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SEC Investigating Lack of Insider Trading Policies for NFT/Crypto Exchanges

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For quite some time, we have been advising that marketplaces and NFT/crypto issuers consider developing an insider trading policy. The SEC is now investigating this issue. If you do not have a policy this is a good time to do so.

The issue of NFT-based insider trading became more well known when a high-profile executive of an NFT marketplace was alleged to have traded NFTs based on non-public information. As we previously addressed, this individual was recently indicted for that activity. Interestingly, he was not charged for insider trading of securities. Rather, he was charged with one count of wire fraud and one count of money laundering. As this indictment shows, liability for improper trading can arise even if the NFT is not a security.

These policies cover the types of activities addressed here and others such as “wash trades” and other improper trading designed to manipulate the price or trading volume of NFTs. We have been working with a number of companies who recognized the benefits of adopting such a policy to supplement their existing policies. We would expect that in light of this indictment and the SEC investigation, more companies will do the same.

This update should be viewed in light of the SEC’s recent focus on the regulation and enforcement of digital assets. In May, the SEC announced that it is doubling the size of its Crypto Assets and Cyber Unit. In March, the SEC announced that it would be examining Fractionalized NFTs in 2022. Also in March, it was reported that the SEC was probing NFTs and had issued subpoenas related to NFT offerings. NFT market participants should be aware of these developments at the SEC and seek legal advice early and often.

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