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Navigating the Ground Rules for Building a Blockchain Business

Meghan Spillane is a partner at Goodwin, an international law firm. She works in the firm's digital currency and blockchain technology practice, as well as its securities, white collar & business litigation group. Spillane regularly interacts with SEC staff and provides counsel to clients on how to structure digital assets prior to the launch of blockchain platforms. This area has become particularly sensitive as the SEC appears to be taking a harder look at whether crypto tokens violate the Howey test, which is used to determine whether a financial instrument is an "investment contract." This interview has been lightly edited for length and clarity.

QUARTZ: What do you enjoy about your job? And what's kept you so engaged with this space?

Spillane: I'm a partner at Goodwin, but I'm on the younger side, so being involved in something that I believe in and being able to become a subject matter expert [is appealing]. You don't have to have decades of experience to make a real impact in this space—it's more about being enterprising, not being afraid to delve into the technology, and making sure you stay up on the latest guidance.

There are so many interesting technologies that can benefit from blockchain. Whether or not they need a token is not always so clear, but a lot of things are going to be made simpler and faster and more democratic by virtue of this technology.

What's it been like to work with clients pursuing ICOs over the last few years?

When I began working with our firm's digital currency and blockchain practice [in mid-2017], we were looking at different ICOs that our clients intended to launch—or had already launched—and helping them assess the risks under the securities and other laws. In fall 2017, we started seeing increased activity from the SEC's enforcement division, which came in the form of subpoenas. There were also state jurisdictions, particularly the Massachusetts Securities Division, that were really active.

What's your job like now?

When interacting with the state and federal regulators in the enforcement context, my role is to look at the facts underlying the token models that are being investigated, work closely with the client to make sure I understand the facts correctly, and then work through the perceived problems that the regulators saw, in an attempt to reach a favorable resolution.

From 2018 and into this year, there's been a lot more guidance from the SEC on how they're likely to view digital assets sold within the US. It's become clearer that the staff will view many models as implicating the securities laws. So, there's been a marked shift in my practice, as I've moved toward educating clients in advance of launch. We work closely with clients to build digital asset models that are in-line with the SEC's guidance.

What have your clients thought of the SEC's approach?

With potential clients, I sense some initial skepticism that actually engaging with regulators is productive in the end—one, because it moves slowly, and two, because there is a chance that you may never get a definitive answer. Nonetheless, I've honestly found my interactions with the staff at the SEC's FinHub (Strategic Hub for Innovation and Financial Technology)—even the ones that haven't resulted in formal no-action relief—to be incredibly illuminating, allowing me to tweak aspects of my clients' models to make them more protective.

From every interaction, I develop a better understanding about the SEC's perspective, and what their particular concerns are. It's important to note that these inquiries are so fact-specific, that what the SEC tells you about client A might not apply squarely to client B, but there are some universal tenets that come out of these discussions, which have given us a bit of an inside scoop.

What are some of the insights you have gained?

One of the most controversial topics—where it seems that the SEC and blockchain-based businesses aren't necessarily seeing eye to eye—is the implementation of transfer restrictions on tokens, and how that impacts the "reasonable expectation of profit" under the Howey test.

The SEC is very knowledgeable about what kinds of restrictions are technically possible, so they're asking those questions because they know that capability exists. But on the other hand, restricting transfers—in whole or part—is something a lot of clients view as antithetical to the spirit of blockchain. While imposing such restrictions doesn't defeat the whole purpose of utilizing distributed ledger technology, in many cases it is viewed as severely limiting the utility of some of the technologies they're trying to develop.

One of the interesting things I've come to understand through my interactions with the [SEC] staff is that transfer restrictions aren't a necessity. I've been able to glean that this is just one factor in the facts and circumstances analysis. For example, if a model doesn't employ transfer restrictions, a party could instead demonstrate other aspects of their model which make it clear that everybody is buying their token because they want to use it.

What's an example of that?

Stablecoins. If you know that you can buy and sell a token for a specific price, that really undermines the motivation to speculate on that token. Who's going to buy it for more on the secondary market than they can buy it for on the website? For me, that's led to a lot of promise that you can be creative and put things into your business model, without having to put on technological restrictions.

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