Yesterday. Today. Tomorrow.

Linklaters

Year in review, Year to come

United States Law

December 2018

Year in review

United States Law in 2018

Although there was much talk of major legislative changes, less happened on the U.S. Congressional front than expected. Much of the changes in the U.S. came from regulatory agencies, the courts, or directly from the executive branch.

Fintech

Enforcement and regulatory guidance on crypto assets:

Bitcoin was created to be a radical alternative to the existing international payments system, where a trusted intermediary was replaced by a decentralized network of users. However, as the market expanded to include more than 2,300 different virtual currencies, the objective of decentralization became increasingly incompatible with systems of regulation designed to protect investors and consumers. In the United States, this tension resulted in regulators setting their sights on cryptocurrencies and crypto assets such as "tokens," as well as the exchanges and brokers which investors and consumers use to access this nascent market. This year, the SEC opened dozens of investigations involving initial coin offerings ("ICOs") and digital assets, many of which were ongoing at the close of FY 2018.

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In March 2018, the SEC issued a statement on potentially unlawful platforms trading digital assets. Following up on an issue which was highlighted in its July 2017 report on the offering of digital tokens, a critical question is whether exchanges that allow token holders to trade tokens need to register as national securities exchanges or operate pursuant to an exemption from registration.

In 2018, a NY federal court ruled in *U.S. v. Zaslavskiy* that an action against a defendant, alleged to have engaged in a fraudulent offering of virtual securities, could not be dismissed on the grounds that the digital tokens were not securities. The case is one of the first to consider the applicability of federal securities laws in a criminal case involving digital securities or tokens.

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While many of its investigations have turned on fraud, the SEC is also pursuing cases to ensure compliance with the registration requirements of the federal securities laws, including enforcement against unregistered broker-dealers and exchanges. In November 2018, the SEC staff issued a statement providing the staff's views on its recent actions, setting out a "path to compliance" with the federal securities laws going forward, even where issuers have conducted an illegal unregistered offering of digital asset securities.

Financial Regulation

Reforming Dodd-Frank:

In May 2018, the Economic Growth, Regulatory Relief and Consumer Protection Act was passed and signed into law, which affected a number of areas of U.S. financial regulation, including consumer protections, systemic risk oversight and securities regulation. While the Act is the most significant legislative amendment to U.S. financial regulation since the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), it did little to change the post-financial crisis regulatory structure put in place by the Dodd-Frank Act. The most significant regulatory relief is targeted at banks and bank holding companies with less than US$250bn in assets, but it offers little relief to large, internationally active U.S. and non-U.S. banking organizations.

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Capital Markets and Corporate

Cybersecurity:

The U.S. Securities and Exchange Commission (the "SEC") was highly focused on cybersecurity in 2018, issuing new guidance to assist public companies in preparing disclosures about cybersecurity.

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In April 2018, the SEC brought its first cybersecurity disclosure enforcement action, resulting in the payment by Altaba Inc. (formerly known as Yahoo! Inc.) of a US$35m penalty.

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In October 2018, the SEC also issued a report of investigation warning companies to reassess their internal accounting controls in light of cyber scams

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Disclosure simplification:

As part of its continuing "disclosure effectiveness" initiative, the SEC adopted a number of streamlining amendments to its rules and forms. The changes were primarily made to eliminate or amend requirements that were duplicative of or overlapping with U.S. GAAP, IFRS or other SEC disclosure requirements.

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2018 highlights

Anything connected to Bitcoin or cryptocurrency got the public's – and the SEC's – attention this year.

2018 highlights

The SEC has made it clear again and again that companies must make cybersecurity disclosure a priority.

2018 highlights

The U.S. withdrawal from the Iran nuclear deal and the EU's response in the form of the Blocking Regulation has turned sanctions compliance into a minefield.

XBRL:

In their annual reports filed in 2018, U.S.-listed foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB had to begin complying with the eXtensible Business Reporting Language ("XBRL") filing requirements.

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The SEC also adopted "inline XBRL", which will require companies to embed interactive data directly into their financial statements, instead of providing such data as a separate exhibit to their filings.

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Expansion in antifraud liability for non-U.S. companies:

In a ruling that potentially expands antifraud liability for non-U.S. issuers, the Ninth Circuit Court of Appeals held in July 2018 that sales of unsponsored American Depositary Receipts traded in the U.S. over-the-counter market could constitute "domestic transactions" under the Supreme Court's *Morrison v. National Australia Bank* decision. *Stoyas v. Toshiba* opens up the possibility of U.S. securities law liability even where the issuer has not affirmatively chosen to sell its securities in the United States.

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Women on boards:

In September 2018, California adopted a law, Senate Bill No. 826, that requires companies incorporated or headquartered in California that are listed on a major U.S. stock exchange to have a certain number of women on their boards of directors, depending on the size of the board. California is now the first U.S. state to require female directors on boards.

Delaware court finds a MAE:

In October 2018, the Delaware Court of Chancery issued *Akorn, Inc. v. Fresenius Kabi AG* – believed to be the first decision of a Delaware court allowing a buyer to terminate a merger agreement due to the occurrence of a material adverse effect.

Competition and Antitrust

CFIUS Expanded:

In August 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), which makes significant changes to the U.S. foreign investment regime. Among other things, FIRRMA has increased scrutiny for certain types of transactions and increased the scope of review by the Committee on Foreign Investment in the United States.

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Changes to merger review process:

In September 2018, the U.S. Department of Justice ("DOJ") announced that it will aim to complete merger reviews more quickly (within six months) and withdrew its 2011 Policy Guide to Merger Remedies.

Libor, forex trials:

In October 2018, two former traders were convicted for scheming to manipulate the London Interbank Offered Rate, while three traders were acquitted for allegedly colluding to rig foreign exchange rates through an electronic chat room known as "the cartel."

Dispute Resolution

U.S. withdraws from Iran deal:

In May 2018, President Trump announced that the United States would withdraw from the Iran nuclear deal and would reinstate secondary sanctions against non-U.S. persons that do business with Iran. In response, the European Commission updated its Blocking Regulation, which attempts to block the extra-territorial effect of foreign sanctions by prohibiting EU entities from complying with specific U.S. sanctions laws.

FCPA developments:

In a significant decision limiting the reach of the Foreign Corrupt Practices Act (the "FCPA"), the U.S. Court of Appeals for the Second Circuit recently rejected the U.S. government's attempt to use conspiracy and accomplice liability to reach conduct by a non-U.S. person that had occurred outside the United States.

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In July 2018, the DOJ clarified its policy is to decline to prosecute companies that self-disclose FCPA violations that they uncover when seeking to acquire another company, if they cooperate with the DOJ's investigation, and remediate the conduct.

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Alien Tort Statute does not reach non-U.S. corporations:

In a significant decision for multinational corporations, the U.S. Supreme Court refused to find non-U.S. corporations liable under the Alien Tort Statute ("ATS"), holding that an expansion of a law with serious foreign policy consequences should be made by Congress, not the judiciary.

Read more...

Whistleblower protections:

In a decision that significantly narrowed the definition of "whistleblower", the U.S. Supreme Court ruled in February 2018 that the Dodd-Frank Act's anti-retaliation protections do not apply to persons who only report securities laws violations internally, and not to the SEC.

Read more...

State court jurisdiction over Securities Act claims:

In a unanimous decision, the U.S. Supreme Court held in March 2018 that U.S. state courts have jurisdiction over securities class action lawsuits alleging only claims under the Securities Act of 1933, leaving open at least one way for plaintiffs to obtain what is often perceived as a more favorable state court forum.

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Banking

Delaware LLC changes:

Effective as of August 1, 2018, the Delaware Limited Liability Company Act was amended to enable any Delaware LLC to divide into, and allocate its assets and liabilities among, two or more LLCs pursuant to a plan of division. Although not clearly stated, the amendments imply that such allocations will not be deemed transfers or restricted payments that would ordinarily be limited by credit agreements. The LSTA has published model language with a general statement that an allocation pursuant to a plan of division under Delaware law is deemed a transfer. Borrowers, though, may begin to propose revisions to specific credit agreement provisions and in such case, lenders will need to consider ways to maintain the protections provided under loan documentation while responding to the needs of borrowers.

Year to come

United States Law in 2019

The U.S. midterm elections, resulting in Democratic control of the House and Republican control of the Senate, does not look promising for major Congressional actions. Agencies such as the SEC, however, continue to focus on regulatory changes.

Fintech

Clearer guidance for token offerings:

The SEC will put out plain English guidance to the market which enables market participants to evaluate whether a prospective token sale would need to be treated as a securities offering. The guidance will also address secondary market transactions, as part of an effort to give developers and entrepreneurs clarity on how the SEC might look at tokens post-initial offering.

Financial Regulation

Volcker reform:

The comment period to the proposal to simplify the Volcker Rule ended in October, and the final rule could be released in 2019. If finalized as proposed, the amendment would tailor the Volcker Rule's compliance requirements based on the size of a firm's trading book, provide more clarity as to the meaning of short-term trading, simplify certain reporting and compliance obligations, and ease the compliance burdens for non-U.S. banks to trade with U.S. counterparties.

Capital Markets and Corporate

JOBS Act 3.0:

In July 2018, the U.S. House of Representatives overwhelmingly passed (406-4) a set of bills packaged together as the JOBS and Investor Confidence Act of 2018 (known as "Jobs Act 3.0"), intended to expand on market-friendly changes to the securities law made by the JOBS Act in 2012. It is not clear if or when Congress will adopt JOBS Act 3.0, but it is likely that the SEC – which has taken a market-friendly approach under Chair Jay Clayton – will act on its own to make a few of the changes in the bill. For example, the SEC is already working on a proposal to expand pre-IPO testing the waters to all issuers (which is currently only available to emerging growth companies).

Bank holding company disclosure:

The SEC is expected to propose amendments to the specialized disclosure under Guide 3 for bank holding companies.

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Review of public company reporting system:

In August 2018, President Trump directed the SEC to study whether to move to a semi-annual rather than quarterly reporting system. The SEC has put on its near-term agenda issuing a concept release reviewing the quarterly reporting requirement.

Easing of disclosure rules for guaranteed securities:

The SEC will likely adopt in some form the changes it proposed in July 2018 that would ease the financial disclosure requirements for guaranteed securities. If adopted as proposed, the changes will make SEC-registered debt offerings more attractive for issuers.

Read more...

Accredited investor definition:

Although the SEC has not yet acted on the Dodd-Frank Act-mandated accredited investor report it issued in December 2015, it may move soon to expand the definition, whether because of Congressional direction to do so (many of the bills introduced in the House of Representatives have included changes to the definition) or on its own accord. SEC Chair Jay Clayton has said that he wants to expand retail investors' access to private investments, including by adding sophistication tests as alternatives to asset tests.

More disclosure effectiveness:

The SEC is expected to propose rules based upon the concept release it issued in April 2016 as part of its "disclosure effectiveness" initiative. The focus of the release is Regulation S-K's business and financial requirements.

Read more...

Changes to SEC's whistleblower program:

Despite the dissent of two Commissioners, the SEC's three Republican-appointed Commissioners are likely to support the recently proposed changes to the Dodd-Frank Act whistleblower program, which will provide the SEC with the discretion to adjust small awards upward and "exceedingly large" awards downward. The proposal came in a year when the SEC issued its highest-ever whistleblower award of US$83m, shared between three people.

Read more...

2019 highlights

A market-friendly SEC is expected to further ease its regulations, with or without Congressional action.

Remaining Dodd-Frank compensation disclosure rules:

The SEC is working on Dodd-Frank Act-mandated rules (originally proposed in 2015) that would require U.S.-listed companies to disclose whether directors, officers and other employees are permitted to hedge or offset any decrease in the market value of equity securities granted by the company as compensation, or held by such employees or directors. Read more... Following such rulemaking, the SEC staff has indicated that it will be working on the compensation clawback and pay vs performance disclosure rules that are also mandated by the Dodd-Frank Act.

Revised resource extraction payment rule:

The SEC staff has indicated that it is working on a revised version of the resource extraction payments disclosure rule, which would require SEC-reporting companies engaged in the commercial development of oil, natural gas or minerals to disclose payments made to a government for the purpose of the commercial development of oil, natural gas or minerals. Although a version of the rule was nullified by Congress in 2017, the Dodd-Frank Act provision that requires the SEC to issue the rule is still in force.

Focus on cybersecurity, Brexit disclosures:

At several conferences, the SEC staff has indicated that it will continue to focus on companies' cybersecurity disclosure. The staff will also be looking for more specific Brexit disclosure, where appropriate, as the March 2019 deadline gets closer.

Dispute Resolution

Broad Russian sanctions legislation:

In August 2018, a bi-partisan group of U.S. Senators introduced a bill titled Defending American Security from Kremlin Aggression Act of 2018 ("DASKA") that would significantly expand the United States' Russia-related sanctions. Among other things, it would establish broad sanctions targeting new areas (such as Russian sovereign debt and energy projects supported by Russian state-owned or parastatal entities outside of the Russian Federation) and a purported requirement to fully block at least one of seven high-profile Russian banks. While the imposition of additional sanctions on Russia has drawn bi-partisan support, DASKA and other similar proposed bills have not materially progressed through the legislative process. It is unclear whether any legislation will ultimately be passed on this topic or what provisions an enacted law would ultimately include.

Reforms to insider trading laws:

Former U.S. Attorney Preet Bharara and SEC Commissioner Robert J. Jackson Jr. have announced that they have formed a new task force that will develop recommendations to reform existing insider trading laws.

Lorenzo decision:

In June 2018, the U.S. Supreme Court granted a writ of certiorari in *Lorenzo v. SEC*, which involves Rule 10b-5 claims against a person who allegedly emailed misleading statements that were originally drafted by his boss, to investors. The SEC's misstatement claim did not satisfy the elements outlined in *Janus Capital Group, Inc. v. First Derivative Traders*. Thus, the case presents the significant question of whether, under the Janus decision, the scheme liability provisions of Rule 10b-5(a) and (c) may be a basis for liability in connection with false or misleading statements by persons who are not themselves the maker of those statements.

Amendments to ICSID dispute resolution rules:

The International Centre for the Settlement of Investment Disputes ("ICSID") is expected to adopt amendments to its dispute resolution rules, which would be the most far-reaching amendments in 50 years. These amendments would modernize the ICSID rules by, among other things, adopting electronic filing, adding a filing checklist, updating the administrative and financial regulations and revising the rules for expedited proceedings.

Cybersecurity protocols for international arbitration:

The International Council for Commercial Arbitration ("ICCA") Working Group on Cybersecurity in International Arbitration will be working on its draft Cybersecurity Protocol for International Arbitration, which is expected to be finalized in 2020. The protocol does not specify particular measures to be included in arbitration agreements or procedural orders, but instead proposes a framework for developing cybersecurity measures appropriate to each individual case.

What now?

Your contacts

We hope that you have found this guide useful.
Please contact your usual Linklaters contact, if you would like to discuss any of these matters further.

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