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May 27, 2022

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Via Email to rule-comments@sec.gov

Re: Release No. 34-94062; File No. S7-02-22; Amendments to Exchange Act Rule 3b-16 Regarding the Definition of “Exchange;” Regulation ATS for ATSS That Trade U.S. Government Securities, NMS Stocks, and Other Securities; and Release No. 34-94524; File No. S7-12-22; Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer

Dear Ms. Countryman:

The Hedge Fund Association (“HFA”) respectfully submits these comments in response to the U.S. Securities and Exchange Commission’s (“SEC” or “Commission”) request for comments regarding the following two releases (together, the “Releases”):

- Release No. 34-94062; File No. S7-02-22; Amendments to Exchange Act Rule 3b-16 Regarding the Definition of “Exchange;” Regulation ATS for ATSS That Trade U.S. Government Securities, NMS Stocks, and Other Securities (the “Exchange Release”); and
- Release No. 34-94524; File No. S7-12-22; Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer (the “Dealer Release”).

The HFA is an international non-profit industry trade group and nonpartisan lobbying organization established to serve the alternative investment industry. We are devoted to advancing transparency, development and trust. Our global presence spans multiple continents and countries. HFA members, past and present, include hedge fund sponsors, financial institutions, funds of hedge funds, family offices, public and private pension funds, endowments and foundations, high net worth individuals, allocators and service providers including prime brokers, accounting firms, administrators, custodians, auditors, lawyers, technologists and third party marketers.

General Statement

As a general matter, the HFA believes that the Commission should reconsider the proposed rules and amendments set forth in the Releases (the “Proposals”). We believe, as other comments to the Proposals have raised, that the Proposals, if adopted, would have a profound impact upon certain categories of market participants that are not currently thought to fall within the definitions of broker, dealer or exchange, and are therefore not subject to the related regulatory frameworks. The HFA believes that the technical nature of the Proposals, focusing on changes to definitions in rules that are probably not fully understood to the general public or even those in the investment industry, has led to a lack of discussion and debate. The comment period was re-opened for the Exchange Release, presumably because industry players have requested additional time to gather their views on the Proposal. We believe that this discussion and debate should occur, and that it should occur in a manner that serves to educate market participants on the existing rules, the scope of the expansion of these rules and the new categories of market participants (many of whom are likely not aware of the Releases) who would be swept into these regulatory schemes. Following this type of education and debate, the SEC would be in a better position to refine future releases (so that they address the intended targets directly, rather than indirectly through definitional changes). We believe that the current Releases don’t adequately address the market impact of the Proposals. We also note that the Releases were published at a time when securities industry professionals, especially those in the private funds area, have been flooded with proposed regulation, which may result in more technical sounding Releases being ignored by the press, market participants or even legal advisors.

The HFA has chosen to comment on both releases simultaneously in one letter, since, as noted above, we believe that there is overlap in our concerns with both Proposals. We note that U.S. Representatives Patrick Henry and Bill Huizenga of the United States House of Representatives Committee on Financial Services also addressed both Releases through a single letter for similar reasons.¹

Intention to Target DeFi and Other Digital Assets Technologies?

The HFA understands that there are products within the digital assets space that fit comfortably into existing regulatory regimes. However, there are certain players in the digital asset space that do not fit squarely within existing frameworks, such as those who would fall under the definition of a “Communication Protocol Systems” in the Exchange Release and participants in DeFi who might now fall under the definition of a “dealer”. DeFi is an emerging technology whose participants may be swept into existing regulatory schemes as a result of the technical changes in the Proposals. The HFA views the emerging fields of digital assets and blockchain technology to not only be important to the field of investing but represents part of a movement for profound social change (e.g., by serving to challenge existing institutions, eliminating intermediaries and providing for new forms of governance by users or other stakeholders). We believe that the digital asset field should be regulated only after robust education and debate, and not as part of more technical changes to definitions in existing regimes that require the reader’s imagination to understand the scope and impacts.

Intention to Target Private Funds as Dealers?

Under the Dealer Proposal, certain private funds controlling \$50 million or more in assets, unlike registered funds, would possibly need to register as dealers under the revised definitions. The HFA believes that these funds and their advisors are already adequately supervised under investment advisory laws and regulations and do not need an additional layer of burdensome regulation. The Dealer Proposal is broad and would require private funds and their counsel to engage in a facts and circumstances analysis to determine whether they are in fact dealers. Facts and circumstances tests rarely result in legal certainty. Those who fail to register (where found to be required) are subject to penalties and those who register defensively (where not found to be required) face “a panoply of regulatory obligations and supervisory oversight.”

Conclusion

We appreciate the opportunity to comment on the proposals set out in the Releases. Although we have not commented on the details of the proposed rules and hope that law firms and other will focus on the technical details and procedural matters, we hope that all industry participants that would be impacted will be given additional warning and a greater opportunity to participate in this process. We will be available to the Commission or its Staff if we can be of assistance.

Sincerely,

Hedge Fund Association

Mitch Ackles
Global President

¹ See their comment letter dated April 18, 2022. Like the Representatives, the HFA is concerned that both Releases will potentially sweep participants in the decentralized finance (DeFi) field into unexpected forms of registration and regulation.