

Government and Regulatory Rundown

SEWARD & KISSEL LLP

Department of Justice

DOJ Promotes Compliance Through Compensation and Clawback Programs (3.2.2023):

- The DOJ announced corporate criminal resolutions will now include a requirement that companies implement a compensation and bonus scheme that promotes compliance and rewards corporations that attempt to claw back payments to corporate wrongdoers.
- As part of a pilot program, the DOJ will reduce fines for companies that claw back compensation and companies will keep the recovered funds.
- Noting the difficulty of recouping payments, the DOJ stated that it will discount fines for corporations that make a good faith effort to claw back compensation but are ultimately unsuccessful.

Healthcare CEO Charged for Insider Trading (3.1.2023):

- An indictment was unsealed charging Terren S. Peizer, the CEO and Board Chairman of Ontrak Inc., a publicly traded health care company, for allegedly engaging in an insider trading scheme in which he fraudulently used Rule 10b5-1 trading plans to trade Ontrak stock.
- This indictment represents the first time that the DOJ has brought criminal insider trading charges based exclusively on an executive's use of 10b5-1 trading plans and the investigation is part of a data-driven initiative led by the DOJ's Fraud Section to identify 10b5-1 trading plan abuse.
- See more: [CEO of Publicly Traded Health Care Company Charged with Insider Trading For Misusing Rule 10b5-1 Trading Plans \(Seward & Kissel\)](#)

New Charges against Bankman-Fried (2.23.2023):

- Manhattan federal prosecutors added charges, including bank fraud conspiracy, conspiracy to make unlicensed money transfers, and fraud counts related to the derivatives market, based on the same essential theory as the initial charging document, which accused Bankman-Fried of looting FTX starting in 2019 while running it into bankruptcy to fund his Alameda Research hedge fund.
- The superseding indictment also alleges that Bankman-Fried was "secretly building Alameda's capacity to misuse FTX customer funds into the computer code" of the platform by encoding "secret loopholes."

DOJ Unveils New Voluntary Self-Disclosure Policy (2.22.2023):

- The U.S. Department of Justice unveiled a voluntary self-disclosure policy for corporate criminal enforcement in all U.S. attorney's offices across the nation.
- Under the terms of the new U.S. attorney directive, a timely voluntary self-disclosure means a company must self-report prior to an imminent threat of the misconduct being revealed or the advent of a government investigation.
- A corporation's divulgence must also occur before the misconduct becoming publicly known, or before the government learns of the malfeasance, and the company will bear the burden of demonstrating to federal prosecutors that the disclosure is timely.

- See more: [DOJ Releases New Voluntary Self-Disclosure Policy \(Seward & Kissel\)](#)

Former Coinbase Insider Pleads Guilty in Cryptocurrency Insider Trading Case (2.7.2023):

- A former Coinbase Global Inc. product manager pled guilty on February 7, 2023 to helping others buy digital tokens based on confidential information about the exchange's upcoming listings.
- While most insider trading cases charge securities fraud, the Coinbase indictment contains only wire fraud counts. This allows the Manhattan U.S. Attorney's Office to avoid weighing in on the contested question of whether cryptocurrency and NFTs qualify as securities.

Danske Bank-DOJ Deal Ties Exec Bonuses to Compliance (1.18.2023)

- On Jan. 5, 2023, Danske Bank was sentenced to three years' probation and ordered to forfeit roughly \$2.06 billion in a global resolution with the DOJ, the SEC and Danish authorities for funneling vast sums of money through its Estonia unit with little oversight.
- One novel provision in the bank's plea agreement with the DOJ was a mandate that Danske Bank implement evaluation criteria related to compliance in its executive review and bonus system, "so that each bank executive is evaluated on what the executive has done to ensure that the executive's business or department is in compliance with the compliance programs and applicable laws and regulations." The plea agreement further notes that a failing score in compliance will make the executive ineligible for any bonus for that year.
- SEC Press Release: <https://www.sec.gov/news/press-release/2022-220>
- DOJ Press Release: <https://www.justice.gov/opa/pr/danske-bank-pleads-guilty-fraud-us-banks-multi-billion-dollar-scheme-access-us-financial>
- Plea Agreement: <https://www.moneylaunderingnews.com/wp-content/uploads/sites/12/2023/01/Danske-Bank-plea.pdf>

SEC

New SEC Rules Highlights Exec Trading Plans (2.24.2023):

- The SEC has revised Rule 10b5-1 to include new requirements for trading plans, including a 120-day cooling off period for corporate officers and directors, a prohibition against overlapping plans, and new reporting requirements.
- Issuers will be required to comply with the new disclosure requirements in financial reports and information statements that cover the first full fiscal period on or after April 1, 2023.

Crypto Association Claims SEC Is Using 'Back Door' To Crypto Regulation (2.23.2023):

- The Chamber of Digital Commerce, a crypto-focused trade association representing more than 200 entities, submitted an amicus brief on February 22, 2023 in the SEC's insider trading action against a former Coinbase employee who allegedly traded ahead of token listings on the exchange and tipped his brother and a friend, who also traded on the information. The amicus brief argued that the case should be dismissed because it represents an unprecedented effort to expand the SEC's jurisdiction through a "regulation by enforcement" approach to digital assets.
- In its complaint, the SEC alleged nine tokens traded in the scheme were securities despite no previous communications surrounding the regulatory status of those projects.

SEC, CFTC Looking Into Wells Fargo Employees' Messaging Channels (2.21.2023):

- The SEC and CFTC are looking into Wells Fargo employees potentially communicating via "unapproved" electronic messaging channels. These investigations are becoming more frequent as regulators increasingly scrutinize employee communications industrywide.

Société Générale Swept Up In SEC Texting Investigation (2.8.2023):

- Société Générale SA, one of the largest banks in Europe, revealed in its fourth-quarter earnings report that it has fallen under a widening SEC probe into the use of unauthorized communication channels at financial institutions and other regulated entities.

SEC Charges Terraform and CEO Do Kwon with Defrauding Investors in Crypto Schemes (2.16.2023):

- Crypto network Terraform Labs and its creator and CEO Do Kwon are facing fraud claims from the SEC over the collapse of its algorithmic stablecoin, TerraUSD, which caused widespread turmoil in the crypto markets and led to multiple high-profile bankruptcies.

SEC Charges Options Clearing Corporation with Rule Failures (2.16.2023):

- The Options Clearing Corp. has agreed to pay \$17 million to the SEC and \$5 million to the CFTC to settle the federal regulators' allegations that the world's largest options clearinghouse had fallen short on enforcing policies designed to manage its operational risks.

SEC Files Subpoena Enforcement Action Against Law Firm in Connection with Breach Probe (1.12.2023):

- The SEC has filed a lawsuit against Covington to enforce a subpoena requiring disclosure of firm client names, specifically clients regulated by the SEC whose data was breached as part of a cyberattack against Covington.

Crypto Exchange Kraken Settles with SEC (2.9.2023):

- The SEC unveiled a settlement with crypto exchange Kraken over an alleged failure to register its staking program as a security. Although Kraken neither admitted nor denied the allegations, it agreed to pay \$30 million and shut down the program for its 135,000 U.S. accounts.
- See more: [Fast and Furious: SEC Cracks Down on Kraken, Federal Regulators Choke Crypto, and DFS Wobbles Stablecoin \(Seward & Kissel\)](#)

CFPB

Supreme Court Will Hear Challenge to CFPB Funding (2.27.2023):

- The U.S. Supreme Court said that it would review a 5th Circuit decision holding that the CFPB's independent funding structure unconstitutionally insulates the agency from congressional oversight.
- Because the CFPB has always had this funding structure, the 5th Circuit's decision casts some doubt on the validity of everything the agency has done since inception.

CFPB Finalizes Its In-House Proceeding Rules (2.24.2023):

- The CFPB said that it is sticking with the changes it made back in February 2022 to the rules of practice governing its in-house enforcement proceedings, despite objections from industry groups that the revisions will put due process at risk.
- Most notably, the revised procedural rules provide the CFPB's director with greater ability to manage the flow of adjudication proceedings. For example, the changes allow the director to, bifurcate cases into separate liability and remedies stages and jump in to rule directly on critical, "dispositive" motions.
- CFPB Final Rule: [Rules of Practice for Adjudication Proceedings | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

CFPB Says Credit Card Companies Withheld Data To Foil Rivals (2.16.2023):

- The CFPB released key findings from a market monitoring inquiry of the nation's six biggest credit

card companies — American Express, Bank of America, Capital One, Citibank, Discover and JPMorgan Chase — which suggested that companies “withheld information [from credit bureaus] in an attempt to make it harder for competitors to offer their more profitable and less risky customers better rates, products, or services.”

- The CFPB stated that “[a] few companies specifically noted they observed other credit card companies had stopped furnishing actual payment information and didn't want to be at a 'competitive disadvantage' by providing data their competitors had chosen to stop sharing.”
- We believe the CFPB may address this issue through its rulemaking on credit reporting, which is currently under development.

CFPB Issues Circular on Unlawful Negative Option Practices (1.9.2023):

- In a circular issued on January 5, the CFPB outlined its view that some negative option programs — in which a subscription is automatically renewed, often after a trial period, unless a consumer takes affirmative action to cancel — can violate its ban on unfair, deceptive and abusive acts and practices.
- The agency warned that financial companies in particular may violate this ban if their negative option programs don't “clearly and conspicuously” disclose their billing terms, don't get consumers' “informed consent” before charging them and don't allow for easy cancellation.

FINRA

FINRA to Increase Focus on Financial Crimes (1.10.2023):

- FINRA indicated it will have an increased focus on financial crimes, including money laundering, cybersecurity, manipulative trading, fraud and sanctions, according to an annual report on the agency's regulatory activities.
- The 2023 Report on FINRA's Examination and Risk Monitoring Program — which includes findings over the past year from the agency's various regulatory operations, including exams and investigations — features a new section focused on financial crimes and firm obligations regarding financial crime compliance efforts.
- Among other things, the report said firms should be considering whether they have reasonably designed anti-money laundering procedures to prevent and detect identity theft and identity fraud in connection with account openings. Firms should also consider whether they're prepared to identify and respond to signs of economic sanctions evasion and whether they are prepared to detect prevent cybersecurity breaches, per the report.

NY Dept. of Financial Services

DFS Announces \$100 Million Settlement with Coinbase, Inc. (1.4.2023):

- NY State Dept. of Financial Services has reached a \$100 million settlement with Coinbase Inc., one of the biggest cryptocurrency exchanges, after finding “significant failures” in its anti-money laundering compliance program.
- The settlement calls for Coinbase to pay a \$50 million fine to the state. Coinbase, which is based in California and holds New York licenses, will also invest \$50 million in strengthening its compliance program over the next two years as part of the settlement, including retaining an independent monitor.

FTC

FTC Launches New Office of Technology to Bolster Agency's Work (2.17.2023):

- The Federal Trade Commission announced that it has launched a new Office of Technology designed to help the agency keep pace with a rapidly evolving technological challenges in the digital marketplace.
- According to the announcement, the office will also "provide technological expertise on non-enforcement actions" that run the gamut of the FTC's research and policy planning work. The agency also stated that the office will have an external role, working on emerging technologies and new trends impacting the FTC's work and engaging "with the public and external stakeholders through workshops, research conferences, and consultations."

Other Government Entities

Government Entities Issue Joint Statement on Liquidity Risks to Banking Organizations Resulting from Crypto-Asset Market Vulnerabilities (2.23.2023):

- The Federal Reserve, Federal Deposit Insurance Corp. and Office of the Comptroller of the Currency issued a joint statement on liquidity risks presented by certain sources of funding from crypto companies and stressed that banks accepting such deposits need to keep close tabs on them.
- The statement comes in the wake of a massive \$8 billion drop of crypto customer deposits reported in Jan. 2023 by Silvergate Capital Corp., which in recent years has made a name for itself by specializing in providing banking services to the crypto industry.
- To that end, the statement outlined some of the "effective practices" to manage such risks, including identifying potential drivers of crypto-related deposit volatility, assessing potential correlations and connections across crypto-related deposits, incorporating their liquidity risks into contingency funding planning, and considering robust due diligence and ongoing monitoring of crypto company depositors.

If you have any questions regarding the matters covered in this memorandum, please contact any member of our Government Enforcement and Regulatory Practice.

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