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Chairman Clayton Asks Lawyers to Knock it Off with the Unregistered Coin Offerings

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In his recent remarks at the Securities Regulation Institute, SEC Chairman Jay Clayton had some stern words for market professionals, especially lawyers, involved in initial coin offerings (ICOs). He expressed concern that lawyers in the space "can do better" in their role as gatekeepers to the securities markets, particularly in advising clients whether the "coin" being offered is a security requiring registration.

In particular, he noted situations where lawyers may have helped to structure an ICO with many of the hallmarks of a securities offering, but have taken the position that the coin is not a security. Second, he noted situations where attorneys have apparently stepped back and provided "equivocal advice" rather than counseling clients that the ICO being promoted would likely require registration. In his view, these approaches are inappropriate in light of SEC guidance indicating that ICOs are likely to qualify as securities under the long-standing *Howey* test for investment contracts.

Chairman Clayton noted that he had instructed the SEC staff "to be on high alert" for these situations. These comments follow his unscripted remarks during a PLI speech in November that "I have yet to see an ICO that doesn't have a sufficient number of hallmarks of a security." We understand that many of the roughly two dozen enforcement attorneys in the SEC's new Cyber Unit are focused on ICO and blockchain-related investigations, with more cases in the pipeline.

With the SEC's assertion of jurisdiction over ICOs as securities, and the CFTC's recent release indicating that it would regulate and monitor cryptocurrency futures contracts, registration and compliance issues are paramount. If a violation renders a security defective, transactions involving cryptocurrencies or ICOs may also be called into question as either void (automatically unwound) or voidable (unwound at the wronged party's discretion). Fund managers with investments in or exposure to ICOs and, more broadly speaking, cryptocurrencies should prepare for increasing regulatory scrutiny and enforcement spillover.

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