

Overview of Overseas Regulations & Developments – U.S.

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US Regulatory Developments

- Relaxation of rules to make certain types of funds and products available, cheaper and faster to market
 - ETFs
 - Crypto-currencies
 - Fund of Funds
- Greater investor opportunities
 - Private Placement
- Investor protection
 - B-D Best Interest Standard

Positive for the industry and investors

ETF Rule Proposal

- ETFs do not fit the Investment Company Act of 1940 (“40 Act”).
- Proposed Rule 6c-11 would simplify and modernize the regulatory framework by:
 - Allowing most ETFs (index and active, but not non-transparent or leveraged ETFs) to operate without first obtaining exemptive relief;
 - Provide greater flexibility with respect to aspects of ETF operations, including the use of “custom baskets” of securities for creation and redemption transactions; and
 - Require additional disclosures regarding ETFs’ trading costs, including certain bid-ask spread information, NAVs, policies, etc.
- The industry is generally supportive of proposed Rule 6c-11 and has submitted comments, largely on the margins (<https://www.sec.gov/comments/s7-15-18/s71518.htm>).

Bitcoin Exchange-Traded Products

- Race to launch first bit-coin backed ETF – many applications which SEC has resisted.
- Example: SEC formally disapproved the proposed rule change by CBOE BZX Exchange, Inc. seeking to list and trade shares of the Winklevoss Bitcoin Trust.
 - The SEC voted three-to-one against the proposal;
 - Second time BZX’s proposed rule change has been rejected;
 - Failed to satisfy the requirements of Section 6(b)(5) of the Securities Exchange Act of 1934, which requires the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices” and “to protect investors and the public interest.”
- Latest attempts:
 - Solidx (VanEck – CBOE). Was due 27 Feb but pulled. Proposed \$200,000 share price;
 - Bitwise. Filed January. Linked to basket of 10 crypto-currencies.
- SEC has signaled it is open to the possibility of approving products in future.

Initial Coin Offerings (ICO)

- pre-2017 largely unregulated. SEC now considers these securities sales – several enforcement actions. Blockvest a turning point?

Proposals for Fund of Funds

- SEC also announced in December that it proposes to streamline and enhance the regulatory framework for FoFs – cheaper and faster process to launch.
- Remove need for exemptive orders, instead consistent rules based framework for formation and oversight:
 - Control and voting
 - Redemption limits
 - Excessive fees
 - Complex structures.

Private Placement Overhaul

- Existing rules aim to protect individual investors from “risky private deals”, but have been cobbled together over time.
- SEC staff are working on proposal to streamline “elaborate patchwork” of exemptions that govern the private sale of securities (Securities Act (s 4(a)(2), Reg D), Investment Companies Act).
 - Will make it easier for startups to raise money without going public;
 - May revise the definition of “accredited investor” to account for sophistication, making more people eligible.
- The House of Representatives passed a bill expanding the definition of an “accredited investor,” but the Senate has not taken it up.

Best Interest Standard for Broker-Dealers

- SEC recognizes the important role B-Ds play but also that they can be conflicted.
 - currently suitability obligations, but not “in the best interest of customers”.
- 2018 SEC published rules and interpretations intended to:
 - Improve the investor experience (treated fairly); and
 - Provide greater clarity regarding customers’ relationships with broker-dealers.
- The proposed rules and interpretations would:
 - Create a principles-based standard of conduct for broker-dealers;
 - Require broker-dealers to act in the best interest of customers;
 - Create additional disclosure obligations for broker-dealers.

BUT would not create a full fiduciary responsibility.

Foreign Investment Risk Review Modernization Act ("FIRRMA")

- National security reviews of foreign investments in US businesses.
- FIRRMA expands the powers of the Committee on Foreign Investment in the United States ("CFIUS") to review certain foreign investments (especially tech, telecoms, infrastructure).
- Potentially includes non-controlling investments by foreign persons in certain US businesses:
 - board or equivalent rights, and
 - have access non-public technical info, or
 - involved in substantive decision making concerning critical technology.
- Pilot program requires filings for such non-controlling investments in "critical U.S. businesses" *e.g.*:
 - Critical infrastructure;
 - Critical technologies; and
 - The maintenance or collection of sensitive personal data of U.S. citizens.
- A declaration must be filed at least 45 days prior to transaction closing.
- CFIUS powers include the ability to suspend transactions or require sell-offs.

FCPA - US's Extra-territorial Reach

- Foreign Corrupt Practices Act top priority for enforcement (DoJ).
- 500+ actions – 1/3rd of which against non-US firms and nationals.
- Prosecutors try and invoke a wide jurisdictional reach – DoJ held a position that non-US persons, even outside the US, could be prosecuted if they were an accessory (i.e. aiding and abetting with FCPA violation).
- Case of Hopkins – UK employee of French multi-national which was prosecuted in US. US courts ruled it was not legitimate to prosecute non-US persons for conspiracy to violate, or aiding and abetting a violation of, the Foreign Corrupt Practices Act (“FCPA”) when the non-US person did not engage in conduct that constitutes a direct violation of the statute.
- Liability for non-US persons is limited to circumstances where those persons acted while in the US or as an agent of a US “domestic concern”.
- Impact? Limited in reality – still catches non-US residents responsible for improper conduct by a US entity, subsidiary, business partner or agent, or overseas joint ventures, and officers, employees, directors or agents of US companies.

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