SEC Chairman: We're going to be bringing more cases

By **FRJ** 28th Feb 2018

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The US Securities and Exchange Commission ("SEC") has brought several cases against virtual currency issuers and public companies that have touted their involvement with blockchain technology.[1] In recent weeks, however, the SEC has expanded its focus to include a wide array of market professionals, or "gatekeepers," who are involved in virtual currency transactions and who should now be looking over their shoulders. As SEC Chairman Jay Clayton stated this week, "if people don't change their ways we're going to be bringing more cases."[2]

First, on December 11, 2017, Chairman Clayton issued a statement on cryptocurrencies and initial coin offerings ("ICOs") that expressly addressed the duties of gatekeepers, including broker-dealers, investment advisers, exchanges, lawyers and accountants.[3] In that statement, he criticized market professionals who have attempted to recharacterize ICOs as utility tokens to avoid application of the securities law, warning that:

> ***On this and other points where the application of expertise and judgment is expected, I believe that gatekeepers and others, including securities lawyers, accountants and consultants, need to focus on their responsibilities.*** *I urge you to be guided by the principal motivation for our registration, offering process and disclosure requirements: investor protection and, in particular, the protection of our Main Street investors.*[4]

He also cautioned market participants against promoting or touting ICOs or operating trading platforms without determining if their activities require registration as broker-dealers or securities exchanges under the Securities Exchange Act of 1934. And he reminded market participants that they must comply with anti-money laundering and know-your-customer obligations and exercise caution when participating in margined cryptocurrency trading.

Second, on January 4, 2018, the SEC commissioners issued a joint statement commending the North American Securities Administrators Association (NASAA) for its work highlighting concerns with virtual currencies and ICOs.[5] In it, the commissioners expressed their opinion that "it is clear that many promoters of ICOs and others participating in the cryptocurrency-related investment markets are not following [the securities] laws."[6] They also cautioned the public that while the "SEC and state securities regulators are pursuing violations . . . there is a substantial risk that our efforts will not result in a recovery of your investment."[7]

Third, on January 22, 2018, Chairman Clayton again addressed market professionals, stating that:

> *Market professionals, especially gatekeepers, need to act responsibly and hold themselves to high standards. To be blunt, from what I have seen recently, particularly in the [ICO] space, they can do better.*[8]

He observed that he has seen a disturbing increase in securities lawyers providing legal advice that is designed to assist promoters in offering a product that has many of the key features of securities but is not being treated by practitioners as a security and therefore are depriving "investors of the substantive and procedural investor protection requirements of our securities laws."

He also highlighted the scenario of securities lawyers "stepping back" from the key issues of whether an instrument is a security or qualifies for an exemption from registration and instead appearing to "provide the 'it depends' equivocal advice, rather than counseling their clients that the product they are promoting likely is a security." He indicated that SEC staff would be on high alert for conduct by securities lawyers that violates the securities laws and rules of professional conduct.

Lastly, in a recent interview with *Bloomberg*, Chairman Clayton disclosed that he had determined that a number of virtual currency exchanges should fall under the SEC's jurisdiction over national securities exchanges.[9] Currently, there are no virtual currency exchanges that are registered with the SEC as national securities exchanges, and it is a herculean task for an entity to register with the SEC as an exchange. As *Bloomberg* noted, enforcing the registration requirement on virtual currency exchanges and subjecting them to regular surveillance and investor protection rules "could slow down a red-hot market."[10]

Accordingly, market participants must remain vigilant to ensure that their actions comply with the federal and state securities laws, even if they are not issuers or promoters of virtual currencies and ICOs. Those interested in ICOs should seek counsel to help navigate existing laws and regulations to ensure compliance.
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