



## asset management group

May 27, 2022

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

**Re: *Notice of Proposed Rulemaking: Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer*<sup>1</sup> (File No. S7-12-22)**

Dear Ms. Countryman:

The Asset Management Group of the Securities Industry and Financial Markets Association (“**SIFMA AMG**”)<sup>2</sup> appreciates the opportunity to provide comments to the Securities and Exchange Commission (the “**Commission**” or “**SEC**”) on the Proposed Rules that would further define the phrase “as a part of a regular business” as used in the statutory definitions of “dealer” and “government securities dealer” under Sections 3(a)(5) and 3(a)(44), respectively, of the Securities Exchange Act of 1934, as amended (“**Exchange Act**”).

If adopted, the Proposed Rules would result in several money managers having to register as “dealers” and “government securities dealers.” While SIFMA AMG can appreciate the Commission’s efforts to protect investors and further the public interest, we do not believe that the Proposal will achieve those goals with respect to money managers. Rather, we believe that many of the policy goals articulated in the Proposal can be achieved through other means that are already in place and less burdensome to amend. As a result, we believe that the Proposal places an unfair burden on market participants, such as money managers, who do not engage in dealing activities nor raise the investor protection and public interest concerns that form the historical basis of the dealer registration requirement. As the Commission is aware, money managers are already subject to a comprehensive regulatory framework that offers significant investor protections and Commission oversight of trading activities.

We also believe that the Proposal suffers from other significant deficiencies, including the potential for an arbitrary application of the rules at the discretion of regulators to a questionable statutory basis for proposing and adopting the rules. For instance, the Proposal’s broad reach and ambiguous standards will greatly increase regulatory uncertainty for buy-side market participants. In addition, we note that the Commission appears to have disregarded Congressional intent regarding the oversight of the securities markets and has not articulated a clear investor protection and public interest rationale for the Proposal. Further, the wording of the Proposal—in particular, the aggregation provisions and qualitative standards—

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<sup>1</sup> Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer, Securities Exchange Act Release No. 94,524 (Mar. 28, 2022), 87 Fed. Reg. 23,054 (Apr. 18, 2022) (“**Proposal**” or “**Proposed Rules**”).

<sup>2</sup> SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG’s members represent U.S. and global asset management firms whose combined assets under management exceed \$45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

is confusing and runs the real risk of being arbitrarily and capriciously implemented in a manner that will capture market participants engaging in trading that have no relation to the traditional dealing activities over which Congress and the SEC has expressed concern over the years. In addition, and of relevance to SIFMA AMG's membership, the Proposal's inclusion of money managers within the meaning of a dealer is simply untenable and not contemplated whatsoever within the framework that Congress intended when it adopted the Exchange Act and the Investment Advisers Act of 1940 ("**Advisers Act**"). SIFMA AMG believes that by attempting to apply a regulatory regime not designed or intended for money managers, the Proposal will cause many operational, logistical, legal, and regulatory issues during implementation that have not been adequately addressed or considered by the Commission. In this respect, the Proposal does not address the wisdom of applying a one-size-fits all solution to different types of entities and merely assumes that the virtues of dealer registration justify the means.

While SIFMA AMG generally supports the investor protections that accompany broker-dealer registration requirements and membership in self-regulatory organizations ("**SROs**"), we believe that, with the Proposal, the SEC has lost sight of how those protections are meant to operate. In brief, our comments generally express the following views:

- **Money Managers Should Be Categorically Excluded from the Proposed Rules:** Money managers act as fiduciaries whose duty is to serve the best interests of their clients. This includes an obligation to place a clients' interests above its own and to exercise a duty of loyalty and a duty of care. Dealers, on the other hand, engage in market-making activities as counterparty to their customers. Indeed, this conflict of interest was the basis for former Section 11(e) of the Exchange Act under which the Commission was tasked with studying the feasibility of segregating the functions of a broker and dealer, with the former characterized as fiduciaries.<sup>3</sup> Congress clearly recognized that dealers and persons acting as fiduciaries perform different functions and have different obligations to investors, yet the Commission is seeking to require money managers to register in a capacity that is the antithesis of the duties that they must undertake as fiduciaries. For these reasons, the Commission should categorically exclude money managers from the Proposed Rules.
- **The Definition of "Own Account" Is Overly Broad:** The Commission's definition of "own account," and the reference to the definition of "control" in the large trader reporting regime is inappropriate, exceedingly broad, and will capture a number of accounts and arrangements that were otherwise not contemplated as encompassing traditional dealer activity. For instance, the definition of control would capture legitimate seeding arrangements in which a money manager is testing a potential investment strategy or seeking to establish a performance track record that can be marketed to potential clients. In addition, the wording of the Proposed Rule's control definitions makes it unclear if a money manager voting a client's proxy securities would result in "control." We believe that, at a minimum, the Commission should exclude all managed accounts from the definition "own account," remove the concept of parallel account structures, and exclude entities that do not engage in trading activity but that would be captured solely because of an affiliate's or subsidiary's trading activities.
- **The Qualitative Standards Are Generally Unworkable:** The qualitative standards that the Commission is proposing lack clarity and run the risk of being implemented in an arbitrary and inconsistent manner. Rather than provide clear guidelines for market participants, every application of the proposed qualitative standards will likely result in further interpretive issues that the courts will

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<sup>3</sup> U.S. Securities and Exchange Commission, Report on the Feasibility and Advisability of the Complete Segregation of the Functions of Dealer and Broker (1936) ("**Segregation Study**").

have to ultimately resolve, thus leaving the industry in the same space it is now. Because the rule text has a “no presumption” clause, and persons can come within the dealer definition through factors other than those described in the Proposed Rules, the proposed qualitative standards are not the exclusive basis for determining dealer status and will thus leave market participants further in the dark as to where the line regarding dealer status lies. If the Commission chooses to move forward with the Proposal, we believe that, at a minimum, the qualitative standards should (i) only apply to firm orders and quotes, rather than trading interests, (ii) be based on a continuous trading standard, rather than a “routinely” standard; (iii) apply in the context of the same security and not substantially similar securities; (iv) not prevent customers from utilizing all available trading protocols in the market, including an order book, and (v) exclude strategies for accounts that seek to benefit a client from market inefficiencies through arbitrage and similar opportunities.

- **The Volume and Dollar Thresholds Lack Rationale:** The quantitative standards that the Commission is proposing with respect to government securities dealers, and the \$50 million exception amount, are inconsistent with Congressional intent and a reading of the relevant definitions. While we believe that trading volume and the value of controllable assets can be used as a factor in assessing whether someone is a dealer, we do not believe that Congress intended for persons to be subject to the dealer registration requirements based on numerical thresholds alone. Rather, we believe that trading activities and intent are important, as reflected in SEC interpretations and federal case law over the years.
- **Alternative Means of Achieving Policy Objectives:** The Commission does not articulate in clear terms how investors would be protected, and the public interest furthered, if it were to adopt the Proposed Rules. Rather, in defending the need for the Proposed Rules, the Commission makes vague references to market stability, market transparency, and a need for increased insights into trading activities for regulatory, investigative, and market risk purposes. While we support appropriate market protections, the Commission fails to consider the other rules and authority at its disposal that can achieve similar results without unnecessarily requiring a wide swath of market participants to register as dealers – notwithstanding the absence of dealing activities. We believe that it is incumbent on the Commission to consider these alternatives and articulate the reasons for why these alternatives are insufficient to advance its articulated policy goals. The Commission has not done so in the Proposal.
- **Commission Has Exceeded Its Statutory Authority:** The broad brushstrokes that the Commission uses with the Proposal would capture several persons that are already subject to comprehensive regulatory requirements, such as money managers. If Congress and other legislative bodies had intended to capture these persons within the framework applicable to dealers in securities, they would not have created separate regulatory frameworks for such persons. Accordingly, we believe that the Commission has vastly exceeded its statutory authority with the Proposal.

## **I. Introduction and Background**

SIFMA AMG generally supports rules which seek to increase transparency, promote market integrity, reduce misconduct, and/or provide regulatory protections. However, it is important that such rules be designed to give market participants a measure of certainty regarding their regulatory obligations, that the benefits of any proposed rules outweigh any associated costs, and that the Commission consider all other options for implementing policy changes, including by enhancing existing rules. We do not believe that the Commission has adequately considered the extent to which modifications to existing rules can achieve the policy objectives that the SEC seeks to advance with the Proposal. As a result, SIFMA AMG cannot support any aspect of the Proposal in its current form. We strongly urge the Commission to

withdraw the Proposal, and instead, issue a concept release or an advance notice of proposed rulemaking to collect additional data points that will help the Commission better understand the current market environment. We believe that such an approach would give the Commission a better opportunity to assess whether the policy objectives that it articulates in the Proposal can be accomplished with modifications to existing rules and reporting frameworks.<sup>4</sup> This is especially important given that the Proposal effectively eliminates the dealer-trader distinction that market participants have relied on for at least 70 years.

In brief, section 3(a)(5)(A) of the Exchange Act, as amended, defines a “dealer” as “any person engaged in the business of buying and selling securities . . . for such person’s own account through a broker or otherwise.”<sup>5</sup> Section 3(a)(5)(B) excludes from the definition of a dealer, “a person that buys or sells securities . . . for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.” When these two provisions are read in tandem, the primary factor for determining whether a person who buys and sells securities for their own account has to register as a dealer is whether they are engaged in trading as a business. Whether a person is “engaged in the business” of buying and selling securities is at the heart of the historical dealer-trader distinction.

The dealer-trader distinction, of which many SIFMA AMG members avail themselves, is an analytical framework that has been in place since at least 1951, when Louis Loss first published his seminal treatise on the securities laws.<sup>6</sup> Although the SEC and its staff articulated features of the dealer-trader distinction over the years,<sup>7</sup> the SEC provided a more comprehensive discussion of the distinction and what it means to be “engaged in the business” of buying and selling securities in 2002. That year, the SEC

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<sup>4</sup> For instance, in 2015, rather than propose rules to alter the rules associated with transfer agents, the Commission issued an advance notice of proposed rulemaking to first solicit public comment. Advance notice of proposed rulemaking; Concept release; Request for comment, Exchange Act Release No. 76,743 (Dec. 22, 2015), 80 Fed. Reg. 81,948 (Dec. 31, 2015). More recently, it did the same for securities offering exemptions. Concept Release on Harmonization of Securities Offering Exemptions, Exchange Act Release No. 86,129 (Jun. 18, 2019), 84 Fed. Reg. 30,460 (Jun. 26, 2019). Perhaps more consequentially, before proposing Exchange Act Rule 3b-16 and Regulation ATS, the Commission issued a concept release to gather more information regarding market structure. Concept Release; Request for Comment, Release No. 38,672 (May 23, 1997), 62 Fed. Reg. 30,485 (Jun. 4, 1997).

<sup>5</sup> As noted by the Commission, because the definition of dealer in Exchange Act Section 3(a)(5) and that of a government securities dealer in Exchange Act Section 3(a)(44) are effectively the same, this comment letter like the Proposal will refer to dealers and the Dealer Definition to refer to both types of dealers, unless the context otherwise requires. *See* Proposal, 87 Fed. Reg. at 23,054, n. 3.

<sup>6</sup> *See* Louis Loss, *Securities Regulation 722* (1st ed. 1951) (discussing dealer-trader distinction). In this connection, the dealer-trader distinction may have been used or developed as an analytical concept within the SEC before the publication of Loss’s treatise, given that Loss held various positions at the SEC during its formative years.

<sup>7</sup> *See, e.g.*, OTC Derivatives Dealers, Exchange Act Release No. 40594 (Oct. 23, 1998), 63 Fed. Reg. 59,362, 59,370 n.61 (Nov. 3, 1998) (listing dealer indicia in context of over-the-counter (OTC) derivatives dealers); Further Definitions of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” Exchange Act Release No. 66,868 (Apr. 27, 2012), 77 Fed. Reg. 30,596, 30,607 (May 23, 2012) (discussing dealer-trader distinction in context of security-based swaps); Stephen V. Hart, SEC Staff No-Action Letter (Mar. 6, 1980); Public Securities Locating Services, SEC Staff No-Action Letter (Sept. 8, 1973); United Trust Co., SEC Staff No-Action Letter (Sept. 6, 1978); Continental Grain Co., SEC Staff No-Action Letter (Nov. 6, 1987); Burton Securities, SEC Staff No-Action Letter (Dec. 5, 1977); United Savings Association of Texas, SEC Staff No-Action Letter (Apr. 2, 1987); Fairfield Trading Corp., SEC Staff No-Action Letter (Jan. 10, 1988); Louis Dreyfus Corp., SEC Staff No-Action Letter (July 23, 1987).

proposed rules to grant banks exceptions and exemptions from the definitions of “broker” and “dealer” as part of the SEC’s implementation of the Gramm-Leach-Bliley Act of 1999.<sup>8</sup>In that proposal, the SEC identified activities that historically have been associated with dealers and would bring someone within the meaning of the phrase “engaged in the business.”<sup>9</sup>

The activities identified by the SEC in the 2002 Proposal include:

- acting as an underwriter in the distribution of new issues;
- acting as a market maker or specialist on an organized exchange or trading system;
- acting as a de facto market maker whereby market professionals or the public look to the person for liquidity; and
- buying and selling securities directly to customers with an assortment of professional market activities, such as providing investment advice, extending credit, lending securities in connection with transactions, and carrying a customer’s securities account.<sup>10</sup>

The SEC further elaborated that: dealers generally are persons who normally have regular clientele; hold themselves out as willing to buy and sell securities at a regular place of business; have a regular turnover of inventory (or participate in the distribution of new issues); and transact a substantial portion of their business with investors (or, in the case of dealers who are market makers, principally trade with other professionals). The SEC contrasted dealer activities with those of traders, who the SEC stated are viewed as:

- having less regular volume;
- not handling other people’s money or securities;
- not making a market in securities; and
- not furnishing dealer-type services, such as providing investment advice, extending credit, or lending securities.<sup>11</sup>

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<sup>8</sup> See 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. 46,745 (Oct. 30, 2002), 67 Fed. Reg. 67,496, 67,498–500 (Nov. 5, 2002) (“2002 Proposal”).

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* In addition to the factors listed in the 2002 Proposal, with respect to dealer status in the context of the Government Securities Act of 1986 (“GSA”), the SEC staff also identified the following factors: issuing or originating securities that would qualify as securities under the GSA; participating in a selling group or underwriting government securities; purchasing or selling government securities as principal from or to customers; carrying a dealer inventory; quoting a market in government securities or publishing quotes; advertising or otherwise holding oneself out as a government securities dealer, such as holding oneself out as being willing to buy and sell particular government securities on a continuous basis; rendering any incidental investment advice; extending or arranging for the extension of credit to others in connection with government securities; running a book or repurchase and reverse repurchase agreements on government securities; and using an interdealer broker, other than a retail screen broker, to effect any government securities transactions. See, e.g., United Savings Association of Texas, SEC Staff No-Action Letter, *supra* note 5.

<sup>11</sup> 2002 Proposal, *supra* note 8, at 67,498–500.

Although the 2002 Proposal is almost two decades old, the SEC affirmed the use of the dealer-trader distinction as an analytical framework when it reiterated the underlying principles of the distinction in connection with the definition of “security-based swap dealer” for purposes of implementing the provisions of the Dodd-Frank Act under the SEC’s purview.<sup>12</sup>

In addition to the statements above, senior SEC officials over the years have publicly acknowledged that hedge funds generally have come within the meaning of a trader rather than a dealer. In 1994, Arthur Levitt, then chair of the SEC, provided this testimony before Congress:

Hedge funds typically claim an exclusion from registration as securities dealers under Section 15(a) of the [Exchange Act] (15 U.S.C. § 78o(a)) based on the “trader” exception to the definition of “dealer.” In general, a trader is an entity that trades securities solely for its own investment account and does not carry on a public securities business. On the other hand, a dealer buys and sells securities as part of a regular business, deals directly with public investors, engages in market intermediary activities, and may provide other services to investors.<sup>13</sup>

In 1998, Richard Lindsay, then director of what is now known as the Division of Trading and Markets, echoed Chairman Levitt’s testimony, noting in written testimony that “hedge funds also rely on the trader exception from broker-dealer registration.”<sup>14</sup>

## **II. Proposed Rule**

The SEC is proposing two rules—Rules 3a5-4 and 3a44-2—to further define the terms dealer and government securities dealers to identify certain activities that would constitute a “regular business” requiring a person engaged in those activities to register. According to the SEC, proposed rules 3a5-4 and 3a44-2 would expand upon existing SEC and staff statements regarding dealers and traders to further define three qualitative standards designed to more specifically identify activities of certain market participants who, in the SEC’s view, assume dealer-like roles and whose trading activity in the market “has the effect of providing liquidity.” Proposed rule 3a44-2, which would apply only to the definition of a government securities dealers, would include a quantitative standard that would establish a bright-line test under which a person engaging in certain specified levels of activity would be deemed to be buying and selling government securities “as a part of a regular business,” regardless of whether that person meets any of the qualitative standards.

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<sup>12</sup> See Further Definition of “Swap Dealer,” *supra* note 7.

<sup>13</sup> See, e.g., Testimony of Arthur Levitt, Chairman, SEC, Concerning Hedge Fund Activities in the US Financial Markets, Before the House Committee on Banking, Finance and Urban Affairs (Apr. 13, 1994).

<sup>14</sup> See, e.g., Testimony of Richard R. Lindsey, Dir., Div. of Mkt. Regulation, SEC, Concerning Hedge Fund Activities in the US Financial Markets, Before the House Committee on Banking and Financial Services (Oct. 1, 1998). In a footnote, Director Lindsey further stated, “Hedge funds also claim an exclusion from registration as securities dealers under Section 15(a) of the Exchange Act (15 U.S.C. § 78o(a)), based on the ‘trader’ exception to the definition of ‘dealer.’ In general, a trader is an entity that trades securities solely for its own investment account and does not carry on a public securities business, while a dealer buys and sells securities as part of a regular business, deals directly with public investors, engages in market intermediary activities, and also may provide other services to investors.”

### As a Part of a Regular Business

Under proposed rules 3a5-4 and 3a44-2, a person that buys and sells securities (or government securities) for its own account would engage in such activity “as a part of a regular business” if the person engages in a routine pattern of buying and selling securities that has the effect of providing liquidity to other market participants.

### Qualitative Standards Applicable to Securities and Government Securities

Under the Proposed Rules, a person would provide liquidity to other market participants, and thus be deemed a dealer, where a person meets one or more of the following qualitative standards:

1. Routinely making roughly comparable purchases and sales of the same or substantially similar securities in a day (“**Intra-Day Standard**”);
2. Routinely expressing trading interests that are at or near the best available prices on both sides of the market and are communicated and represented in a way that makes them accessible to other market participants (“**Trading Interest Standard**”); or
3. 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.

### Quantitative Standard Applicable Only to Government Securities

Under proposed rule 3a44-2, a person would be deemed a government securities dealer if in each of four out of the last six calendar months, that person engaged in buying and selling more than \$25 billion of trading volume in government securities. A person would be a dealer under this standard irrespective of whether the person meets any of the qualitative standards discussed above.

### Excluded Persons

The proposed rules provide two exclusions from the definition of a dealer irrespective of whether such persons meet the qualitative or quantitative standards. The first exclusion is for an investment company registered under the Investment Company Act of 1940 Act (“**1940 Act**”). The second is for a person that has or controls total assets of less than \$50 million. This latter definition corresponds to the definition of an institutional account under FINRA Rule 4512(c).<sup>15</sup>

### Own Account, Control, and Aggregation

As explained by the SEC, the Proposal would define a person’s “own account” in a way that recognizes that corporate families and entities may be organized in various structures, focusing on the trading activity occurring at the firm or legal-entity level or the trading activity that is being employed on

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<sup>15</sup> FINRA Rule 4512(c) provides that the term “institutional account” shall mean the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.

behalf, or for the benefit, of the entity, and limit the registration burden to those entities engaged in dealer activity. To achieve this result, the Proposal would define a person's "own account" as any account:

1. Held in the name of that person;
2. Held in the name of a person over whom that person exercises control or with whom that person is under common control subject to the following exclusions:
  - a. An account in the name of a registered broker, dealer, or government securities dealer, or an investment company registered under the 1940 Act;
  - b. An account held in the name of a client of an investment adviser registered under the Investment Advisers Act of 1940 ("**Advisers Act**") unless the adviser controls the client as a result of the adviser's right to vote or direct the vote of voting securities of the client, the adviser's right to sell or direct the sale of voting securities of the client, or the adviser's capital contributions to or rights to amounts upon dissolution of the client; or
  - c. With respect to any person, an account in the name of another person that is under common control with that person solely because both persons are clients of an investment adviser registered under the Advisers Act unless those accounts constitute a parallel account structure.
3. Held for the benefit of those persons identified above.

The concept of control would cross reference the meaning of control in Exchange Act Rule 13h-1(a)(3), which defines the term as follows:

The term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of securities, by contract, or otherwise. For purposes of this section only, any person that directly or indirectly has the right to vote or direct the vote of 25% or more of a class of voting securities of an entity or has the power to sell or direct the sale of 25% or more of a class of voting securities of such entity, or in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that entity.

This definition would effectively require certain firms to aggregate trading activities and assets to determine whether collectively, and individually, the firm or the entities under a firm's control come within the meaning of a dealer or government securities dealer. In furtherance of this aggregation concept, the Proposal would define a *parallel account structure* to mean a structure in which one or more private funds (each a "parallel fund"), accounts, or other pools of assets (each a "parallel managed account") managed by the same investment adviser pursue substantially the same investment objective and strategy and invest side by side in substantially the same positions as another parallel fund or parallel managed account.



### III. Money Managers Should Be Categorically Excluded from the Proposal

As the Commission is aware, money managers (e.g., investment advisers) and broker-dealers act in different capacities, have entirely different responsibilities to investors, and are subject to regulatory schemes that each protect investors through different means appropriate to such actions and responsibilities.<sup>16</sup> When viewed in this context, it is important to highlight that the primary historical motivation for regulating dealers is based on a concern regarding unscrupulous sales practices and the protection of investors assets.<sup>17</sup> These concerns are simply not present when it comes to money managers, especially given their fiduciary responsibilities.

As discussed succinctly in the IA/BD Staff Study:

An investment adviser is a fiduciary whose duty is to serve the best interests of its clients, including an obligation not to subordinate clients' interests to its own. Included in the fiduciary standard are the duties of loyalty and care. An adviser that has a material conflict of interest must either eliminate that conflict or fully disclose to its clients all material facts relating to the conflict.

In addition, the Advisers Act expressly prohibits an adviser, acting as principal for its own account, from effecting any sale or purchase of any security for the account of a client, without disclosing certain information to the client in writing before the completion of the transaction and obtaining the client's consent.

The states also regulate the activities of many investment advisers. Most smaller investment advisers are registered and regulated at the state level. Investment adviser representatives of state- and federally-registered advisers commonly are subject to state registration, licensing, or qualification requirements.<sup>18</sup>

In contrast, the SEC describes dealers in the Segregation Study as follows:

The characteristic activities of a dealer in securities are similar to those of a dealer or jobber in merchandise. The dealer sells securities to his customer which he has purchased or intends to purchase elsewhere or buy securities from his customer with a view to disposing them elsewhere. In any such transaction he acts for his own account and not as agent for

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<sup>16</sup> See Staff Study on Investment Advisers and Broker-Dealers as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Jan. 2011) (“**IA/BD Staff Study**”).

<sup>17</sup> The SEC staff articulated this concept succinctly when it stated that

[p]rincipal trading raises concerns because of the risks of price manipulation or the placing of unwanted securities into client accounts (i.e., “dumping”). Engaging in principal trading with customers or clients represents a clear conflict for any fiduciary. Advisers Act Section 206(3) prohibits an adviser from engaging in a principal trade with an advisory client unless it discloses to the client in writing before completion of the transaction the capacity in which the adviser is acting and obtains the consent of the client to the transaction. *Id.* at 118.

<sup>18</sup> *Id.* at iii–iv.

the customer. He receives no brokerage commission but relies for his compensation upon a favorable difference or spread between the price at which he buys and the amount for which he sells. The risk of loss is entirely his own.

Where the broker and dealer functions are combined in a single person, his own interests may conflict with the interests of those to whom he owes a fiduciary duty. This conflict may react to the disadvantage of his brokerage customers in a variety of ways. A broker who trades for his own account or is financially interested in the distribution or accumulation of securities, may furnish his customers with investment advice inspired less by any consideration of their needs than by the exigencies of his own position. The securities, equities and credit balances of his customers may be endangered by the risks which he incurs in making excessive commitments for his own account. A complicating factor in these situations is that the average investor too frequently is unaware of the distinction between the broker and dealer relationships and hence takes no account of the possibility that the advice and service proffered by a broker may be affected with a powerful, independent interest at variance with his fiduciary obligation. As a method of safeguarding the ambassador from dangers of this type, complete segregation of the broker and dealer functions has been proposed.<sup>19</sup>

What is clear from these passages is that when it comes to sales practices, the regulatory framework generally applicable to money managers has always provided significant investor protections. In terms of the protection of an investor's assets, broker-dealers in securities are subject to a myriad of financial responsibility rules that are meant to ensure, among other things, that: (i) customer assets are segregated from those assets of the broker-dealer<sup>20</sup> and (ii) the broker-dealer has enough liquid assets to satisfy customer claims in the event of the broker-dealer's failure.<sup>21</sup> These requirements are generally in place because of the concern for customer assets when the broker-dealer engages in risky proprietary trading activities. These concerns are simply not present with money managers. For example, in the context of SEC-registered investment advisers, the SEC staff has stated that:

Advisers Act Rule 206(4)-2 regulates the custody practices of investment advisers registered or required to be registered under the Advisers Act. Rule 206(4)-2 requires advisers that have custody of client funds or securities to implement controls designed to protect those client assets from being lost, misused, misappropriated or subject to the advisers' financial reverses, such as insolvency. Unlike banks and broker-dealers, investment advisers typically do not maintain physical custody of client funds or securities but rather may have custody because they have the authority to obtain client assets, such as by deducting advisory fees from a client account, writing checks or withdrawing funds on behalf of a client, or by acting in a capacity, such as general partner of a limited partnership, that gives an adviser or its supervised person the authority to withdraw funds or securities from the limited partnership's account.

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<sup>19</sup> Segregation Study at XIV–XV.

<sup>20</sup> *See, e.g.*, Exchange Act Rule 15c3-3.

<sup>21</sup> *See, e.g.*, Exchange Act Rule 15c3-1.

A registered adviser with custody of client funds or securities is required to take a number of steps designed to safeguard those client assets. The adviser must maintain client funds and securities with “qualified custodians,” such as a bank or a broker-dealer and make due inquiry to ensure that the qualified custodian sends account statements directly to the clients. The adviser must promptly notify its clients as to where and how the funds or securities will be maintained, when the account is opened and following any changes to this information.

Generally, all advisers with custody of client assets must undergo an annual surprise examination by an independent public accountant to verify client assets. In addition, if the adviser itself maintains, or if it has custody because a related person maintains, client assets as a qualified custodian, it must obtain, or receive from a related person, a report of the internal controls relating to the custody of those assets from an independent public accountant that is registered with and subject to regular inspection by the Public Company Accounting Oversight Board.<sup>22</sup>

As demonstrated by the passages above, money managers are subject to a comprehensive investor protection framework. Considering the comprehensive regulatory framework for private funds, and the fact that these firms do not engage in dealing activities, Congress did not intend to capture money managers within the regulatory regime applicable to dealers. As such, the Commission’s Proposal to capture investment advisers within the dealer regulatory framework places it in conflict with the demonstrated Congressional intent. For these reasons, we recommend that if the Commission decides to move forward with the Proposal, it should, at a minimum, categorically exclude money managers advisers from being within scope.

#### **IV. Definition of “Own Account” Is Too Broad**

SIFMA AMG believes that the definition of “own account,” and the cross reference to the definition of “control” in the large trader reporting rule (i.e., Exchange Act Rule 13h-1) are not an appropriate benchmark for determining dealer status as such an approach would capture persons that do not raise the investor protections that are associated with acting as a dealer. For example, although Congress has never articulated its reasoning for requiring broker-dealers to register, the Commission appears to have evaluated Congress’s intent in a 1963 report of a special study of the securities markets, where it states that “no amount of disclosure in a prospectus can be effective to protect investors unless the securities are sold by a salesman who understands and appreciates both the nature of the securities he sells and his responsibilities to the investor to whom he sells.”<sup>23</sup> Yet, the Proposal would effectively capture persons without customer-facing obligations or with existing obligations that already exceed what is applicable to dealers.

For instance, and as illustrated in example one in the Proposal, a holding company with control over subsidiaries that arguably meet the definition of a dealer under the Proposed Rule could itself potentially have a dealer registration requirement solely because it controls its subsidiaries even though it

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<sup>22</sup> IA/BD Study, at 34–35. While these statements were in the context of SEC-registered investment advisers, we note that these principals apply generally to money managers that have a fiduciary obligation.

<sup>23</sup> See, e.g., David A. Lipton, *A Primer on Broker-Dealer Registration*, 36 Cath. U.L. Rev. 899, 906 (1987) (citing Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. I, at 588 (1963)).

does not engage in any customer-facing activities, trading activities, or any other activities typically associated with being a dealer. This issue is of particular concern where a U.S. based holding company has foreign subsidiaries whose activities would be included under the aggregation provisions of the “own account” definition, even where those activities have no U.S. touch point. The issue is readily apparent in the context of foreign entities whose activities would bring them within the definition of a dealer but who would otherwise be exempt from having to register as such pursuant to Rule 15a-6 of the Exchange Act. In this instance, there is no legal, investor protection, or public interest justification for requiring the holding company to register as a dealer. At a minimum, if the Commission were to go forward with the Proposal, we believe the Commission apply the principles of the entity approach to broker-dealer registration that it articulated in the adopting release to Rule 15a-6.<sup>24</sup> Under that approach, registration activities are assessed on an entity-by-entity basis, rather than across affiliated entities.

In addition, the definition of control, and its reference to the “possession, direct or indirect, of the power to direct what causes the direction of the management and policies of a person whether through the ownership of securities by contracts or otherwise” is overly broad and could potentially capture a vast array of advisory and other relationships. We believe that this is of particular concern when this part of the control definition is read in tandem with the concept of a parallel account structure. We note that there are very legitimate reasons for a parallel account structure, especially for larger, global managers that have a range of client types in different jurisdictions, including private funds and managed accounts that pursue the same investment objective and strategy.

However, under the Proposed Rules, an investment adviser that exercises discretion over multiple managed accounts, that all pursue the same strategy could potentially result in the advisor and the clients being subject to dealer registration requirements. This is in large part due to the vague nature of what it means to have the power to direct the policies of a person by contract or otherwise. In addition, we note that this vague standard could capture a money manager’s affiliated general partner and limited partners in a private fund. Such a result, however, is counterintuitive given that a registered investment adviser, as a fiduciary, is subject to a greater fiduciary obligation to its clients than is a dealer, and that a client has no intent to engage in dealer activities.<sup>25</sup> In addition, the Proposal fails to consider how the principal trading prohibitions in the Advisers Act would impact an investment adviser that comes within the meaning of the term dealer solely because of its managed accounts.

While the Commission excludes client accounts of advisers registered under the Advisers Act, it provides no basis for why state-registered advisers or exempt reporting advisers, and their respective clients, are not afforded similar exclusions. We further note that the Proposal appears to have two definitions of control: one that references the large trader reporting rule which includes a 25% threshold and another similarly worded definition that references an adviser’s right to vote or direct the vote of voting securities of the client, the adviser’s right to sell or direct the sale of voting securities of the client, or the adviser’s capital contributions to or rights to amounts upon dissolution of the client without a 25% threshold. These conflicting definitions will be difficult to apply and will suffer from the same concerns expressed above about the potential for arbitrary application of the proposed rules by regulators.

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<sup>24</sup> Registration Requirements for Foreign Broker-Dealers, Exchange Act Release No. 27017 (July 11, 1989), 54 Fed. Reg. 30,013, 30,017 (Jul. 18, 1989) (“**Rule 15a-6 Adopting Release**”).

<sup>25</sup> For example, discretionary authority granted to a client under an investment management agreement clearly should not be construed as the money manager having control over the investment policies of a client. Nor does a money manager’s voting proxies.

Because of these definitional issues, we believe that the Commission should limit the concept of “own account” to the first prong of the definition – an account in a person’s name. Trading activity reviews should be limited only to each account. We note that this would be consistent with the entity approach to broker-dealer registration discussed above and articulated in the Rule 15a-6 Adopting Release. If Congress had intended various structures as the Commission is proposing to do, we believe that it would have mandated such an explicit undertaking. It did not.

## **V. The Qualitative Standards Are Unworkable**

SIFMA AMG appreciates the Commission’s attempt to develop standards that market participants can point to when determining whether their trading activities constitute being engaged in the business of dealing. However, rather than provide much needed clarity on the issue, we believe that the qualitative standards outlined in the Proposal will have the opposite effect. We believe that the standards outlined by the Commission are incredibly vague and will ultimately lead to inconsistent application across market participants.

For example, in discussing the Intraday Standard and the Trading Interest Standard, the SEC discusses the concept of “routinely” to mean more frequent than occasional but not necessarily continuous, such that a person’s transactions in roughly comparable positions, throughout the day and routinely over time, constitute “[engaging] in a routine pattern of buying and selling securities that has the effect of providing liquidity for market participants . . . .”<sup>26</sup> With respect to the Trading Interest Standard, SEC states “that the proposed rules are intended to reflect market evolution to capture significant liquidity providers who express trading interests at a high enough frequency to play a significant role in price discovery and the provision of market liquidity, even if their liquidity provision may not be continuous like that of some traditional dealers.”<sup>27</sup> SIFMA AMG believes that this conceptual framework is extremely vague and can result in an arbitrary and potentially capricious application of the Intraday Standard. As drafted, the standard effectively requires that a person, such as an SEC examination or enforcement staff member, exercise discretion over the meaning of “routinely” without reference to an adequate baseline. In this case, it is not hard to foresee SEC examination staff taking the view that certain trading activities are not “routine” for purposes of Rule 3a5-4 or Rule 3a44-2, only to have SEC enforcement staff review the same facts and come to an opposite conclusion a short time later. We do not believe that these concerns will be alleviated by having examination and enforcement staff consult with the SEC’s policy making divisions (i.e., the staff of the Division of Trading & Markets), because the lack of a solid baseline by which to assess trading activity is the primary issue, not whether the policy-making divisions are consulted.

Although the SEC states that in developing the concept of routinely it relied on the same conceptual framework outlined in the adopting release defining terms associated with security-based swap dealing activities,<sup>28</sup> we do not believe that this is an appropriate baseline to assess dealing activities in traditional

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<sup>26</sup> Proposal, 87 Fed. Reg. at 23,105.

<sup>27</sup> Proposal, 87 Fed. Reg. at 23,068.

<sup>28</sup> Proposal, 87 Fed. Reg. at 23,066, n.132, citing to Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,” Exchange Act Release No. 66868 (Apr. 27, 2012), 77 Fed. Reg. 30,596, 30,609 (May 23, 2012) (“Entities Adopting Release”).

securities. In referencing the Entities Adopting Release, the SEC fails to mention that this concept was developed specifically because of the nature of the swap market as a whole, and the fact that “many types of swaps are not entered into on a continuous basis, it is not necessary that a person enter into swaps at the request or demand of counterparties on a continuous basis in order for the person to be a market maker in swaps and, therefore, a swap dealer.”<sup>29</sup> The traditional market for securities and government securities are entirely different than the market for swaps and security-based swaps, which merits the difference in treatment. Ultimately, swaps and security-based swaps are not fungible instruments with active secondary trading markets where there is continuous trading of these instruments. As a result, it is entirely inappropriate for the SEC to borrow concepts from that regulatory framework and apply them on a wholesale basis to traditional securities markets without, at a minimum, explaining why these vastly different markets merit similar treatment. Moreover, the Entities Adopting Release framed the concept of routinely in the context of market-making activities, and unlike the Proposal, actually provides constructive guidance regarding activities constitute market making on a routine basis that market participants and regulators can at least reference as a baseline by which to judge trading activities.<sup>30</sup> That is something that is woefully missing from the Proposal.

We also note that these same issues are present in the “roughly comparable” and “substantially similar” concepts outlined in the Intraday Standard. In describing the concept of “roughly comparable” the SEC states that this concept would generally “capture purchases and sales similar enough, in terms of dollar volume, number of shares, or risk profile, to permit liquidity providers to maintain near market-neutral positions by netting one transaction against another transaction.” The SEC further states that “to be “roughly comparable,” the dollar volume or number of shares of, or risk of offset by, the purchases and sales need not be exactly the same.” The SEC then explains that “a full netting of positions may fail to capture a number of significant firms, due to the unique characteristics of certain liquidity providers in today’s markets. Instead, “roughly comparable” purchases and sales would fall within a reasonable range that generally would have the effect of offsetting one transaction against the other.” According to the SEC, “a person that closes or offsets, in the same day, the overwhelming majority of the positions it has opened, has likely made ‘roughly comparable purchases and sales.’” As with the concept of “routinely,” the “roughly comparable” concept will ultimately be applied in a discretionary manner by regulators given the Commission’s clear acknowledgement that it is not providing a bright-line test.<sup>31</sup> When coupled with the aggregation provisions discussed above, this roughly comparable is so broad that it runs the risk of capturing market participants and their affiliates where one entity is engaged in a long strategy while an affiliated entity trades in a short strategy even though these entities may have firewalls in place to prevent each entity from knowing the other’s specific trading activities.

The “substantially similar” concept also suffers from similar deficiencies. The SEC states that the application of this concept “would be based on the facts and circumstances analysis that would take into

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<sup>29</sup> Entities Adopting Release, 77 Fed. Reg. at 30,609 n.192.

<sup>30</sup> More specifically, that release states that routinely standing ready to enter into swaps at the request of a counterparty includes routinely: “(i) quoting bid or offer prices, rates or other financial terms for swaps on an exchange; (ii) responding to requests made directly, or indirectly through an interdealer broker, by potential counterparties for bid or offer prices, rates or other similar terms for bilaterally negotiated swaps; (iii) placing limit orders for swaps; or (iv) receiving compensation for acting in a market maker capacity on an organized exchange or trading system for swaps.” *Id.*

<sup>31</sup> Proposal, 87 Fed. Reg. at 23,066, n.136.

account factors such as, for example, whether (1) the fair market value of each security primarily reflects the performance of a single firm or enterprise or the same economic factor or factors, such as interest rates; and (2) changes in the fair market value of one security are reasonably expected to approximate, directly or inversely, changes in, or a fraction or a multiple of, the fair market value of the second security.” While the SEC provides limited examples of trading that would not be substantially similar (i.e., buying stock in Ford and selling stock in Chrysler, buying stock and selling bonds issued by the same company, buying cash Treasury securities and selling Treasury futures), markets participants run the risk that this concept will be applied in an arbitrary manner by regulators.

In addition, we note that the Trading Interest Standard is unworkable simply because the SEC does not have experience in evaluating how this standard would actually operate under real market conditions. More specifically, for purposes of this standard, the proposed rules would use the term “*trading interest*” rather than “*quotations*,” with trading interest being defined in the same way as in the proposed changes to Rule 3b-16 of the Exchange Act—any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price.<sup>32</sup> SIFMA AMG believes that it is entirely premature for the Commission to use a standard from an entirely new rule proposal that is yet to be adopted and that is subject to an extended comment period.<sup>33</sup> Moreover, applying this standard to investment advisers will subject them to potential dealer status simply for exercising their fiduciary duties. For instance, an investment adviser may have to submit “trading interests” throughout a trading day in order to obtain best execution and meet other fiduciary obligations acting for their clients, or to use specific trading protocols available in the market, such as the order book. Requiring that investment advisers register as dealers for engaging in activities in furtherance of their clients’ interests is entirely at odds with the regulatory framework that Congress and the states intended for money managers.

If the Commission were to proceed with the Proposal, we believe that it should modify the standards to ensure that the standards reference “continuous” activity rather than one based on an ambiguous standard based on the concept of “routinely.” A continuous standard would be more consistent with how dealer activity has historically been measured. In addition, we believe that the Commission should not use a “substantially similar” standard, but rather, should base a standard on activity occurring in the same security. In addition, we believe that a “trading interest” standard should be replaced with a quotation and order based standard and any standard should not prevent customers from utilizing all available trading protocols in the market, including an order book. We believe that these changes would more accurately capture Congressional intent.

## **VI. Volume and Dollar Thresholds**

SIFMA AMG appreciates that the Commission has developed a quantitative standard by which to assess whether a person comes within the meaning of a government securities dealer; we do not believe

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<sup>32</sup> Amendments to Exchange Act Rule 3b-16 Regarding the Definition of “Exchange”; Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, Exchange Act Release No. 94,062 (Jan. 26, 2022); 87 Fed. Reg. 15,496 (Mar. 18, 2022).

<sup>33</sup> Reopening of Comment Periods for “Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews” and “Amendments Regarding the Definition of ‘Exchange’ and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities,” Exchange Act Release No. 94,868 (May 9, 2022).

that a trading volume standard alone is in the public interest, consistent with the protection of investors, or consistent with the requirements of the Exchange Act. While we believe that a volume threshold could be one of many factors used to assess whether trading activity rises to the level of dealing activity, we do not believe that volume alone is enough to make a person a government securities dealer absent some additional criteria. Indeed, the SEC has long recognized that volume is alone is not determinative factor for assessing dealer status. For example, in a release adopting rules regarding the registration of municipal securities dealers, the SEC stated:

While the determination of when a bank is a municipal securities dealer might be premised on, among other matters, the number of transactions engaged in by the bank in a non-fiduciary capacity or the rate of turnover of the bank's inventory of municipal securities, the Commission does not now have sufficient data or experience with bank municipal securities dealers to ascertain whether such tests are appropriate. *In any event, it would appear that the nature of a bank's activities, rather than the volume of transactions or similar criteria, are of greater relevance in determining when a bank is a municipal securities dealer.*<sup>34</sup>

While that release speaks in the context of municipal securities dealer, the core dealer functions in that definition are the same as in the definition of dealer and the definition of a government securities dealer – being engaged in the business of buying and selling securities for one's own account. In this regard, we find it interesting that the SEC would impose a volume standard only with respect to the definition of a government securities dealer while simultaneously stating that:

The legislative history relating to the enactment of the Government Securities Act of 1986 provides that the term government securities dealer “would utilize key concepts from the current definitions of . . . ‘dealer’ and ‘municipal securities dealer.’”<sup>35</sup>

In addition to the questionable statutory basis for establishing a volume threshold only with respect to government securities dealers, the Proposal's quantitative standard also fails to account for some practical considerations. For instance, is a market participant required to maintain its registration as a government securities dealer if in subsequent months it no longer satisfies the volume threshold? While the Commission does note that the extended time periods for calculating the volume thresholds are meant to account for and level out an anomalous increase in trading, the Commission does not address situations where a market participant may have fallen out of the qualitative standard. In any event, we do not believe that a volume threshold by itself without any of the other factors that have historically been associated with dealers is an appropriate basis by which to classify someone as a dealer. In addition, we believe that the volume threshold for government securities activities does not adequately consider incidental activities that may inadvertently bring persons within the government securities dealer definition. For instance, market participants may purchase government securities to hedge positions in futures. We do not believe that such activities should

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<sup>34</sup> Adoption of Rule 15ba2-1, Related Form Msd, Rule 15ba2-2 and Temporary Rule 15ba2-3(T) Relating to the Registration of Municipal Securities Dealers Under Section 15b(A) of the Securities Exchange Act of 1934; Adoption of Temporary Rule 15a-1(T) Relating to the Registration of Municipal Securities Brokers and Dealers Under Section 15 of the Act; and Delegation of Authority to the Staff of the Commission, Exchange Act Release No. 11742 (Oct. 15, 1975) (emphasis added). We note that the definitions of a municipal securities dealer and that of a dealer are substantially the same.

<sup>35</sup> Proposal, 87 Fed. Reg. 23,058 n.42, citing to H.R. Rep. No. 258, 99th Cong., 1st Sess. 24 (1985). S. Rep. No. 426, 99th Cong., 2d Sess. 19 (1986).



require dealer registration. Such a result may ultimately lead to market participants chilling trading their trading activities in a way that may ultimately increase spreads rather than close them. Such a result would not be consistent with the public interest.

In addition, SIFMA AMG believes that the exclusion in the Proposal for persons that have or control less than \$50 million is not consistent with a plain reading of the dealer definition. First, other than referencing FINRA's use of that monetary threshold for distinguishing retail investors from institutional investors, the Commission provides no economic or legally adequate basis for establishing this threshold. While the Commission makes a conclusory statement that persons with less than \$50 million in controllable assets are not likely to engage in liquidity providing activities, the Commission simply provides no basis for that view. Moreover, the \$50 million is of no real consequence since the Commission has made clear that persons can come within the dealer definition irrespective of whether they meet the standards of the proposed rules.

## **VII. Failure to Consider Alternatives**

While the Proposal speaks broadly to investor protection and public interest rationales in furtherance of the changes, the Commission does not clearly articulate the benefits that would result from the Proposed Rule nor does it meaningfully consider alternative means of achieving its stated objectives. From an investor protection perspective, and as discussed above, the SEC has not articulated how requiring money managers to register as dealers affords greater protections to investors in light of the historical basis for requiring dealers to register. However, the SEC does reference vague concepts around enhancing market stability through increased insights to trading activities and market risks,<sup>36</sup> and visibility across the market in order to respond to significant market events.<sup>37</sup> The SEC fails to consider how existing frameworks can be used or enhanced to achieve these goals without imposing a registration obligation on a significant number of market participants. For instance, if the SEC is seeking to increase market transparency, there is already a framework for reporting transactions. These include the consolidated audit trail (CAT) that was adopted by the various SROs under Rule 613 of Regulation NMS. That reporting requirement greatly enhances the market data that regulators will receive. Indeed, the Commission noted that:

A consolidated audit trail will significantly improve the ability of regulators to reconstruct broad-based market events so that they and the public may be informed by an accurate and timely accounting of what happened, and possibly why. The sooner a reconstruction can be completed, the sooner regulators can begin reviewing an event to determine what, if any, regulatory responses might be required to address the event in an effective manner.<sup>38</sup>

In addition to CAT, the SEC fails to note that Exchange Act Rule 13h-1 – the large trader reporting rule – was adopted in large part to: (1) help the SEC identify market participants engaged in substantial trading activity; (2) obtain information needed to monitor more efficiently the impact of those trades on the

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<sup>36</sup> Proposal, 87 Fed. Reg. at 20,361.

<sup>37</sup> Proposal, 87 Fed. Reg. at 20,372.

<sup>38</sup> Consolidated Audit Trail, Exchange Act Release No. 67,457 (Jul. 18, 2012), 77 Fed. Reg. 45,722, 45,732 (Aug. 1, 2012).

markets; and (3) analyze such market participants' trading activity.<sup>39</sup> In addition to CAT and the large trader reporting rule, the Commission barely mentions FINRA's Trade Reporting and Compliance Engine (TRACE), which as of September 1, 2022, will capture the vast majority of government securities transactions.<sup>40</sup> These rules address most if not all of the market transparency and data collection issues that the Commissions suggest is the impetus of the Proposal.

The Commission also fails to address how Exchange Act Rule 15c3-5 already addresses the risk measures that it suggests need to apply to the persons that would be captured under the Proposal. Indeed, Rule 15c3-5 was specifically adopted to require broker-dealers that are members of an exchange or alternative trading system ("ATS"), or who operate an ATS, to implement certain risk management controls and supervisory procedures to manage the various risks of their customers accessing the market. Of note, the market participants that would be subject to dealer registration requirements generally have to access the markets through broker-dealers and ATSS, meaning that these market participants are already subject to risk-reducing measures, as customers of broker-dealers and subscribers to ATSS.

### **VIII. Commission Has Exceeded Its Statutory Authority**

Although the SEC has the statutory authority to re-define terms in the Exchange Act, we believe that the broad manner in which it is doing so is inconsistent with Congressional intent. To this end, Section 3(b) of the Exchange Act gives the SEC the authority to define terms used in the Act. That provision reads, in relevant part:

The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this chapter, consistently with the provisions and purposes of this chapter.

While this provision appears to provide the SEC with broad authority, the SEC's use of that provision has been subject to successful challenge when the SEC overreached in its attempts to capture certain banks within the definitions of broker and dealer.<sup>41</sup> In this regard, it is worth noting that the Proposal lacks exclusions for entities subject to another, and perhaps more comprehensive, regulatory framework. Banks, credit unions, insurance companies, clearing agencies, and others could end being captured by the Proposal in a way that the regulators for and the legislation associated with these entities may not have intended.

In addition, credit unions, although performing bank-like functions in some instances, do not benefit from the types of exclusions available to banks. Similarly, insurance companies, which may engage in the routine buying and selling of securities for a host of legitimate reasons, also do not enjoy the benefit of a statutory exclusion from the dealer definition like banks. We also note that some clearing organizations novate transactions as part of the broader mechanism by which systemic risk in the securities markets is

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<sup>39</sup> See, e.g., Press Release, SEC Adopts Large Trader Reporting Regime, <https://www.sec.gov/news/press/2011/2011-154.htm>.

<sup>40</sup> Federal Reserve Depository Institution Reporting to TRACE, FINRA, <https://www.finra.org/filing-reporting/trace/federal-reserve-depository-institution-reporting>.

<sup>41</sup> See, e.g., *Am. Bankers Ass'n v. SEC*, 804 F.2d 739 (D.C. Cir. 1986) ("Rule 3b-9 Case").

mitigated. In this respect, the Proposal potentially captures clearing agencies within the Dealer Definition when engaging in these activities in a manner that was clearly not contemplated by Congress.

With that mind, the SEC may want to consider the following statement from the Rule 3b-9 Case:

In the end, all of the SEC's efforts to avoid the "plain meaning" of the definitions of "broker," "dealer" and "bank" fail. We give effect to the statutory language not simply because its meaning is as "plain" as can be, but because it reflects a basic decision by Congress on how to allocate responsibility among different federal agencies for regulating financial institutions and markets. Rule 3b-9, whatever its beneficial purpose or the regulatory need for some such authority, still represents an attempt by one federal agency to reallocate, on its own initiative, the regulatory responsibilities Congress has purposefully divided among several different agencies. It is tantamount to one of the regulatory players unilaterally changing the rules of the game. The SEC by itself cannot extend its jurisdiction over institutions expressly entrusted to the oversight of the Comptroller, the Board of Governors, the FDIC, and others.<sup>42</sup>

## **IX. Conclusion**

SIFMA AMG appreciates the Commission's intent to support the efficient functioning of our markets, but absent the clear identification of a problem not already well-addressed by existing regulations, we have serious questions and concerns about the potential for an expansive interpretation as to the scope of these changes. As explained above, in addition to the lack of a strong investor protection and public interest rationales, the Proposal simply will be unworkable if adopted as is. Rather than proceed, we strongly encourage the Commission to seek public comment in a concept release or notice of advance rulemaking in order to better understand market conditions and evaluate whether existing regulatory requirements can achieve the same policy goals that the Commission articulates in the Proposal.

The Proposal of 194 pages has been published at a time when a large number of other reforms have been proposed by the Commission, including new rules related to the reporting of security-based swaps, significant revisions to the Commission's Section 13 reporting rules and their application to derivatives, new proposals to enhance short sale disclosures, amendments to Regulation ATS, new rules to implement security-based swaps execution facilities, and new requirements with respect to reporting of securities lending transactions. The operational burden and the commercial impact of all these new and additional requirements on market participants will, in the aggregate, be quite significant, thereby demanding adequate time for thoughtful analysis and comment and, ultimately, implementation.

In addition, the Commission has presented 78 questions for response concerning the operation of the Proposal, and SIFMA AMG feels strongly that a 60-day comment period is simply an insufficient amount of time to allow for meaningful consideration of, and comment on, the Proposal, which would impose significant changes to current market practices.<sup>43</sup> The Commission has failed to respond to multiple

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<sup>42</sup> *Id.*

<sup>43</sup> See Letter to Honorable Gary Gensler, Chair, Securities and Exchange Commission, from Alternative Credit Council (ACC); Alternative Investment Management Association (AIMA); American Bankers Association (ABA); American Council of Life Insurers (ACLI); American Investment Council (AIC); Bank Policy Institute (BPI); Bond Dealers of America (BDA); FIA Principal Traders Group (FIA PTG); Financial Services Forum (FSF); Institute of

requests from a diverse group of trade associations recommending that the comment period for this particular proposal be lengthened to 120days.<sup>44 45</sup>

In this regard, SIFMA AMG reconfirms our request that the comment period should have been extended to 120 days. In particular, we note that the range of activities and operational ramifications implicated by the Proposal warrants a 120-day comment period. We are concerned that a 60-day comment period means that commenters are unable to deliberate on the issues carefully and provide the quality of responses and alternatives that would be valuable for the Commission's consideration as part of thoughtful rulemaking. Given that, the Commission should be open to providing further guidance or no action relief post adoption if issues are later raised that we were unable to identify during our abbreviated review of this proposal.

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On behalf of SIFMA AMG, we appreciate the opportunity to respond to the Proposal and your consideration of our comments and recommendations. If you have any questions or require additional

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International Bankers (IIB); Institute for Portfolio Alternatives (IPA); Investment Adviser Association (IAA); Investment Company Institute (ICI); Loan Syndications and Trading Association (LSTA); Managed Funds Association (MFA); National Association of Corporate Treasurers (NACT); National Association of Investment Companies (NAIC); National Venture Capital Association (NVCA); Real Estate Roundtable (RER); Risk Management Association (RMA); Securities Industry and Financial Markets Association (SIFMA); Securities Industry and Financial Markets Association Asset Management Group (SIFMA AMG); Security Traders Association (STA); Small Business Investor Alliance (SBIA); and U.S. Chamber of Commerce (the Chamber) Center for Capital Markets (CCMC) (collectively, the Associations) regarding the need for sufficient comment periods, cost benefit analysis and meaningful public input in the regulatory rulemaking process, dated April 5, 2022. [Joint-Trades Letter to SEC 04 05 22](#)

<sup>44</sup> See letter to the Honorable Gary Gensler, Chair, Securities and Exchange Commission; The Honorable Rostin Behnam, Chair, Commodity Futures Trading Commission; The Honorable Janet L. Yellen, Secretary, Department of Treasury; The Honorable Jerome H Powell, Chair, Board of Governors of the Federal Reserve System; Dr. John C. Williams, President and CEO, Federal Reserve Bank of New York from Alternative Investment Management Association (AIMA); FIA Principal Traders Group (FIA PTG); Managed Funds Association (MFA); Securities Industry and Financial Markets Association Asset Management Group (SIFMA AMG); and Security Traders Association (STA) (collectively, the Associations) regarding the Proposed Rule that will impact the investment and trading strategies, operations, risk management, compliance and reporting functions of many Association members, dated May 23, 2022. [Joint Trades Letter to IAWG 05 23 22](#)

<sup>45</sup> See letter to the Honorable Gary Gensler, Chair, Securities and Exchange Commission from Alternative Investment Management Association (AIMA); FIA Principal Traders Group (FIA PTG); Investment Adviser Association (IAA); Managed Funds Association (MFA); Securities Industry and Financial Markets Association (SIFMA); Securities Industry and Financial Markets Association Asset Management Group (SIFMA AMG); and Security Traders Association (STA) (collectively, the Associations) requesting the Commission to extend the comment period to a 120-day period from the date of publication in the Federal Register, dated May 20, 2022. [Joint Trades Letter to SEC 05 20 22](#)

Ms. Countryman

May 27, 2022

Page 21

information, please do not hesitate to contact us by calling Lindsey Keljo at (202) 962-7312 or William Thum at (202) 962-7381.

Sincerely,



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Lindsey Weber Keljo  
Asset Management Group - Head



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William C. Thum  
Managing Director and Assistant General Counsel

cc: The Honorable Gary Gensler, Chair  
The Honorable Hester M. Peirce, Commissioner  
The Honorable Allison Herren Lee, Commissioner  
The Honorable Caroline A. Crenshaw, Commissioner