



MODERN MARKETS
INITIATIVE

August 2, 2022

By electronic mail to rule-comments@sec.gov

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer (Release No. 34-94524; *File No: S7-12-22*)

Dear Ms. Countryman:

Modern Markets Initiative ("MMI"), the education and advocacy organization devoted to the role of technological innovation in creating the world's best markets, is grateful for the opportunity to provide follow-up written comments to the U.S. Securities and Exchange Commission (the "SEC" or "Commission") in connection with the "Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer" (File No: S7-12-22)(the "Proposal").

As expressed in our prior comment letter of May 27, 2022, MMI supports the overall objectives of increasing transparency and protecting investors, however MMI expresses concern whether the Proposal is the best way to achieve them. MMI urges the SEC to further review the Proposal for potential unintended adverse impact on liquidity provision.

Among other things, MMI believes it may be instructive to look to the European regulatory landscape, in particular the Markets in Financial Instruments Directive II (MiFID II) that has applied since January 2018. MiFID II was the largest overhaul of financial services regulation in more than a decade. MiFID II affects the entire investment lifecycle and significantly expanded regulation of financial institutions, their services and activities within the European Economic Area (EEA).

Legislation with such far-reaching impact was bound to create unintended consequences, and this has borne out with MiFID II, as evidenced by the so-called “Quick Fix” Directive, which was implemented on 28 February 2022 to relax and/or remove certain requirements that posed an undue administrative burden on market participants and hampered competition.¹ A number of additional post-implementation MiFID II reviews and proposed changes are in process.

In September 2021, the European Securities Markets Authority (ESMA) published its final report with revision proposals relating to MiFID II’s algorithmic trading regime.² Highly relevant to the Commission’s current Proposal, ESMA proposed to delete the registration requirement for proprietary trading firms having Direct Electronic Access (DEA, or “market access” in US terms) to exchanges, a requirement which was newly imposed by MiFID II in 2018.

After observing the impact of this requirement in practice for four years, ESMA concluded that the costs of requiring full registration of firms dealing on own account for the sole purpose of allowing that firm to have market access outweighed the benefits expected from such registration.

Part of the reasoning is that the integrity of markets is guarded by market-facing “gatekeeper” entities, which in U.S. markets are self-regulatory organizations or their broker dealer members. In the case of market access, the broker dealer providing it has the responsibility of ensuring its clients adhere to regulatory requirements. In order to fulfill its responsibility, broker dealers assess potential customers as to whether it is appropriate to grant the customer market access (due diligence). Broker dealers must have access to information on their clients, irrespective of clients’ jurisdiction or their registration status. Broker dealers also ensure their clients have effective systems and controls to properly monitor trading activity and prevent trading that may create risks to the firm or that could create or contribute to a disorderly market.

This same reasoning holds true in U.S. markets. Therefore we strongly recommend the Commission consider this important course correction from European regulators before potentially repeating a similarly damaging mistake here.

¹ See European Quick Fix Directive, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.068.01.0014.01.ENG&toc=OJ%3AL%3A2021%3A068%3ATOC (Feb 26, 2021)

² See “MiFID II/MiFIR review report on Algorithmic Trading,” ESMA, (Sept 28, 2021), at https://www.esma.europa.eu/sites/default/files/library/esma70-156-4572_mifid_ii_final_report_on_algorithmic_trading.pdf

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. Wegner', with a stylized flourish at the end.

Kirsten Wegner
Chief Executive Officer
Modern Markets Initiative