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Remediation of Defective Digital Asset Securities Offerings

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Agenda

- Introduction
- What are Digital Assets?
- SEC Regulation of Digital Assets
- Remediation of Defective Digital Asset Securities
- Conclusions

Digital Asset Securities

- The definitions of "security" under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") are nearly identical and each is broad enough to include the various types of instruments that are used in commercial marketplaces that one might suspect to fall within the ordinary concepts of a security.

- This would include common instruments like stocks, bonds, and notes, as well as the various collective investment pools and common enterprises devised by persons seeking to generate profits from the efforts and investments of others (i.e. investment contracts and instruments commonly known as securities).

- Section 2(a)(1) of the Securities Act defines a "security" as:

> [A]any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, . . . transferable share, ***investment contract***, . . . any put, call, straddle, option, or privilege on any security, certificate of deposit, . . . or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Digital Asset Securities

- Although the term “note” is specifically enumerated in the Securities Acts' definitions of “security,” courts have not found all notes to be securities because notes are used in a variety of contexts.

- A note may function as both a commercial vehicle, which is not a security, as well as an investment vehicle, which courts have deemed to be a security.

- In *Marine Bank v. Weaver*, 455 U.S. 551 (1982), the U.S. Supreme Court addressed whether the sale of a $50,000 certificate of deposit, with a 6-year maturity that featured a 7.5% interest rate was a security.

- The note also provided that, if the bank permitted early withdrawal, the depositor would earn interest at the bank's current savings passbook rate on the amount withdrawn, except that no interest would be paid for the three months prior to withdrawal.

- The Court noted that while the definition of “security” in the Exchange Act is quite broad, Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.

Digital Asset Securities

- The Court cautioned, however, "[t]he definition of 'security' in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires."
- The Court also noted that a certificate of deposit is not the functional equivalent of the withdrawable capital shares of a savings and loan association held to be securities, nor is it similar to any other long-term debt obligation commonly found to be a security.
- The purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency.
- The Court held neither the certificate of deposit nor the agreement in question was a security within the meaning of § 10(b) of the Securities Act.

SEC Regulation of Digital Assets

- Independent federal agency, established pursuant to the Securities Exchange Act of 1934
- Headed by 5-member Commission
- Large – approximately 4800 employees in 2022
- Responsibilities Protect investors, oversee U.S. equity markets and fixed income markets, review disclosures and financial statements of exchange-listed public companies, oversee activities of registered entities like investment advisors, and oversee securities exchanges
- Significantly increased activity in the digital asset space over the past few years
  - Most talked about – began with The DAO Report in July 2017
  - Formed the Crypto Assets and Cyber Unit – 50 dedicated positions
  - Brought more than 80 enforcement actions since 2017
  - Just last year: Justin Sun, Paul Pierce, Terraform Labs, Kraken, Genesis, Gemini, Caroline Ellison

SEC Regulation of Digital Assets

- The SEC Division of Enforcement was created in August 1972 to consolidate enforcement activities that previously had been handled by the various operating divisions at the SEC's headquarters in Washington.
- The SEC's enforcement staff conducts investigations into possible violations of the federal securities laws, and prosecutes the SEC's civil suits in the federal courts as well as its administrative proceedings.
- SEC investigation processes/timeline
- What you see is the tip of the iceberg
- Penalty structure
- Alternatives / options?

SEC Regulation of Digital Assets

- Recent Investigations/Settlements and Trends
  - Ripple (in Litigation) – includes claims of unregistered offer and sale of securities
  - Coinbase (in Litigation) – includes claims of unregistered offer and sale of securities in connection with its staking-as-a-service program
  - Bittrex (settled on Aug. 10, 2023 for $24 million) – crypto Asset Trading Platform Bittrex and former CEO to settle SEC charges for operating an unregistered securities exchange, broker, and clearing Agency
  - Binance (in Litigation) includes claims of unregistered offer and sale of securities
- SEC Crypto Assets and Cyber Enforcement Actions

BarnBridge DAO

BarnBridge DAO Agrees to Stop Unregistered Offer and Sale of Structured Finance Crypto Product

FOR IMMEDIATE RELEASE
2023-258

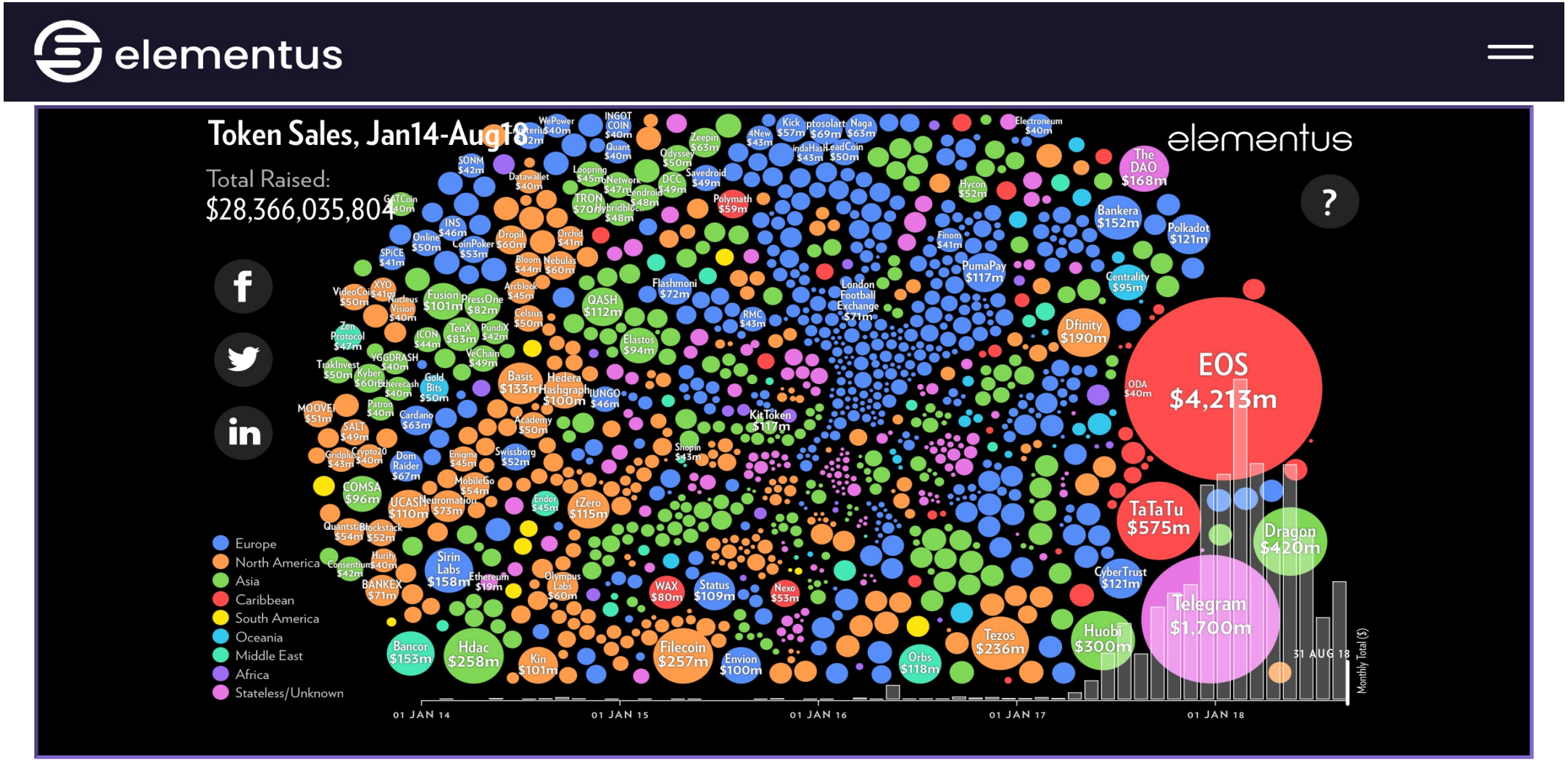
Washington D.C., Dec. 22, 2023

The Securities and Exchange Commission today announced that BarnBridge DAO, a purportedly decentralized autonomous organization, and its two founders, **Tyler Ward and Troy Murray, will pay more than $1.7 million to settle charges that they failed to register BarnBridge's offer and sale of structured crypto asset securities known as SMART Yield bonds.** The Commission also charged the respondents with violations stemming from operating BarnBridge's SMART Yield pools as unregistered investment companies. To settle the SEC's charges, BarnBridge agreed to disgorge nearly $1.5 million of proceeds from the sales, and Ward and Murray each agreed to pay a $125,000 civil penalties.

According to the SEC's orders, the respondents compared the SMART Yield bonds to asset-backed securities and marketed them broadly to the public. Investors could purchase "Senior" or "Junior" SMART Yield bonds through BarnBridge's website application. SMART Yield pooled crypto assets deposited by the investors and used those assets to generate fixed or variable returns to pay investors. A BarnBridge white paper, published by Ward, claimed that SMART Yield bonds would "mirror the safety and security of highly-rated debt instruments offered by traditional finance…while still providing the outsized return" through its smart contract protocols. According to the orders, SMART Yield attracted more than $509 million in investments from investors, and BarnBridge was paid fees by the investors based on the size of their investment and their choice of yield.

Without admitting or denying the SEC's findings, BarnBridge, Ward, and Murray agreed to cease-and-desist orders prohibiting them from violating and causing violations of the registration provisions of the Securities Act of 1933 and the Investment Company Act of 1940. **The SEC orders reference remedial actions initiated by Ward and Murray.**

ICOs


elementus
Token Sales, Jan14-Aug18
Total Raised:
$28,366,035,804
elementus
?
EOS
$4,213m
TaTaTu
$575m
Dragon
$420m
Telegram
$1,700m
Dfinity
$190m
The DAO
$168m
Bankera
$152m
Polkadot
$121m
Centrality
$95m
PumaPay
$117m
Huobi
$300m
Tezos
$236m
CyberTrust
$121m
Filecoin
$257m
Hdac
$258m
Sirin Labs
$158m
Bancor
$153m
Kin
$101m
Envion
$100m
Orbs
$118m
Status
$109m
WAX
$80m
Nexo
$53m
Basis
$133m
Hedera Hashgraph
$100m
QASH
$112m
Fusion
$101m
Flashmoni
$72m
Elastos
$94m
TenX
$83m
Kik
$57m
Kin Token
$117m
Shopin
$43m
Swissborg
$52m
tZero
$115m
UCASH
$110m
COMSA
$96m
Cardano
$63m
Academy
$50m
Ethereum
$19m
Olympus Labs
$60m
Europe
North America
Asia
Caribbean
South America
Oceania
Middle East
Africa
Stateless/Unknown
01 JAN 14
01 JAN 15
01 JAN 16
01 JAN 17
01 JAN 18
31 AUG 18
Monthly Total ($)

Salt Blockchain

- **The SEC settled charges against Salt Blockchain Inc. ("Salt") for conducting an unregistered initial coin offering ("ICO") of digital tokens.**
- Salt agreed to settle the action by returning the proceeds from the offering to investors, registering the tokens as securities, and paying a civil penalty.
- According to the SEC's order, from June 2017 to December 2017, Denver-based Salt raised approximately $47 million through the ICO to develop its business of offering loans backed by blockchain assets.
- The order found that Salt told investors that it would take various steps to increase the price of the tokens, and that those tokens could be sold at a profit on a secondary market.
- **The order also found the tokens were therefore offered and sold as investment contracts, yet Salt did not register its ICO pursuant to the federal securities laws, nor did the offering qualify for an exemption from the registration requirements.**
- The order found that Salt violated the registration provisions of Sections 5(a) and (c) of the Securities Act of 1933.
- Without admitting or denying the SEC's findings, Salt agreed to cease and desist from committing or causing any violations of the charged provisions, to engage in a claims process to return funds to investors who purchased tokens, and to pay a civil penalty of $250,000.
- The company also agreed to register its tokens as securities and file required periodic reports with the SEC.

Salt Blockchain

- Salt Agreed that within fourteen (14) days from the date of the Order, Salt had to issue a press release (the "Press Release"), in a form not objected to by SEC staff, notifying of this Order and containing a link to the Order.

- At the same time, Salt had to prominently post the Press Release, link to the Order on Salt's company website, and maintain it there until the "Claim Form Deadline".

- **Salt also had to within one hundred twenty (120) days of the date of the Order File a Form 10 to register under Section 12(g) of the Securities Exchange Act of1934 the Salt Tokens as a class of securities (the "Exchange Act Registration").**

- Salt had to promptly and in good faith respond to any and all comments concerning the Exchange Act Registration issued by the Division of Corporation Finance.

Salt Blockchain

- **Salt also had to on a date no later than sixty (60) calendar days after the date of the filing of the Exchange Act Registration, or on the date seven (7) days after the Exchange Act Registration became effective, whichever date was sooner (the earlier date being the "Effective Date"):**

- Distribute by electronic means reasonably designed to notify each potential claimant ("Distribution"), a notice and a claim form (the "Claim Form"), both of which shall be in a form not objected to by SEC staff, and both of which shall include a link to Salt's filing page on EDGAR, informing all persons and entities that purchased Salt Tokens from Salt before and including December 31, 2019, of their potential claims under Section 12(a) of the Securities Act, including the right to sue "to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if [the purchaser]no longer owns the security" and informing purchasers that they may submit a written claim on the Claim Form directly to Salt at an address indicated on the Claim Form of a purchaser's assertion of rights under Section 12(a) of the Securities Act, and that such claims must be submitted by a date certain ("Claim Form Deadline");

- The Claim Form Deadline had to be the earlier of three (3) months from date that the Division of Corporation Finance notifies Salt that the Division's review of the Form 10 had been concluded or six (6) months from the Effective Date.

- Simultaneously with the Distribution of the Claim Form, Salt had to post the Claim Form on the company's website and maintain it there until the Claim Form Deadline.

Salt Blockchain

- Salt had to maintain such Exchange Act Registration and make timely filings of all reports required by Section 13(a) of the Exchange Act at least until the later of:

- The Claims Form Deadline;

- Such time as Salt had filed all reports required for the fiscal year within which the Act Registration became effective; and

- Such time as Salt was eligible to terminate its registration pursuant to Rule 12g-4under the Securities Exchange Act of 1934.

Salt Blockchain

- Salt had to pay the amount due under Section 12(a) of the Securities Act, if any, to each qualified person or entity that purchased Salt Tokens from Salt before and including December 31, 2019, and that submitted a written claim to Salt's address by the Claim Form Deadline using the Claim Form.

- Within three (3) months from the Claim Form Deadline, Salt had to make all payments it deems to be due and adequately substantiated to purchasers who submitted the Claim Form by the Claim Form Deadline.

- Salt was permitted to require that a claimant submit additional documentation supporting that the claimant is entitled to receive payment under Section 12(a) of the Securities Act and Paragraph 15 above.

- Upon receiving such a request, a claimant had thirty (30) days to provide the requested documentation in writing to the address provided by Salt.

- For any claims not paid, Salt had to provide the claimant with a written explanation of the reason for non-payment.

Salt Blockchain

- Beginning thirty (30) days after the Claim Form Deadline, Salt had submit to SEC staff a monthly report of the claims received and the claims paid under Paragraph 16 above, including:

- Identifying information about each claimant;

- The amount of each claim;

- The resolution of each claim, including the amount of each payment; (d)identification of all claims not paid and the reasons for all non-payment of claims; and

- A list of all complaints received (if any) and the manner in which Salt addressed each complaint.

- Salt had to provide SEC staff with any related additional information or documentation reasonably requested by the SEC staff, such as documentation submitted by the claimant and documentation supporting Salt's decision regarding the claim.

- In response to any objections by the SEC staff to Salt's handling of one or more claims, Salt had to reconsider its decision(s) in light of the objection and will provide a written explanation to the SEC staff of its decision following such reconsideration.

Salt Blockchain

- Within seven (7) months of the Effective Date, Salt had to submit to SEC staff a final report of its handling of all claims received (the "Final Report").
- Salt had to certify, in writing, compliance with the undertakings within sixty (60) days of their completion.
- The certification had to identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance.
- The SEC staff could make reasonable requests for further evidence of compliance, and Salt agrees to provide such evidence, as applicable.
- If Salt planned to file a Form 15 to terminate its registration pursuant to Rule12g-4 under the Exchange Act on the grounds that the Salt Token no longer constitutes a "class of securities" under Rule 12g-4 because the Salt Token is no longer a "security" under Section 3(a)(10) of the Exchange Act, Salt must notify the SEC staff at least thirty (30) days prior to such filing.
- Upon such notification, the SEC staff may make reasonable requests for further information, and Salt agrees to provide such information, as applicable.
- Salt must retain all records and communications relating to the Salt Token offering for a period of at least one year after the date it submits the certification of compliance, or until such time as otherwise required by law.

How Do You Become a ’34 Act Company?

One Way – Registration

- Section 12(b) - Listed on a national securities exchange
- Section 12(g) – More than 2,000 holders of record and $10 million in assets at FYE

What is a Section 12(g)?

As of the most recent fiscal year-end:

- Have more than $10 million in assets; and
- Have a class of equity securities held of record
- By either 2,000 or more persons or 500 persons who are not accredited investors; and
- In the case of a bank, savings and loan holding company or a bank holding company, by 2,000 or more persons.

How Do You Become an Exchange Act Company?

- Section 12(b) - Listed on a national securities exchange.
- Section 12(g) - More than 2,000 shareholders and $10 million in assets at FYE.
- Section 15(d) - Had a Securities Act registration statement go effective.

Section 15(d)

- Each issuer which shall file a registration statement which has become effective under the Securities Act shall file [as may be required by the SEC], such supplementary and periodic information, documents, and reports as may be required pursuant to Exchange Act section 13 in respect of a security registered pursuant to section 12 of the Exchange Act.

How Do You Become a Act Company?

- A company is not subject to Exchange Act reporting requirements under more than one of the aforementioned sections at a time.
- If a company has a class of securities registered pursuant to Section 12(b), its reporting obligations under Sections 12(g) and 15(d) are suspended
- If a company has securities registered pursuant to Section 12(g), then its reporting obligations under Section 15(d) are suspended
- Even if a company does not have a class of securities registered under Section 12, it can still have reporting obligations by default under Section 15(d) if it has an effective registration statement under the Securities Act.

Form 10

- Item 1 – Business (S-K Item 101)
- Item 1A – Risk Factors (S-K Item 105)
- Item 2 – Financial Information (S-K Items 303 and 305)
- Item 3 – Properties (S-K Item 102)
- Item 4 – Security Ownership of Certain Beneficial Owners and Management (S-K Item 403)
- Item 5 – Directors and Executive Officers (S-K Item 401)
- Item 6 – Executive Compensation (S-K Items 402 and 407(e)(4))
- Item 7 – Certain Relationships and Related Transactions, and Director Independence (S-K Item 404 and 407(a))
- Item 8 – Legal Proceedings (S-K Item 103)
- Item 9 – Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters (S-K Item 201)
- Item 10 – Recent Sales of Unregistered Securities (Item 701)
- Item 11 – Description of Securities to be Registered (S-K Item 202)
- Item 12 – Indemnification of Directors and Officers (S-K Item 702)
- Item 13 – Financial Statements and Supplementary Data (Regulation S-X financials; S-K Item 302)
- Item 14 – Changes in and Disagreements with Accountants on Accounting and Financial Disclosure (S-K Item 304)
- Item 15 – Financial Statement Schedules and Exhibits (S-K Item 601)

Form 10 is automatically effective 30 days after exchange certification (12(b)) or 60 days after filing (12(g)) unless effectiveness is accelerated

One Effect of Registration - § 13(a)

- Every issuer of a security registered under Exchange Act section 12 must file with the SEC:

- Such information and documents as the SEC shall require to keep reasonably current the information and documents required to be included in or filed with the Form 10 registration statement; and

- Such annual reports, certified if required by the rules and regulations of the SEC by independent public accountants, and such quarterly reports as the SEC may prescribe.

- *See* Rules 13a-1 (annual report) and Form 10-K; 13a-13 (quarterly report) and Form 10-Q; 13a-11 (current report) and Form 8-K.

Form 10-K

Same items as in the original Form 10 *plus*

- Item 1B – Unresolved Staff Comments (Accelerated Filers)
- Item 1C – Cybersecurity NEW
- Item 4 – Mine Safety Disclosures (S-K Item 104)
- Item 5 – issuer Repurchases of Equity Securities (S-K Item 703) NEW disclosures regarding repurchase objectives and rationales
- Item 9A – Controls and Procedures (S-K Items 307 and 308)
- Item 9B – Other Information S-K 408(a) and (d) – Rule 10b5-1 plans
- Item 9C – Disclosure Regarding Foreign Jurisdictions that Prevent Inspections
- Item 10 – Directors, Executive Officers and Corporate Governance (S-K Items 405, 406 and 407(c)(3), (d)(4), (d)(5)) and 408(b)
- Item 11 – Executive Compensation (S-K Item 407(e)(4) and (e)(5) and NEW claw back disclosures

Form 10-Q

Part I – Financial Information

- Item 1 – Financial Statements
- Item 2 – MD&A (S-K Item 303)
- Item 3 – Quantitative and Qualitative Disclosures About Market Risk (S-K Item 305)
- Item 4 – Controls and Procedures (S-K Items 307 and 308(c))

Part II – Other Information

- Item 1 – Legal Proceedings (S-K Item 103)
- Item 1A – Risk Factors
- Item 2 – Unregistered Sales of Equity Securities and Use of Proceeds (S-K Items 701, 703)
- Item 3 – Defaults Upon Senior Securities
- Item 4 –Mine Safety Disclosures (D-K Item 104)
- Item 5 – Other Information – also: S-K Item 407(c)(3) – changes in nominating process

Form 8-K

- 9 sections
- 33 reportable events
- Generally a four business day filing requirement for mandatory items (subject to limited exceptions)

Other Matters

- Proxy and Tender Offer Rules
- Section 16 for directors, officers and greater than 10% holders
- Williams Act reporting (*e.g.*, 13D/G)
- De-registration (Forms 25 and 15):

Time Frame	Required Filings
Before and Upon Filing Form 25	Company and beneficial owners of the company's registered securities must continue to file all reports required under any applicable provisions of the Exchange Act and rules of the exchange (s) in which the company's securities are traded.
10 days after Filing Form 25 and upon filing Form 15	Company is relieved of reporting requirements imposed by registration pursuant to Section 12(b), Section 15 (d) (i.e. periodic reporting requirements) and the exchange rules, but the company and beneficial owners of the company's registered securities must continue filing other reports required by the Exchange Act, including those required by Sections 14 (a), 16 and 13 (d).
90 days after filing Form 15	Company is relieved of all reporting requirements under the Exchange Act for securities that were deregistered.

Presenter Biographies

MATTHEW LINDENBAUM

Matthew represents companies in high-stakes litigation with an emphasis on class action defense in the automotive and financial services industries, including the emerging crypto-currency industry. He also defends companies and individuals in government investigations and enforcement actions involving the United States Department of Justice, the Securities and Exchange Commission, and conducts internal investigations for companies and special board committees.

Matthew is the leader of Nelson Mullins' Boston Litigation Team and has been repeatedly recognized as a Massachusetts Super Lawyer "Rising Star." He developed in-depth knowledge of the business of digital assets, mortgage loan origination, servicing and securitization, and automotive manufacturing and sales businesses. Matthew advises and represents corporations, officers, and boards of directors and their committees in business litigation matters. He also assists clients with a wide range of general commercial litigation matters and has advised clients on disclosure, corporate governance, litigation avoidance, and other matters.

GARY BROWN

Gary primarily represents public companies in securities compliance and board governance matters. He is a frequent speaker on securities matters for the Practicing Law Institute (PLI) and an adjunct professor at the Vanderbilt University Law School where he teaches securities law. He was Special Counsel to the U.S. Senate during its *Enron* investigation and also in its investigation into the role of investment banks during the 2008 financial crisis. He is the author several PLI publications: *Securities Law and Practice Desk book*, *Master the 8-K (*4th Edition 2024*), Master the 10-K and 10-Q (*4th Edition 2024*), Master the Proxy Statement (3rd* Edition 2024*).*

KEVIN TRAN

Kevin assists financial institutions and technology clients with financial regulatory, securities, and corporate matters. He focuses on the representation of early stage, mid-stage, and publicly traded FinTech companies focused on blockchain technology, digital assets, and cryptocurrencies, including broker-dealers, digital asset and currency trading platforms, digital asset custodians, alternative trading systems, and securities exchanges and swap execution facilities.

Moderator Biography

RICHARD B. LEVIN

Richard is chair of the FinTech and Regulation Practice and was one of the first lawyers to focus on the regulation of blockchain and digital assets. He is considered a thought leader in the FinTech space. Richard brings his experience as a senior legal and compliance officer on Wall Street and in London to bear in advising clients on corporate, FinTech, securities, and regulatory issues. A problem-solver by nature, he has been advising FinTech clients on legal and regulatory issues since the start of electronic trading in the late 1990s. His practice focuses on helping financial services and technology clients identify and address regulatory issues as they build their businesses.

Richard's practice focuses on the representation of early stage and publicly traded companies in the FinTech space, including investment banks, broker-dealers, investment advisers, peer-to-peer lending platforms, digital currency trading platforms, alternative trading systems (ATSs), exchanges, and custodians. He represents these firms before the U.S. Securities and Exchange Commission (SEC), the U.S. Commodity Futures Trading Commission (CFTC), the Financial Industry Regulatory Authority (FINRA), the U.S. Department of the Treasury, Office of the Comptroller of the Currency (OCC), state regulators, and Congress. Richard has represented clients before regulators in Australia, Canada, France, Germany, Hong Kong, Ireland, Japan, Singapore, South Korea, and the United Kingdom. His current and past clients include leading national financial institutions, multinational financial services holding companies, leading firms in the FinTech space, and institutions engaging in global investment banking, investment management, securities, and other financial services with institutional clients.

Richard has been identified by Chambers and Partners as one of the leading lawyers in the Blockchain and Cryptocurrencies category since the inception of the category. He has been recognized by Chambers for his knowledge on regulatory matters, great relationships with regulators, for helping clients push the boundaries of the FinTech sector, and for his advice on matters such as broker-dealer licensing and alternative trading systems. Richard is routinely quoted by leading publications including Bloomberg, the New York Times, Reuters, and the Wall Street Journal and is a frequent speaker at conferences around the world on the regulation of FinTech, blockchain, and digital assets.

Contact Details

To learn more about our FinTech and Regulation practice, or to contact a member of our team, click here or visit our website at nelsonmullins.com.

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