When Disclosure May Not Be Enough

Related Capabilities

- Securities & Financial Services Litigation & Enforcement
- Investment Funds
- Investment Management
- FinTech

The Commission and others have periodically cautioned investors and market professionals about complex products and educating Main Street investors about them to minimize their risk. Chair Gensler, for example, has delivered remarks on the subject. Chair Gary Gensler, Statement on Complex Exchange Traded Products (Oct. 4, 2021) (here). Indeed, the risk is highlighted by the fact that the Commission has filed enforcement actions against market professionals who did not furnish investors with adequate warnings and information when recommending investments in complex products. *See, e.g. UBS Financial Services, Inc.* Adm. Proc. File No. 3-20912 (June 29, 2022); *In the Matter of American Financial Services, Inc.,* Adm. File No. 3-20151 (Nov. 13,2020). Nevertheless, investors continue to purchase these products and suffer losses.

Last week Commissioner Caroline A. Crenshaw published remarks reiterating her concerns about certain complex products. The Commissioner begins by focusing on Rule 6c-11, enacted in 2019, which created a framework that permits exchange-traded funds or ETFs meeting certain criteria to come directly to market without going through the regulatory process. Under the Rule single-stock ETFs are coming directly onto the market. Yet according to the Commissioner that product present a high level of risk: “The complexity of the product is such that “it would likely be challenging for an investment professional to recommend such a product to a retail investor while also honoring his or her fiduciary obligations or obligations under Regulation Best interest.” Nevertheless, an investor can purchase the product without consulting with any market professional. Under these circumstances it seems likely that many investors are purchasing products about which they have little understanding.

It is this prospect that propelled Commissioner Crenshaw to renew her call for the agency to fashion a comprehensive and consistent approach to the review of complex exchange-traded products to better protect investors -- last year she and Commissioner Allison Herren Lee initiated this suggestion. Yet none has emerged to date. *See also* Lori J. Schock, Director, Office of Investor Education and Advocacy (July 11, 2022)(here) (cautioning investors re investments in complex products). Given the complexity of those products which likely is not mitigated by disclosure - a point well illustrated by the enforcement actions cited above -- perhaps these products should not be readily available until an approach is created to properly protect investors.