



March 16, 2023

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

Submitted via email to rule-comments@sec.gov

Re: Notice of Proposed Rulemaking on Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer, File No. S7-12-22

Dear Ms. Countryman:

BlackRock, Inc. (together with its affiliates, “**BlackRock**”)¹ respectfully submits its comments to the Securities and Exchange Commission’s (the “**SEC**” or “**Commission**”) proposed rule Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer (“**Proposal**”).²

We appreciate the Commission’s goals of enhancing transparency, market integrity, and resiliency by ensuring market participants engaging in liquidity providing activity register as dealers with the SEC. As acknowledged in the Proposal, “all market participants who buy or sell securities in the marketplace arguably contribute to a market’s liquidity.” Therefore, we agree with the Commission’s focus on market participants who are “buying and selling securities for their own account and providing liquidity ‘as a part of regular business’.”³ However, we are concerned that the Proposal’s expansion of the definitions of a “dealer” and a “government securities dealer” through the use of the proposed qualitative and quantitative tests, is overly broad and could trigger dealer or government securities dealer registration requirements by market participants as a result of investment strategies and portfolio maintenance activities that we consider to be ordinary asset management activity. We support the comment letters submitted on the Proposal by the Investment Company Institute (“**ICI**”),⁴ the

¹ BlackRock is one of the world’s leading asset management firms. We manage assets on behalf of institutional and individual clients worldwide, across equity, fixed-income, liquidity, real estate, alternatives, and multi-asset strategies. Our client base includes pension plans, endowments, foundations, charities, official institutions, insurers, and other financial institutions, as well as individuals around the world.

² SEC Release No. 34-94524 (Mar. 28, 2022), 87 Fed. Reg. 23,054 (Apr. 18, 2022) (“**Proposing Release**”), available at: <https://www.govinfo.gov/content/pkg/FR-2022-04-18/pdf/2022-06960.pdf>.

³ Proposing Release at 23054.

⁴ <https://www.sec.gov/comments/s7-12-22/s71222-20129683-295958.pdf>

SIFMA Asset Management Group (“**AMG**”),⁵ and the Managed Funds Association.⁶ Our comments are intended to supplement the views provided in those letters, including the concerns raised in those letters with respect to the qualitative tests and the quantitative standard for being required to register with the Commission as a government securities dealer.

I. Ordinary Investing Activity Should Not Require Registration as Dealer.

We are concerned that traditional trading and investing activity of asset managers could be considered dealing activity under some of the qualitative tests under the Proposal. The Proposal identifies three types of trading activities that the Commission considers to have “the effect of providing liquidity”⁷ to other market participants and would require firms engaging in any such activities to register as dealers or government securities dealers: (1) routinely making roughly comparable purchases and sales of the same or substantially similar securities (or government securities) in a day (“**Qualitative Test 1**”); (2) 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 (“**Qualitative Test 2**”); 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 (“**Qualitative Test 3**”).⁸ As discussed further below, if adopted as proposed, the qualitative tests could inadvertently encompass market participants such as asset managers engaged in investing rather than dealing activity. While the discussion below focuses on Qualitative Test 1, we share many of the concerns which were raised by SIFMA AMG, the Managed Funds Association, and the Investment Company Institute with Qualitative Test 2, Qualitative Test 3, and the quantitative standard for being required to register with the Commission as a government securities dealer in their respective comment letters.

II. Qualitative Test 1 Could Capture Ordinary Investing Activities Employed by Asset Managers on Behalf of Their Clients.

The following are examples of ordinary investment activities which could involve the routine buying and selling of the same or substantially similar securities on the same day:

- **Relative Value and Basis Trades:** Relative value trades are an investment strategy where investors take risk between two correlated assets, often by buying one and selling short the other. One common form of relative value strategy involves trading the basis between on-the-run and equivalent off-

⁵ <https://www.sec.gov/comments/s7-12-22/s71222-20129903-296064.pdf>

⁶ <https://www.sec.gov/comments/s7-12-22/s71222-20129911-296085.pdf>

⁷ Proposing Release at 23,061-62.

⁸ *Id.* at 23,065.

the-run securities. Off-the-run securities tend to be less liquid than on-the-run securities, but both share similar instrument characteristics (e.g., similar remaining tenor, same issuer, etc.). As a result, investors that are willing to accept the liquidity risk (e.g., insurance companies, corporations, pension funds, and hedge funds that are not subject to daily subscriptions and redemptions) may be willing to invest in off-the-run securities to earn a return from this premium while selling short the equivalent on-the-run securities in order to hedge interest rate and credit risk. The use of this investment strategy could entail the purchase and sale of substantially similar securities on the same day.

- **Liquidity Trades:** Market participants who prioritize liquidity risk may engage in nearly opposite trades to maintain or enhance the liquidity profile of their portfolio. In this case, market participants may sell an aging off-the-run security and buy a more liquid, on-the-run security to enhance the liquidity profile of their holdings. Such liquidity trades could entail buying and selling substantially similar securities on the same day.
- **T-Bill Maintenance:** Many asset managers have core position holdings in short-dated Treasury securities (e.g., Treasury bills, or T-bills) as part of their cash and liquidity management strategy. Due to their short maturities, T-bills need to be “rolled” frequently in order for the asset manager’s core position in T-bills to be maintained (i.e., a soon-to-mature T-bill is sold, and a T-bill with a slightly longer tenor is purchased). Frequent rolls of T-bill positions could involve the routine purchase and sale of substantially similar securities on the same day.
- **Hedging Activity:** The initiation and maintenance of hedge positions may require investors to buy and sell the same security on the same day:
 - Investors may wish to hedge risks associated with changes in the yield curves (e.g., that they may steepen or flatten) by simultaneously initiating a long and short position in securities from the same issuer with different tenors.
 - An investor may buy and sell an ETF intraday to hedge or maintain their desired level of exposure to broader market risk while looking to building, restructuring, or rebalance a portfolio of individual securities on that same day.
 - Intraday price movements and intraday changes in portfolio composition may cause investors to adjust the size of hedge positions of the course of a day. For example, investors may hedge the interest-rate risk associated with a corporate bond portfolio using Treasury bonds. Specifically, if an investor liquidates certain corporate bonds in the morning, they may also decrease the size of their hedge position by buying certain benchmark Treasury securities (e.g., 5-year on-the-run Treasuries); if they buy additional corporate bonds later that day, they may increase the size of their hedge position later that day by selling the same benchmark Treasuries.
- **Multi-Strategy or Multi-Manager Portfolios:** Many asset managers operate multiple independent strategies for the same fund or separate account client, which could, in the aggregate, compound the risk of unknowingly triggering Qualitative Test 1. For example, one asset manager

could be engaged in a long strategy while another asset manager could be engaged in a short strategy for the same or substantially similar securities for the same portfolio.

BlackRock does not enter into trades on behalf of its clients as a market maker. When carrying out the strategies above, BlackRock is acting as a fiduciary to its clients, to achieve their respective investment and risk management objectives. BlackRock is not reacting to external customer orders or requests-for-quote where a third party is asking it to make a price or supply liquidity. Rather, these trades are initiated in the context of the broader investment and risk management objectives articulated in investment management agreements between BlackRock and its clients. The buying and selling activities described above are not a source of short-term trading profits for BlackRock's clients and are not part of a business purporting to provide liquidity to the market. Indeed, rather than being compensated for providing liquidity to the market, our clients generally incur transaction costs in the form of spread and commissions paid to third-party broker-dealers that BlackRock relies upon to access securities markets and to provide the liquidity necessary to execute its clients' investment strategies, including the activities described above.

III. Treating Investors as Dealers Will Harm End-Investors and Markets.

Requiring dealer registration based on ordinary investment activity would substantially harm end-investors and markets. As discussed in SIFMA AMG's and ICI's respective comment letters, we are concerned that the Proposal's definition of "own account" is overly broad and could require that separately managed accounts ("**SMA**s") register as dealers based on the activity of their unaffiliated advisers acting as their agents.⁹ We do not believe there is significant benefit to regulating an adviser's SMA as dealers, and, additionally, it is not clear how an SMA could, in practice, register as a dealer and comply with the attendant requirements.¹⁰

BlackRock's investment funds and clients benefit from protections afforded to customers of a broker-dealer, such as requirements that broker-dealers safeguard investment assets of customers and protected status in the event a broker-dealer insolvency. If BlackRock's funds and SMA's are categorized as dealers, they would lose their status as "customers" and these important protections.

Further, many of the regulatory requirements imposed on dealers and government securities dealers may conflict with the requirements imposed on asset managers and their clients, which may themselves be highly regulated entities (e.g., pension plans, insurance companies, etc.). For example, if BlackRock's funds or SMA's are considered dealers, would it have a best execution obligation when participating in all-to-all trading protocols where they may match with another end-user? If so, how would BlackRock's fiduciary duty to achieve best execution for its client be

⁹ *Supra* note 5, at 2.

¹⁰ *Supra* note 4, at 9.

reconciled with a best execution obligation to our client's counterparty? Moreover, many investment funds (e.g., pension plans) may not be permitted to register as a dealer under their organizational charters. Should an investment fund be required to register as a dealer or government securities dealer, many potential fund investors may not be permitted to invest in the equity of a broker-dealer.

Requiring dealer registration from asset managers' clients based on the manager's investing activity may not only be burdensome and costly, but likely impossible for many market participants who may not have the wherewithal to comply with the applicable requirements. As a result, the Proposal, if adopted, could have a chilling effect on investment activity, forcing investors to avoid engaging in common and valuable investment strategies to avoid the impracticable requirement to register as a dealer. This could impede investors' ability to efficiently manage risk and harm investment returns. Further, if investors pull back from impacted strategies, markets themselves may become less liquid due to lower participation and may be subject to wider price distortions due to the lack of arbitrage and relative value trading strategies. This could increase trading costs and risk for all investors.

IV. Recommendations

The investing strategies described above illustrate the challenge of attempting to define dealing activity based on standards that look solely at trading activity or execution methods in isolation, without taking other factors into account. Looking narrowly to tests based on specific types of activity risks ignoring critical context in which the trading activity is carried out. A market participant's overall posture with respect to securities markets should also be considered. Qualitative Test 1 does not consider the intent behind the buying and selling transactions and how such transactions fit into the broader investment and risk management activities of the investor. For example, when viewed in isolation, what may appear to be the routine buying and selling of 10-year Treasuries on the same day may in fact be part of a broader risk management strategy to hedge key rate duration risk associated with a broader portfolio of securities. Any determination of whether an entity is buying and selling securities "as part of a regular business" should take all relevant facts and circumstances into account.

If the Commission proceeds with the Proposal, we recommend changes to the qualitative tests so as not to capture traditional investing activity.

The buying and selling activity described above would not fall within Qualitative Test 1 unless they occur "routinely." The Proposal explicates the definition of "routinely" as "more frequent than occasional but not necessarily continuous." This standard is too ambiguous to be workable. Moreover, asset managers are regularly initiating new positions and rebalancing existing positions, including with respect to buying and selling activity described above. To avoid unintentionally capturing such trades and to limit the chilling effect on legitimate investing activity, if the Commission were to proceed with the Proposal, we would urge it modify Qualitative Tests 1 and 2 to reference "continuous" activity rather than "routinely," the former of which 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. The Commission notes that determining whether securities are “substantially similar” would be a facts-and-circumstances analysis that would take into account factors such as whether: “(1) [t]he 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.”¹¹ This standard is challenging, if not impossible, to apply in practice - whether changes in the fair market value of one security are “reasonably expected” to approximate changes in the fair market value of another security is not always clear or possible to determine.

We appreciate the opportunity to comment on this Proposal and look forward to continued discussion on this topic.

Sincerely,

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Managing Director, Global Public Policy

Michael Winnike
Director, Market Structure, Global Trading

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Director and Counsel, Trading & Derivatives

¹¹ Proposing Release at 23,067.