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Insights: Perspectives

Top Takeaways in the World of Securities Regulation

FEBRUARY 28, 2019 Written by David M. Eaton and David A. Stockton

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TOP TAKEAWAYS IN THE WORLD OF

Securities Regulation

Kilpatrick Townsend partners David Eaton and David Stockton participated recently in the "Advanced Securities Law" seminar sponsored by the State Bar of Georgia in Atlanta. Mr. Eaton chaired the program and Mr. Stockton presented on *Securities Laws Applicable to Communications of Corporate Earnings*. The panel provided timely updates and insights into trends and developments in the securities law area.

Top takeaways include:

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Non-GAAP Financial Measures

The SEC's recent crackdown on the use of Non-GAAP financial measures (such as EBITDA and 'adjusted' earnings) appears to have significantly improved compliance, as SEC comment letters on non-GAAP topics were down substantially in 2018, after spiking in 2016 and 2017. Despite this, there was one significant enforcement action by the SEC in December 2018 over an issuer's failure to include comparable GAAP measures in the headlines of two earnings releases where it presented non-GAAP measures. (SEC guidance in fact requires that the comparable GAAPs *precede* the non-GAAP.)

Blockchain Technology

The applicability of the securities laws to blockchain technology continues to rapidly evolve. The SEC's position on the threshold issue of whether these interests constitute securities is becoming clear - if there are persons in the blockchain network who have any kind of special rights or can exercise any kind of special control over the network (particularly to ensure that it runs smoothly or as originally contemplated by the creators), then the interests are likely to be a security under the traditional "***Howey***" test because investors are relying on the entrepreneurial or managerial efforts of others. Even if a token has a practical use, advertisements that focus on profits/appreciation in value rather than the practical use of the token may cause the token to constitute a security.

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Securities Bar is Warned by SEC

In a shot fired across the bow of the securities bar, SEC Chairman Clayton in January 2018 said that the SEC staff is on high alert for approaches to ICOs that may be contrary to professional obligations of the securities bar. Clayton noted that there have been token offerings where attorneys have taken either a backseat and not addressed whether a coin may be a security or even, in some cases, assisted promoters in structuring offerings of products that have many of the key features of a securities offering without complying with the securities laws.

M&A Litigation

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Litigation surrounding larger M&A deals continues to be the norm, but has shifted from state courts to federal courts since the *In re Trulia* decision in 2016, which sharply limited 'disclosure only' class settlements. Post-closing lawsuits seeking damages have also become more common. Surveys showed that M&A-related lawsuits were dismissed at higher rates and resolved more quickly than other securities class action filings not involving M&A matters.

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Crowdfunding Offerings

A representative of the Georgia Securities Commissioner reported that filings for offerings under the Crowdfunding Regulations included in the 2016 JOBS Act now totaled over 1,150 nationwide. The statute is being used for relatively small offerings, with amounts raised in completed offerings averaging only about $218,000. FINRA has seen registrations of over 45 funding portals, which have substantial responsibilities to assure compliance under the statute.

Top Shareholder Proposals

Regarding corporate governance developments, the top three governance proposals filed by public company shareholders in 2018 related to (i) the right of shareholders to call a special meeting, (ii) the establishment of an independent chairman, and (iii) the right of shareholders to act by written consent without a meeting. Board diversity is becoming increasingly important, with ISS and Glass Lewis policies coming into effect which require at least one female director to avoid a 'withhold' recommendation.

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