May 27, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer (File No. S7-12-22, RIN 3235-AN10); 87 Fed. Reg. 23,054 (April 18, 2022)

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned Proposed Rule ("Proposal" or "Release")[2] intended to expand the definition of "as a part of a regular business" in the definition of "dealer" and "government securities dealer." The Proposal, if adopted, would require market participants, including high-frequency trading firms providing liquidity, to register as dealers or government securities dealers if they are conducting dealer-like activities.

First, the Proposal would establish three qualitative standards to identify market participants that act to provide liquidity to the market and assume dealer-like roles. Second, the Proposal would establish quantitative standards to identify market participants that buy and sell *government* securities in sufficient quantities to be deemed "as a part of regular business." Any person that meets either the qualitative or quantitative standards would be required to register with the Commission as a dealer or government securities dealer, become a member of a self-regulatory organization, and comply with applicable securities laws and regulations. These requirements will enhance transparency, market resilience, and investor protection. They will also promote fair competition by establishing similar regulatory requirements for all market participants engaged in essentially the same trading activities.

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[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer, 87 Fed. Reg. 23,054 (April 18, 2022).

The increased use of electronic trading in our capital markets has fundamentally altered not only how the markets operate, but also the manner in which people trade and invest. Prominent among these changes is the rise of electronic, algorithmic trading by high-frequency trading firms, which now account for nearly half of all trading volume in the U.S. equities and Treasury securities markets.[3] Given the speed with which they can buy and sell large volumes of securities–in a matter of milliseconds–these firms can greatly increase the chances of a flash crash by exacerbating directional moves in the markets. As history has borne out with the 2010 flash crash in U.S. equities markets and the 2014 Treasury securities flash crash, these firms and trading strategies pose substantial risks to the stability of the financial markets and investor protection. For these reasons, and the others set forth in the Release, the Commission should move swiftly to finalize this proposal and require these firms to register as dealers or government securities dealers.

BACKGROUND

The definition of the terms "broker" and "dealer" in the Securities Exchange Act of 1934 were thought to be two of the most important definitions within the Act at the time it was drafted, in large part because "many of the provisions of the act apply only to members of exchanges and brokers and dealers who do business through them."[4] A dealer is defined by the Securities Exchange Act as "any person engaged in the business of buying and selling securities for such person's own account," excluding "a person that buys or sells securities…for such person's own account…but not as a part of a regular business."[5] The second part of the definition is generally referred to as the "trader" exception and is meant to draw a distinction between a dealer, as defined in the Securities Exchange Act, and an ordinary investor that trades regularly for their own account but not as a part of a regular business.[6] The distinction between dealer and trader has been around since Louis Loss published his treatise on securities law in 1951 entitled *Securities Regulation*. However, the rise in algorithmic, electronic trading by high-frequency trading firms has blurred the line between dealer and trader in recent years.

The increasing usage of algorithmic, electronic trading by high-frequency trading firms has fundamentally changed how the markets operate.[7] Today, this is one of the dominant forms of trading in our markets, representing roughly 50 percent of the trading volume in U.S. equities

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3 Johannes Breckenfelder, *Competition among high-frequency traders and market liquidity*, VoxEU (Dec. 17, 2020), https://voxeu.org/article/competition-among-high-frequency-traders-and-market-liquidity; Scott Patterson and Geoffrey Rogow, *What's Behind High-Frequency Trading*, Wall St. J. (August 1, 2009), https://www.wsj.com/articles/SB124908601669298293.

4 S. Rep. No. 73-792, at 13 (1934).

5 Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)5.

6 Release at 23,058 citing Louis Loss, *Securities Regulation* 722 (1st ed. 1951) ("One aspect of the 'business' concept is the matter of drawing the line between a 'dealer' and a trader—an ordinary investor who buys and sells for his own account with some frequency").

7 While not entirely extinct, the days of brokers and dealers on the floors of U.S. stock exchanges trading paper tickets has dramatically declined. John Aidan Byrne, *NYSE floor traders are facing job extinction*, N.Y. Post (Aug. 4, 2019), https://nypost.com/2019/08/04/nyse-floor-traders-are-facing-job-extinction/ ("With the heyday of the human floor trader now ancient history, many observers say the bell now tolls for the few traders remaining. On a typical day, some 250 floor traders mill about — a far cry from the thousands who once traded securities on the venerable floor").

markets and 48 percent of the total U.S. Treasury interdealer market.[8] While high-frequency trading is not clearly defined in law, the Commission has described it as "professional traders acting in a proprietary capacity that engage in strategies that generate a large number of trades on a daily basis."[9] The Commission further described the characteristics of a high-frequency trading firm as:

1. the use of extraordinary high-speed and sophisticated computer programs for generating, routing, and executing orders;
2. use of co-location services and individual data feeds offered by exchanges and others to minimize network and other types of latencies;
3. very short timeframes for establishing and liquidating positions;
4. the submission of numerous orders that are cancelled shortly after submission; and
5. ending the trading day in as close to a flat position as possible (that is, not carrying significant, unhedged positions overnight).[10]

While some have touted the benefits that high frequency trading firms can bring to markets, namely liquidity and price discovery, others have criticized those same firms for raising prices on retail and institutional investors, engaging in market manipulation and frontrunning, and exacerbating market moves.[11] Recent liquidity crises in both the U.S. equities and Treasury securities markets have shown the effects on markets dominated by, and heavily reliant on, high frequency trading firms.

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8 Johannes Breckenfelder, *Competition among high-frequency traders and market liquidity*, VoxEU (Dec. 17, 2020), https://voxeu.org/article/competition-among-high-frequency-traders-and-market-liquidity; Scott Patterson and Geoffrey Rogow, *What's Behind High-Frequency Trading*, Wall St. J. (August 1, 2009), https://www.wsj.com/articles/SB124908601669298293; *see also* Release at 23,055 ("In 2020, staff at the Board of Governors of the Federal Reserve published a paper estimating that PTFs account for 61 percent of the trading activity on interdealer broker platforms").

9 Concept Release on Equity Market Structure, Exchange Act Release No. 61358 (Jan. 14, 2010), 75 Fed. Reg. 3,594, 3,606 (Jan. 21, 2010).

10 *Id*.

11 *See* Bruno J. Navarro, *High-frequency trading benefits investors: Advocate*, CNBC (Apr. 2, 2014), https://www.cnbc.com/2014/04/02/high-frequency-trading-benefits-investors-advocate.html; Richard Finger, *High Frequency Trading: Is It A Dark Force Against Ordinary Human Traders and Investors?*, Forbes (Sep. 30, 2013), https://www.forbes.com/sites/richardfinger/2013/09/30/high-frequency-trading-is-it-a-dark-force-against-ordinary-human-traders-and-investors/?sh=7ba86b456352 ("Things get dicey when a market dislocation occurs and then bids dry up. With no affirmative obligation to be buyers of last resort, if some big macro news event causes markets to shudder, then the HFT's simply pack their bags and there are no underlying bids in the markets"); *US Equity Market Structure: An Investor Perspective*, BlackRock (Apr. 2014), https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-us-equity-market-structure-april-2014.pdf ("BlackRock is firmly opposed to predatory High Frequency Trading (HFT) practices which seek to manipulate the market or disadvantage end-investors. These practices constitute market abuse and should be treated as such in law").

Flash Crash of 2010

On May 6th, 2010, the U.S. equities markets experienced the largest intraday point decline in its history. In a roughly five-minute sell-off, the Dow Jones Industrial Average found itself down more than 1,000 points only to bounce back 500 points minutes later and ultimately close down roughly 350 points. Several stocks saw their prices lose nearly 100% of their value, trading at just one penny, while certain index funds like the Russell 1000 Value Index Fund fell from $59 to $0.08.[12] These exorbitant price movements in a matter of minutes, with no readily discernable explanation, sent the markets and regulators into a frenzy. In a post-mortem report issued by the Commission and the Commodity Futures Trading Commission, the agencies concluded that the event was triggered by an unusually large sell order, which triggered further selling by algorithmic, electronic trading systems or high-frequency trading firms.[13]

At the time of the May 6, 2010 Flash Crash, high-frequency trading firms accounted for roughly 40-50 percent of the total trading volume in terms of dollars.[14] During periods of calm market conditions, high-frequency traders can serve as a source of liquidity in the markets by adding to the trading volume, without resulting in a directional price move.[15] However, during times of market stress, high-frequency trading firms can amplify directional price moves and significantly add to volatility, which in turn, "increases the speed at which the best bid and offer queues get depleted, inducing [high-frequency trading firms] to act faster, leading to a spike in trading volume, and setting the stage for a flash-crash-type event."[16] It is well established that high-frequency trading firms played a significant role in the 2010 flash crash by exacerbating downward pressure on the markets with their algorithmic, electronic trading that bought and sold, but mostly sold, securities in the matter of milliseconds.

Treasury Market Volatility and 2014 Flash Crash

The Treasury securities markets have a long history has one of our most important and foundational financial markets. "He touched the dead corpse of the public credit and it sprang upon its feet." These are the words etched in stone at the base of the statue of Alexander Hamilton that lay outside the U.S. Department of Treasury building in Washington, D.C. As the nation's first Secretary of the Treasury, Secretary Hamilton helped to create the U.S. Treasury securities market with his carefully crafted plan to assume states' debts and fund the debts of the national

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12 Tom Lauricella, *Market Plunge Baffles Wall Street*, Wall St. J (May 7, 2010), https://www.wsj.com/articles/SB10001424052748704370704575228664083620340.

13 Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, Findings Regarding the Market Events of May 6, 2010 (Sep. 30, 2010); *see also* Speech, Gregg E. Berman, SEC, Market Participants and the May 6 Flash Crash (Oct. 13, 2010) ("So while it does not seem that HFTs directly caused a wave of selling, HFTs did ride that wave down as prices declined").

14 Speech, Gregg E. Berman, SEC, Market Participants and the May 6 Flash Crash (Oct. 13, 2010).

15 Andrei Kirilenko, Albert S. Kyle, Mehrdad Samadi, and Tugkan Tuzun, *The Flash Crash: High-Frequency Trading in an Electronic Market* 26, archived at https://www.cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_flashcrash0314.pdf.

16 *Id.*

government at par, as set forth in his Report on Public Credit. Since U.S. securities first traded in the public markets in 1790, much has changed. Compared to the $447,857.92 that was traded in the U.S. securities markets in 1790, the amount of U.S. Treasury debt has ballooned to roughly $29 trillion as of the end of 2021.[17]

Since the sale of the first U.S. Treasury securities in 1790, the U.S. Treasury securities market has developed into the largest and most liquid bond market in the world and serves as the basis of the global financial system. Despite its importance, regulators still do not have all the tools necessary to adequately oversee this market. For instance, high-frequency trading firms, which do not have to register with the Commission, account for more than 50 percent of the total trading volume in the U.S. Treasury cash and futures markets on any given day.[18] This lack of transparency into the U.S. Treasury market has hamstrung the ability of regulators to maintain fair, orderly, and efficient markets. This regulatory gap in one of the most important bond markets in the world helped contribute to several liquidity crises over the past decade.[19]

One such liquidity crisis that exemplifies the risk of algorithmic, electronic trading in the U.S. Treasury securities market by high-frequency trading firms was the volatile round trip in prices that took place on October 15, 2014. During that episode, the 10-year Treasury bond experienced unusual volatility and dropped and recovered an extraordinary 1.6% in a matter of 12 minutes.[20] While other electronically traded markets have experienced similar moments of volatility throughout their own histories, this move in the U.S. Treasury securities market was swift and unprecedented.[21] A joint staff report published by the federal financial regulators stated this about the event:

> Before 2014, many did not believe that an event of this type was likely to occur in the Treasury market. This disruption made clear that the rise of electronic trading in the Treasury market meant that market liquidity provision had become more short-term in nature, some liquidity providers were backed by less capital, and liquidity was more vulnerable to shocks as a result of the change in the composition of liquidity providers. In addition, electronic trading permitted rapid increases in orders that removed liquidity.

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17 Robert E. Wright, "U.S. Government Bond Trading Database, 1776-1835," https://eh.net/database/u-s-government-bond-trading-database-1776-1835/; U.S. Department of Treasury, Debt to the Penny, https://fiscaldata.treasury.gov/datasets/debt-to-the-penny/debt-to-the-penny.

18 U.S. Department of Treasury, Joint Staff Report: The U.S. Treasury Market on October 15, 2014 21 (July 13, 2015).

19 *See, e.g.,* U.S. Department of Treasury, Recent Disruptions and Potential Reforms in the U.S. Treasury Market: A Staff Progress Report (Nov. 8, 2021); Annette Vissing-Jørgensen, Bank for International Settlements, The Treasury market in spring 2020 and the response of the Federal Reserve (Oct. 2021); Alex Aronovich, Dobrislav Dobrev, and Andre Meldrum, The Treasury Market Flash Event of February 25, 2021, FEDS Notes, Washington: Board of Governors of the Federal Reserve (May 14, 2021).

20 Zachary S. Levine, Scott A. Hale, and Luciano Floridi, *The October 2014 United States Treasury bond flash crash and the contributory effect of mini flash crashes*, PLOS One (Nov. 1, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5665520/.

21 U.S. Department of Treasury, Recent Disruptions and Potential Reforms in the U.S. Treasury Market: A Staff Progress Report 18 (Nov. 8, 2021).

In identifying the exact causes of the flash crash, the report went on to highlight the lack of transparency and regulatory access to data:

> Following the October 2014 disruption, analysis found that diversity in trading venues and participants and fragmented and incomplete data reporting had left market participants and individual regulatory agencies with only a very limited view of Treasury risk transfer and price discovery. These gaps posed challenges to understanding the causes of the flash rally.[22]

The events of October 15, 2014, serve as a stark reminder that while the rise of electronic trading brings with it some benefits, it also brings with it many new challenges, including trading strategies that can institute large buy and sell orders in a matter of milliseconds. Those events also underscored the role high-frequency trading firms can play in further exacerbating such events. For example, while high-frequency trading firms still accounted for a majority of trading during the 12-minute bond market flash crash, they significantly reduced the dollar amount of standing quotes in central limit order books.[23] While high-frequency trading firms can be a source of liquidity in these markets, markets can be subject to shocks or flash crashes when that liquidity is pulled back or disappears.

OVERVIEW OF THE PROPOSAL

The Commission has proposed new rules to further define the term "as a part of a regular business" in Sections 3(a)(5) and 3(a)44 of the Securities Exchange Act of 1934 to identify market participants that meet the definition of "dealers" or "government securities dealers" and should be subject to registration with the Commission. Specifically, the Proposal:

- establishes new rules 3a5-4 and 3a44-2 to include qualitative standards for determining when a person is engaged in buying and selling securities for its own account and engaged in that activity "as a part of a regular business." These standards include:
    - routinely making roughly comparable purchases and sales of the same or substantially similar securities (or government securities) in a day; or
    - routinely expressing trading interests that are at or near the best available prices on both sides of the market and that are communicated and represented in a way that makes them accessible to other market participants; or
    - earning revenue primarily from capturing bid-ask spreads, by buying at the bid and selling at the offer, or from capturing any incentives offered by trading venues to liquidity-supplying trading interests;

22 *Id.*
23 *Id.*

- establishes a quantitative standard as part of rule 3a44-2, in addition to the qualitative standard, for determining when a person is engaged in buying and selling *government securities* for its own account and engaged in that activity "as a part of regular business," which is met if that person in each of four out of the last six calendar months, engaged in buying and selling more than $25 billion of trading volume in government securities; and

- excludes from compliance with proposed rules 3a5-4 and 3a44-2: (1) any person that has or controls less than $50 million in total assets, and (2) any investment company registered with the Commission under the Investment Company Act of 1940.

Persons satisfying these "as part of a regular business" tests for determining who is a "dealer" or "government securities dealer" would be required to register with the Commission, become a member of a self-regulatory organization, and comply with the applicable securities laws and rules.

COMMENTS

I. The Release appropriately recognizes that many high-frequency trading firms should be regulated as dealers to enhance transparency, market integrity, and investor protection.

The Proposal is framed largely in terms of the need for improved oversight of the trading activities of proprietary trading firms, or "PTFs." The Release also observes that certain private funds, particularly hedge funds, are likely to be engaged in the types of trading that would fall under the Proposal. By whatever label, however, the underlying or common focus of the Proposal is on those firms that engage in high-frequency trading strategies i.e. those that "employ automated, algorithmic trading strategies (including passive market making, arbitrage, and structural and directional trading) that rely on speed, which allows them to quickly execute trades, or cancel or modify quotes in response to perceived market events."[24]

High-frequency trading firms play such a dominant role in our capital markets that more oversight and government regulation into their activities is clearly necessary and appropriate. As technology changes the way markets operate and the manner in which people trade, the regulations that govern our capital markets must evolve accordingly. While debates continue regarding the advantages and disadvantages of high frequency trading in terms of market integrity and stability, there is no denying their importance. Even supporters of high frequency trading firms, who often tout the role they play in the market by providing liquidity, efficiency, and enhanced price discovery, must concede the point. Regardless of whether you agree with the arguments made by supporters of high frequency trading firms or not, it is beyond doubt they play an outsized role in the operation of our capital markets due to the sheer volume of trading they perform in U.S. equities and Treasury securities markets. And in terms of their potential impact, one need look no

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[24] Release at 23,055.

further than the roles these firms played in the 2010 flash crash and the 2014 Treasury flash crash described above.

The continued evolution and expansion of high-frequency trading strategies provides further support for the Proposal. We are seeing markets that have historically been reluctant to embrace electronic trading, such as the corporate bond markets, move towards this mode of trading.[25] The rise of electronic trading in other markets will almost assuredly attract more high-frequency trading firms seeking to arbitrage those markets. This is further evidence that the Proposal should extend to all securities and not stop at the water's edge of the U.S. equities and Treasury securities market.

Despite the volume of trading represented by high-frequency trading firms, and the concerns they raise about predatory trading practices and market instability, many of these firms are not registered with Commission as a dealer, even though they provide dealer-like functions. This has led to a bifurcated regulatory regime between entities performing similar functions, enabling high-frequency trading firms to escape Commission oversight as a dealer to the detriment of investors and other dealers.

Regulation of these firms as dealers will confer numerous benefits in terms of transparency, market stability, and investor protection. As explained in the Release,[26] dealers are required to register with the Commission, join an SRO, and adhere to a comprehensive regulatory regime. That framework includes provisions that limit risk and promote financial responsibility through net capital requirements; promote transparency through reporting and disclosure requirements; facilitate regulatory oversight through books and records requirements and the examination process; and curb abusive conduct through dealer-specific anti-manipulation and anti-fraud rules. Moreover, registered dealers are subject to the rules and enforcement authorities of the SROs, and Government securities dealers are further subject to rules issued by the Treasury that concern financial responsibility, capital requirements, recordkeeping, reports and audits, and large position reporting. And the Proposal will promote fairness and competition among registered and unregistered dealers by applying similar rules to all dealer activities that meet the proposed standard.

II. **The Proposal's qualitative and quantitative standards appropriately build on the Commission's past regulations and courts' interpretation of the definition of "dealer" and "as a part of regular business."**

The Proposal's qualitative and quantitative standards build upon and are consistent with past Commission regulations and case law for defining a dealer. As mentioned above, the

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25 Joy Wiltermuth, *Electronic trading in U.S. corporate bonds is finally taking off. But it's still early days, says this investor*, Marketwatch (July 13, 2021), https://www.marketwatch.com/story/electronic-trading-in-u-s-corporate-bonds-is-finally-taking-off-but-its-still-early-days-says-this-investor-11626223622; ("Specifically, electronic trading of U.S. investment-grade bonds grew 111% between 2017 and the end of 2020, while the smaller high-yield, or "junk bond" portion, rose by 145% for the same period, the 'Coalition Greenwich' report said").

26 Release at 23,078-79.

Securities Exchange Act defines a dealer as "any person engaged in the business of buying and selling securities for such person's own account," excluding "a person that buys or sells securities…for such person's own account…but not as a part of a regular business."[27] However, the Securities Exchange Act and accompanying report language are silent as to what "as a part of regular business" means. In determining the meaning of that phrase, the Commission and the courts have assessed "the frequency with which the person buys and sells securities for its own account."[28] The Commission and the courts have concluded that there is a point where trading in one's own account transitions out of the realm of the trader's exception and into the realm of the dealer. The Commission has identified "acting as a 'market maker' or a 'de factor market maker whereby market professionals or the public look to the firm for liquidity,' as a factor that indicates 'dealer' status."[29] The Proposal's qualitative and quantitative standards are consistent with these past interpretations of the definition of "dealer" and "as a part of regular business."

The Proposal identifies three activities in its proposed qualitative standards that "would be considered to have the effect of providing liquidity to other market participants."[30] The Commission takes the right approach by listing activities instead of classes of market participants to determine the effect of providing liquidity as an indicator of dealer status. This approach will enable the Commission's regulations and its oversight of dealers to evolve with the evolution of all electronically traded markets for all securities. As discussed earlier, the "trader" exception was meant to "exclude from the definition of 'dealer' members of the public who buy and sell securities for their owners account as ordinary traders."[31] The Proposal's qualitative standards would help to bring greater regulation and oversight over high-frequency trading firms that act as market makers, while at the same time, respecting the goals of the "trader" exception.

The Proposal's quantitative standards for government securities markets, coupled with the proposed qualitative standards, will help to capture the high-frequency trading firms trading in significant volumes of U.S. Treasury bonds that are not currently registered with the Commission. Recent disruptions in the U.S. Treasury market including the 2014 flash crash, the 2019 repo market pressures, the 2020 COVID liquidity crisis, and 2021 flash rally illustrate that more

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27 Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)5.

28 Release at 23,058.

29 Release at 23,056 citing Definition of Terms in and Specific Exemption for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Exchange Act Release No. 46745 (Oct. 30, 2002), 67 FR 67496, 67498–67500 (Nov. 5, 2002) ("2002 Release") (stating that a person generally may satisfy the definition, and therefore, be acting as a dealer in the securities markets by conducting various activities, including "acting as a market maker or specialist on an organized exchange or trading system").

30 Release at 23,065.

31 Release at 23,059 citing *SEC v. Am. Inst. Counselors, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 95,388 (D.D.C. 1975) (citing Loss, Securities Regulation (2d ed. 1961)); *see also* Definition of Terms in and Specific Exemption for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Exchange Act Release No. 46745 (Oct. 30, 2002), 67 FR 67496, 67498–67500 (Nov. 5, 2002) ("[A] person that is buying securities for its own account may still not be a 'dealer' because it is not 'engaged in the business' of buying and selling securities for its own account as part of a regular business"); *SEC v. River North Equity LLC*, 415 F. Supp. 3d 853, 859 (traders purchase securities already in the marketplace and turn a profit from selling them after they appreciate in value); Sodorff, 50 SEC 1249, 1992 WL 224082, at *5.

transparency and government regulation and oversight are needed in this market.[32] The Proposal will give the Commission additional tools with which to oversee these markets and help protect their fairness and stability.

III. <u>The Proposal should ensure the proposed Rule 3a5-4 and Rule 3a44-2 extends to all securities, including digital assets.</u>

The Proposal correctly extends proposed Rule 3a5-4 and Rule 3a44-2 to all securities, including digital assets. As the Commission considers commenters' views and finalizes the Proposal, it must not be persuaded to carve out any asset classes from the broad statutory definition of "dealer."[33] The cryptocurrency and digital assets industry is rapidly expanding with some industry lawyers and lobbyists insisting that their offerings and platforms fall outside well-established securities laws and regulations. But clearly, the Commission must apply securities regulation equally to all securities regardless of how novel, "innovative," popular, or profitable such offerings may be. The U.S.'s securities laws and regulations established almost a century ago, have enabled the U.S.'s capital markets to become the envy of the world. Indeed, because of those attributes, the Commission must ensure that the investor protection and market stability concerns often presented by those offerings are addressed through regulation. This Proposal should be no different.

Chairman Gensler has correctly explained on several occasions that many cryptocurrencies almost certainly fall under the definition of a security.[34] Likewise, Chairman Gensler has noted recently that the five largest platforms that facilitate the purchasing and selling of those securities make up 99 percent of all such trading and likely facilitate the trading of more than 100 digital asset tokens.[35] Any person who meets the definition of "dealer" as defined by the Securities Exchange Act and meets the qualitative standards laid out in this proposal for a person engaged in buying and selling securities for its own account and engaged in that activity "as a part of a regular

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32 *See, e.g.,* U.S. Department of Treasury et al., Recent Disruptions and Potential Reforms in the U.S. Treasury Market: A Staff Progress Report (Nov. 8, 2021), https://home.treasury.gov/system/files/136/IAWG-Treasury-Report.pdf; Annette Vissing-Jørgensen, Bank for International Settlements, The Treasury market in spring 2020 and the response of the Federal Reserve (Oct. 2021), bis.org/publ/work966.pdf; Alex Aronovich, Dobrislav Dobrev, and Andre Meldrum, The Treasury Market Flash Event of February 25, 201, FEDS Notes, Washington: Board of Governors of the Federal Reserve (May 14, 2021), https://doi.org/10.17016/2380-7172.2909.

33 *See* Comment Letter, U.S. Representatives Patrick McHenry and Bill Huizenga (Apr. 18, 2022), https://www.sec.gov/comments/s7-12-22/s71222-20128285-290981.pdf ("We are particularly concerned the proposed rules can be interpreted to expand the SEC's jurisdiction beyond its existing statutory authority to regulate market participants in the digital asset ecosystem, including in decentralized finance (DeFi)").

34 Gary Gensler, Chairman, SEC, Remarks Before the Aspen Security Forum (Aug. 3, 2021) ("many of these tokens are offered and sold as securities…these products are subject to the securities laws and must work within our securities regime"); Gary Gensler, Chairman, SEC, Interview with CNBC, (Jan. 10, 2022) ("…if they call themselves a token, they are still probably, possibly a security"); Gary Gensler, Chairman, SEC, Prepared Remarks of Gary Gensler on Crypto Markets, Penn Law Capital Markets Association Annual Conference (Apr. 4, 2022) ("The [BlockFi] settlement made clear that crypto markets must comply with time-tested securities laws").

35 Gary Gensler, Chairman, SEC, Prepared Remarks of Gary Gensler on Crypto Markets, Penn Law Capital Markets Association Annual Conference (Apr. 4, 2022).

business," should be subject to the requirements applicable to registered securities dealers. The Commission should not be swayed by the often-hyperventilated arguments from those commenters representing the cryptocurrency industry and their apparent sense of entitlement to regulatory immunity under the securities laws.

CONCLUSION

We hope these comments are helpful as the Commission finalizes the Proposal.

Sincerely,

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