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Recently, Bitcoin and other crypto-currencies have been widely reported in national mainstream news, with stories describing rapidly higher prices and interest, especially among retail investors. As a result, regulated financial professionals are fielding an increasing number of questions concerning Bitcoin and the like. These conversations have led many investors to conclude "I'd like to purchase or invest in Bitcoin."

The Commodities Future Trading Commission’s Regulatory Interpretation

In 2015, the Commodities Futures Trading Commission ("CFTC") opined that Bitcoin and other crypto-currencies are commodities subject to regulation under federal law. In particular, the CFTC determined that Bitcoin is a "virtual currency" without any legal tender status. Currently, the CFTC maintains jurisdiction over "virtual currencies" as used in derivative contracts and can bring enforcement cases in instances involving fraud or manipulation of the "virtual currency" in interstate commerce.

CFTC Regulation is Only One Side of the Coin

Believing that CFTC regulation is the only law of the land when advising clients on crypto-currencies is dangerous. In a regulatory environment lacking any tailored securities regulation, financial professionals must be even more diligent in fielding questions from their clients and providing any guidance. In particular, financial professionals should be wary of the potential for regulation of crypto-currencies through securities enforcement.

On December 11, 2017, SEC chairman Jay Clayton issued a statement on crypto-currency highlighting considerations for mom and pop investors when investing in crypto-currencies, including reduced investor protections and the unregulated nature of initial coin offerings and crypto-currency exchange-traded products. Joseph Borg, the head of NASAA, the organization of state and provincial securities regulators, and director of the Alabama Securities Commission, has also commented on crypto-currency calling it a "mania curve."

Without question, crypto-currencies will be front and center on the radar of both federal and state securities regulators during 2018. And while no formal securities regulation exists, there is the potential for securities regulators to regulate crypto-currencies through enforcement.

In particular, regulated financial professionals (subject to either a suitability or fiduciary duty standard) must be cautious in providing guidance on the sale of securities as a means to purchase crypto-currencies. Anti-fraud and other securities regulations often concern the offer OR sale of securities. From this perspective it is not far-fetched to envision a scenario in which an investor is fraudulently induced to sell shares of XYZ Corp. to fund the purchase of a crypto-currency. It could be especially problematic where the circumstances surrounding the sale of the security are not well documented, the risks of the purchase are not fully disclosed, and the financial professional fails to consider the investors experience and risk tolerance. One possible outcome of this scenario
is a complaint to an aggressive securities regulator who may initiate a costly investigation and pursue a subsequent enforcement action.

**Conclusion**

While a wave of future securities regulation is possible, the bottom line is that registered financial professionals must be cautious in advising clients regarding the purchase of crypto-currency under current securities law. Failure to do so has the potential to lead to a costly state or federal securities enforcement action if funds used to purchase the crypto-currency are derived from, or otherwise involve, the sale of a security within the regulator’s purview.

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