examinations can only be achieved with "significant investments in human capital and technology resources." This statement raises the possibility that in the future the Division may recommend a significant increase in resources devoted to adviser inspections, such as through the creation of a self-regulatory organization. [Read Katten's advisory.](#)

SEC Shortens Settlement Cycle

By James Brady

On February 15, the SEC adopted rule changes to shorten the standard settlement cycle for most broker-dealer transactions from two business days after the trade date (T+2) to one business day after the trade date (T+1). The revised rules also shorten the standard settlement cycle for firm commitment offerings priced after 4:30 p.m. ET from four business days after the trade date to T+2. In addition, the revised rules include various other changes relating to security-based swaps, allocations, confirmations and affirmations, and clearing agency requirements to facilitate straight-through processing (STP). [Read about the adopted rule change.](#)

Regulate Staking-as-a-Service by Rules, Guidance, Not Enforcement – an Opinion

By Daniel Davis, Gary DeWaal

This opinion piece analyzes a recent SEC settlement which espoused the SEC's view that a cryptoasset trading platform's staking-as-a-service program involved the offer and sale of an unregistered security. Dan and Gary suggest that the SEC misapplied the "Howey" test used to determine when a public offering constitutes an investment contract and thus a security. "Even when customers' cryptoassets were bonded for staking, customers apparently still owned them. There was no investment." They further argue that novel, counter-intuitive theories articulated by the SEC in the settlement would benefit from regulatory guidance rather than rules generated from enforcement actions. [Read Katten's article.](#)

Corporate Bond ETFs May Come Under the Regulatory Microscope

By Peter Wilson

Judging from this framing by the *Financial Times*, an obscure debate over bond liquidity may prompt regulatory scrutiny. Corporate bond exchange-traded funds (ETFs) may be a niche product, but anything described as "akin to Libor" deserves careful compliance scrutiny. [Read about ETF baskets.](#)

ESG Litigation Heats Up in Marketing, Climate Pollution and DEI

By Christopher Cole, Johnjerica Hodge, India Williams, Ally Jordan

Published by *Bloomberg Law*, this article looks at the growing trends in environmental, social and governance (ESG) related litigation. An increase in shareholder derivative lawsuits, consumer protection litigation, suits by environmental advocacy groups, employment discrimination claims — individual and class — and other private action litigation driven by topics such as green washing, climate pollution and diversity, equity and inclusion (DEI) matters will factor big in 2023. [Read Katten's article.](#)

Recent NLRB Decision Impacts Employer Use of Non-Disparagement and Confidentiality Clauses

By Julie Gottshall, Stacey Knight, Michelle Gyves, Janella Gholian, Janet Widmaier, Andrew Schuyler, Jill Settlemyer

The National Labor Relations Board (NLRB) issued a recent decision that impacts the use of non-disparagement and confidentiality clauses in employee agreements. In the *McLaren Macomb* decision, the Board concluded that non-disparagement and confidentiality clauses infringe on an employee's rights under the National Labor Relations Act (NLRA) because they may dissuade protected employee activity. This decision has broad implications for all employers

(not just those with a unionized workforce) whose employment templates contain such clauses. [Read Katten's advisory.](#)

Ever-Expanding BIPA Damages: Illinois Supreme Court Holds Each Collection or Dissemination of Biometric Data Constitutes a Separate Violation of BIPA

By Janet Widmaier, Geoffrey Young, Charles DeVore

In an eagerly-awaited decision in *Cothron v. White Castle System, Inc.*, the Illinois Supreme Court recently held, by a 4-3 margin, that a separate claim for damages accrues under the Illinois Biometric Information Privacy Act (BIPA) every time a private entity scans or transmits an individual's biometric identifier or information in violation of BIPA. In so holding, the Court rejected the commonly asserted position that a BIPA violation occurs only upon the first scan and first transmission. This is bad news for businesses operating in Illinois that utilize biometric data, as this holding significantly expands the potential BIPA damages. [Read about the decision.](#)

China Issues Final Standard Contract Clauses for Cross-Border Data Transfers

By Trisha Sircar

On February 24, the Cyberspace Administration of China (CAC) released the [final version](#) of the Standard Contract Clauses for Cross-Border Transfer of Personal Information (the SCCs) and the Measures for the SCCs (the Measures) under the Personal Information Protection Law (PIPL). The final version of the Measures and the SCCs almost mirror the draft version published in June 2022 and track closely to the [European Union's SCCs](#) for international transfers, pursuant to the General Data Protection Regulation (GDPR). [Read about key takeaways.](#)

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