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STRUCTURING OPTIONS FOR RETAIL CRYPTO FUND PRODUCTS

The author describes categories of cryptocurrency assets and then explores four different structuring options for retail crypto-fund structures, and the regulatory issues they have raised.

By Susan Gault-Brown *

In last month's article, *Blockchain Basics for Investment Managers: A Token of Appreciation* ("Blockchain Basics"), the authors provided a comprehensive review of the application of investment management laws, including the Investment Company Act of 1940 and Investment Advisers Act of 1940, to blockchain and cryptocurrency products.¹ Building from their discussion, the purpose of this article is to explore the various structuring options for creating a retail fund product that invests in cryptocurrencies, such as bitcoin and ether, and/or in other types of coins and tokens, such as those issued in initial coin offerings ("ICOs").

With respect to funds with a primary investment strategy of investing in cryptocurrencies, this article describes some of the pros and cons of four potential retail "crypto-fund" structures: (1) an open-end mutual fund or exchange-traded fund ("ETF") registered under the Investment Company Act (an "Open-End Fund"); (2) a closed-end fund registered under the Investment

Company Act (a "Closed-End Fund"); (3) a fund that is not registered under the Investment Company Act, interests of which are registered under the Securities Act of 1933 (a "33 Act Fund" or "33 Act ETP"); and (4) a commodity pool, interests of which are registered under the Securities Act (a "Commodity Pool"). Before discussing each of these structures, this article first will review the types of instruments such funds might hold.

DESCRIPTION OF CRYPTO INVESTMENTS

Cryptocurrency assets currently can be grouped into three distinct categories. The first category includes cryptocurrencies like bitcoin and ether that are being used, to some extent, to purchase goods and services. It can be argued that these assets function more like fiat currency than like a security (as defined under the federal securities laws). Nevertheless, in December of 2017, Jay Clayton, Chair of the Securities and Exchange Commission, questioned the assertion that such cryptocurrencies are not securities, emphasizing that "[w]hether this assertion proves correct with respect to any digital asset that is labeled as a cryptocurrency will

¹ Baris & Klayman, *Blockchain Basics for Investment Managers: A Token of Appreciation*, 51 Rev. Sec. & Comm. Reg. 6 and 7 (Mar. 21, 2018).

*SUSAN GAULT-BROWN is a Financial Services Partner in the Washington, DC office of Morrison & Foerster LLP and Chair of the firm's Investment Management Practice. Her e-mail address is sgaultbrown@mofo.com.