Countdown to April 19: crypto trading platforms need to comply

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On March 29, 2021, the Canadian Securities Administrators (CSA) and the Investment Industry Regulatory Organization of Canada (IIROC) published Staff Notice 21-329 *Guidance for Crypto-Asset Trading Platforms: Compliance with Regulatory Requirements* (the Staff Notice). The notice outlines securities law requirements applying to crypto asset trading platforms (CTPs) and areas where there may be flexibility in how the requirements apply to a CTP's business model. The guidance in the Staff Notice details the steps platform operators need to take to comply with securities legislation. To bring their operations into compliance, the CSA is encouraging CTPs to contact their local securities regulator to discuss the registration process and address applicable requirements.

On the same day, the Ontario Securities Commission (OSC) issued a press release (the OSC Press Release) stating that CTPs that facilitate the trading of derivatives or securities with persons in Ontario must bring their operations into compliance with Ontario securities law. CTPs must contact the OSC by April 19, 2021 to discuss how to bring their operations as either a dealer or a marketplace into compliance. If a CTP currently trading in derivatives or securities in Ontario does not do so by this date, the OSC confirmed that steps will be taken to enforce applicable requirements under securities law.

These developments require trading platforms to assess whether the digital assets or instruments traded, or transactions entered into, with Canadian clients constitute securities or derivatives under Canadian securities and derivatives laws. If the platform qualifies as a CTP, participants are advised to contact their legal counsel to determine their regulatory options and the impact on their existing business model. To the extent that a platform does not qualify as a CTP, it is advisable to document this analysis in the event of a regulatory inquiry.

Of significance to foreign-based CTPs, the Staff Notice confirms that CTPs operating from outside of Canada that have Canadian clients are expected to comply with Canadian securities legislation.

We remind participants that Canadian securities and derivatives laws are triggered when a firm is in the "business of trading or advising on securities or derivatives" even

when the firm has no physical presence in Canada or there have been no solicitation efforts. We also point out that the regulators cast a broad net when determining whether a derivative or a security is involved, particularly in the context of CTPs.

Key takeaways

As outlined in the Staff Notice, some CTPs operate in a manner similar to marketplaces (Marketplace Platforms) and other CTPs are in the business of trading crypto assets that are securities (Security Tokens) or instruments or contracts involving crypto assets (Crypto Contracts) (Dealer Platforms). A "marketplace" is defined as an entity that brings together the orders of multiple buyers and sellers of securities and, in some jurisdictions, parties to certain types of derivatives, using established, non-discretionary methods through which buyers and sellers agree to the terms of a trade.

Some CTPs may have elements of both Marketplace Platforms and Dealer Platforms and, depending on the business model and activities conducted by a CTP and the risks that it creates, the regulatory treatment of one CTP may differ from another. The Staff Notice focuses on CTPs that facilitate the trading of Security Tokens and/or Crypto Contracts (rather than CTPs that facilitate the trading of other products or contracts that are structured as "traditional" derivatives and that also provide exposure to crypto assets, such as commodity future contracts, contracts for difference or swaps).

We note that securities legislation does not apply to CTPs if:

- The underlying crypto asset is not a security or a derivative; and
- The contract is settled by immediate delivery of the crypto asset.

This position is set out in CSA Staff Notice 21-327 *Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto Assets*. Underpinning the Staff Notice is the regulators' approach of looking at each CTP and its trading practices, and not focusing exclusively on the nature of the asset class. There is a general acknowledgement that a one-size fits all approach is not appropriate or feasible.

The Staff Notice contemplates different registration options for CTPs depending on the nature of their activities, including:

- Investment dealer registration and IIROC membership (and, if applicable, compliance with marketplace rules);
- Exempt market dealer registration; and
- Restricted dealer registration.

Canadian regulators welcome innovation and the evolution of fintech businesses. The Staff Notice provides CTPs with guidance on the necessary steps to comply with securities legislation, including the steps required to continue to operate on an interim basis, as well as how to prepare to integrate into the full Canadian regulatory regime in the long term. The regulators acknowledge that securities and derivatives law requirements may need to be tailored, or exemptions granted, to accommodate novel business models, but underscore the importance of working within the existing regulatory framework.

If you have any questions about the Staff Notice, please contact one of the authors listed below or any other member of BLG's Cryptocurrency and Blockchain Group. Our Cryptocurrency and Blockchain Group leverages BLG's expertise in legal areas, such as investment management, corporate finance, derivatives and fintech, to provide advisory and transactional support right from the start.

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